No. 16-1462

In the Supreme Court of Iowa

Mark Griffioen, Joyce Ludvicek, Mike Ludvicek,
Sandra Skelton, Brian Vanous,

Plaintiffs-Appellants,

v.

Cedar Rapids and Iowa City Railway Company, Alliant Energy Corporation;
Union Pacific Railroad Company; Union Pacific Corp.; Hawkeye Land Co.;
Hawkeye Lane II Co., Hawkeye Land NFG, Inc.; Stickle Enterprises, Ltd.;
Midwestern Trading, Inc.; Midwest Third Party Logistics, Inc.; Stickle Grain Co.;
Stickle Warehousing, Inc.; Rick Stickle; Marsha Stickle,

Defendants-Appellees.

Appeal from the Iowa District Court in and for Linn County,
Case No. LACV078694, The Honorable Paul D. Miller

Final Brief of Defendants-Appellees
Union Pacific Railroad Company and Union Pacific Corporation

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GLOSSARY*

Acronym	Description
CRANDIC Defendants	Cedar Rapids and Iowa City Railway Company and its corporate parent, Alliant Energy Corporation
FRSA	Federal Railway Safety Act, 49 U.S.C. §§ 20101, *et seq*.
ICC	Interstate Commerce Commission
ICCTA	Interstate Commerce Commission Termination Act, Pub. L. No. 104-88, 109 Stat. 803 (1995), codified in relevant part at 49 U.S.C. §§ 10101 – 11908.
App.	Appendix filed in this appeal
STB	Surface Transportation Board, a three-member body within the U.S. Department of Transportation. *See* 49 U.S.C. §§ 701-703.
Stickle Defendants	The Stickle Defendants are: Defendants Hawkeye Land Co., Hawkeye Land II Co., Midwestern Trading, Inc., Midwest Third Party Logistics, Stickle Grain Co., Stickle Warehousing, Inc., Rick Stickle and Marsha Stickle.
Union Pacific	Union Pacific Railroad Company, an interstate freight railroad that operates in 23 States. Union Pacific's parent, Union Pacific Corporation, is a named defendant.

* Although not required, a glossary is provided for the Court's convenience.

STATEMENT OF THE ISSUE

Whether the district court properly held that the relief sought by plaintiffs amounts to regulation of rail transportation and thus is federally preempted pursuant to 49 U.S.C. § 10501(b).

- **Principal Authority:** U.S. Const., Art. VI, cl. 2 (Supremacy Clause); 49 U.S.C. § 10501(b); 49 U.S.C. §§ 10102(6), (9); *Tubbs v. Surface Transp. Bd.*, 812 F.3d 1141 (8th Cir. 2015); *City of Lincoln v. STB*, 414 F.3d 858 (8th Cir. 2005); *Elam v. Kansas City S. Ry. Co*., 635 F.3d 796 (5th Cir. 2011); *Pace v. CSX Transp*., 613 F.3d 1066 (11th Cir. 2010); *Vill. Of Big Lake v. BNSF Ry. Co*., 382 S.W.3d 125 (Mo. Ct. App. 2012); *Maynard v. CSX Transp., Inc*., 360 F. Supp. 2d 836 (E.D. Ky. 2004), *aff'd*, No. 04-5448 (6th Cir. Feb. 7, 2005); *Waubay Lake Farms Ass'n v. BNSF Ry. Co*., No. 12-4179-RAL, 2014 WL 4287086 (D. S.D. Aug. 28, 2014); *Jones Creek Investors, LLC v. Columbia County Ga*., 98 F. Supp. 3d 1279 (S.D. Ga. 2015); *A&W Properties, Inc. v. Kansas City S. Ry. Co*., 200 S.W.3d 342 (Tex. App. 2006); *Thomas Tubbs—Petition for Declaratory Order*, STB Docket No. FD 35792, 2014 WL 2014 WL 5508153 (STB Oct. 31, 2014).

ROUTING STATEMENT

This appeal raises issues of federal preemption under the Interstate Commerce Commission Termination Act, 49 U.S.C. § 10501(b). The Court should retain the appeal. *See* Iowa R. App. P. 6.1101(2)(c).

STATEMENT OF THE CASE

In June 2008, the Cedar Rapids area sustained unprecedented flooding when the Cedar River crested to its highest level in history. This historic event is commonly referred to as the "Great Flood of 2008."[1] Nearly five years later, plaintiffs filed this suit seeking over $6 billion in property damages. (JA 3-52.) They allege that Union Pacific – an interstate freight railroad – and other defendants caused this historic flooding through railroad operations on their bridges crossing the Cedar River.

Union Pacific has consistently maintained that, even assuming the far-fetched allegations in the complaint, plaintiffs' claims are expressly preempted by federal law. In 1995, Congress enacted the Interstate Commerce Commission Termination Act ("ICCTA") and placed authority over rail transportation exclusively with an agency of the U.S. Department of Justice, in order to ensure that decisions relating to rail regulation are based upon the best interests of the nation as a whole. 49 U.S.C. § 10501(b). The ICCTA contains an express

[1] *Kurka v. Iowa County, Iowa*, No. 08–CV–95–LRR, 2009 WL 2139365, at *2 (N.D. Iowa July 19, 2009).

preemption clause: "the remedies provided under this part with respect to the regulation of transportation are exclusive and preempt the remedies provided under Federal or state law." 49 U.S.C. § 10501(b). The need for federal preemption stems from the fact that railroads move through and serve multiple states. This broad preemption provision reflects Congress' intent to ensure that the national rail network will operate free of a patchwork of inconsistent state regulation and would not be at the mercy of any state's parochial interests.

Union Pacific's defense of federal preemption is solidly grounded in the language of the ICCTA preemption provision. Plaintiffs allege here that Union Pacific violated state standards in the operation of rail cars on its tracks and in the construction and operation of its bridges. (Ruling, at 10) (JA 342.) The ICCTA expressly preempts all state remedies when the disputed activity falls within the meaning of rail "transportation," which encompasses the "construction" and "operation" of rail cars, tracks, and bridges. 49 U.S.C. § 10501(b); 49 U.S.C. §§ 10102(6), (9). Railroad cars, tracks, and bridges are classic instrumentalities of commerce, and they cannot be regulated by every jurisdiction in which they operate. Under the ICCTA, it does not matter whether the state laws have a non-railroad purpose because a multitude of different state regulation interferes with interstate commerce without regard to the purpose behind the state regulation. The statute says that the federal agency's jurisdiction is ***exclusive***; in other words, no

state regulation is allowed when the disputed activity falls within the federal agency's jurisdiction. Thus, courts have repeatedly found ICCTA preemption in cases involving state laws of general applicability, such as negligence or other common law torts. *See* note 20, *supra*.

Contrary to plaintiffs' assertions, there is nothing "remote" or "incidental" about the effect of their state law claims on railroad operations. They represent precisely the kind of balkanized state-law interference with rail transportation that Congress intended to preempt. Union Pacific's track and bridges are part of a major interstate route for transporting freight to different parts of the country. Other States depend upon Union Pacific's tracks and bridges in Iowa for the transportation of goods. Plaintiffs now seek to impose Iowa's regulatory authority on those interstate operations and facilities in multiple different ways, including theories of when, where, and how Union Pacific can operate its rail cars on its bridges. Of course, Iowa's authority in this regard would be no greater or less than that of other states, so to permit Iowa to regulate these interstate operations is to permit the same regulation fifty times over. As the courts and federal agency explained, this patchwork of state tort regulation over the railroad's primary conduct would wreak havoc on the U.S. rail industry – an industry that Congress has sought to preserve following its near financial collapse in the 1970s. It strains credulity to suggest that the requested award of "over six billion dollars of property

damages" will have little or no impact on Union Pacific's rail operations. (Pl. Br. 1).

When Union Pacific removed this case to federal court, the district court found that the state law claims were preempted by ICCTA. The federal court explained that plaintiffs' allegations go to "core operational activity, with ramifications on the continued operations of the [rail] network, governed by the ICCTA." *Griffioen v. Cedar Rapids & Iowa City Ry. Co.*, 977 F. Supp. 2d 903, 905, 908 (N.D. Iowa 2013). While the Eighth Circuit found that the district court lacked subject matter jurisdiction, the circuit court expressly left the door open for the railroads to raise ICCTA preemption as an affirmative defense in state court. *Griffioen v. Cedar Rapids & Iowa City Ry. Co.*, 785 F.3d 1182, 1192 (8th Cir. 2015).

Following remand to state court, Union Pacific filed a motion for judgment on the pleadings based on ICCTA preemption. While the motion was pending, the U.S. Court of Appeals for the Eighth Circuit issued a published decision in a different case with similar facts. *Tubbs v. Surface Transp. Bd*., 812 F.3d 1141 (8th Cir. 2015). In both this case and in *Tubbs*, plaintiffs sought property damages from the railroad under common-law tort and state statutes, claiming that the railroad diverted water onto their property while trying to protect rail infrastructure from rising floodwaters. *See id.* at 1143. The Eighth Circuit affirmed the federal

agency's finding of ICCTA preemption, explaining that these state law challenges represented precisely the kind of balkanized state-law interference with rail transportation that Congress intended to preempt. *See id.* at 1146. The Eighth Circuit thus joined a number of courts holding that ICCTA preempts common tort claims asserting that the railroad took actions to protect its infrastructure from rising flood waters at the expense of neighboring property. (Ruling, at 6-10) (JA 338-42.)

In light of the overwhelming precedent, the trial court here granted the motions for judgment on the pleadings because the ICCTA ***expressly*** preempts plaintiffs' claims. "Plaintiffs' state law claims are expressly preempted by federal law because the claims fall within the scope of the ICCTA preemption clause." (Ruling at 10) (JA 342.) The court reasoned that plaintiffs have stated claims that "go directly to" the regulation of rail transportation and "that would result in Plaintiffs managing or governing the operations of the railroads." (*Id*.) Because any amendment to the complaint would be futile, the trial court dismissed the railroad defendants from the case. After plaintiffs moved to voluntarily dismiss the remaining non-railroad defendants from the case, the trial court entered a final judgment. (JA 345-49.)

On appeal, plaintiffs do not challenge the trial court's finding of ***express*** preemption under the ICCTA. They instead construct a different ground for the

court's ruling – ***conflict*** preemption (Pl. Br. 2-3) – and then rely primarily upon cases involving conflict preemption to assert error by the trial court (Pl. Br. 28-35). Thus, plaintiffs have waived the basis for the trial court's decision under review. In any event, even if the Court were to reach the merits, plaintiffs' arguments lack merit. Plaintiffs protest that finding preemption will leave them without remedies. The federal government has already given the State of Iowa over $4 billion in disaster relief for the 2008 floods, and plaintiffs voluntarily dismissed the non-railroad defendants from this case. (JA 345-46.) In any event, preemption – whether express or implied – always has the effect of leaving plaintiffs without a state law remedy.

STATEMENT OF FACTS

A. Plaintiffs' Allegations

Plaintiffs are five individuals who allegedly sustained property damages as a result of the Flood of Cedar Rapids in June 2008. (Complt. ¶¶ 1-5) (JA 4-5.) Styling their Complaint as a putative class action, plaintiffs raise negligence and strict liability theories of liability. (Complt. ¶¶ 47-51, 80-97) (JA 13-14, 28-34.) They sued three groups of defendants: (1) the Union Pacific Railroad Company and its parent; (2) the Cedar Rapids and Iowa City Railway Company and its parent (collectively, CRANDIC), and (3) ten additional defendants (collectively, the Stickle Defendants). (JA 5-6.)

Plaintiffs assert that Union Pacific violated duties under tort common law and a state statute. (Complt. ¶¶ 81, 85, 91, 95) (JA 28-29, 30-31, 32-33, 34-35.) According to the Complaint, Union Pacific owns two railroad bridges – Quaker Plant Railroad Bridge and Prairie Creek Power Plant Railroad Bridge. (Complt. ¶¶ 25-26) (JA 7.) These bridges "span[] the Cedar River in Cedar Rapids, Iowa." (Complt. ¶¶ 28, 30-31) (JA 7-8.) In June 2008, Union Pacific "chose to load two lines of connected rail cars with heavy rock ballast weight and chose to place the two lines of railcars side by side" on its bridges. (Complt. ¶¶ 85, 88, 91, 95) (JA 30-31, 32-35.) These Union Pacific bridges did not collapse, but plaintiffs alleged that the railcars prevented river water from going downstream and diverted water

onto their property. (Complt. ¶¶ 82, 86, 92, 95-96, 110, 114, 120, 124) (JA 29, 31, 33, 34-35, 41, 43, 45-46, 48.)

Plaintiffs alleged that "all defendants" jointly own a third bridge, known as Cargill Plant Railroad Bridge. (Complt. ¶ 26) (JA 7.)[2] Plaintiffs allege that all defendants placed weighted rail cars on the Cargill Plant Railroad Bridge or, in the alternative, did not place weighted rail cars on Cargill Plant Railroad Bridge. (Complt. ¶ 30) (JA 7-8.) Plaintiffs further allege that "Defendants failed [to] build, maintain, inspect, and keep in good repair . . . [the] Cargill Plant Railroad Bridge." (Complt. ¶ 40) (JA 9.) Plaintiffs assert that this bridge collapsed as a result, causing or exacerbating the 2008 historic flooding in Cedar Rapids. (Complt. ¶¶ 110, 114, 119, 123) (JA 41, 43-44, 45, 47-48.)

The Complaint, by its own terms, seeks to regulate future railroad operations. Plaintiffs seek compensatory, treble, and punitive damages "to punish" Union Pacific and the other defendants for their actions, "while deterring and discouraging [them] and others from taking similar action in the future . . .." (Complt. pps. 35, 38, 47-48) (JA 8, 9, 13-14.)

[2] Union Pacific and its parent company do not have any ownership in the Cargill Plant Railroad Bridge but this allegation can be assumed for present purposes.

B. Federal Court Litigation

After removing this case to federal court, Union Pacific moved for judgment on the pleadings based on ICCTA preemption. *Griffieon v. Cedar Rapids and Iowa City Ry. Co*., 977 F. Supp. 2d 903, 905 (N.D. Iowa 2013). The federal court found that plaintiffs were challenging via state law core aspects of federal rail transportation that fall within ICCTA's express preemption clause. "Here, the parking of loaded cars on tracks to prevent them from washing away was a core operational activity, with ramifications on the continued operations of the [rail] network, governed by the ICCTA." *Id*. at 905. Accordingly, the federal court dismissed the complaint based on express ICCTA preemption.

On appeal, the Eighth Circuit found that the federal district court lacked subject matter jurisdiction. *See Griffieon v. Cedar Rapids and Iowa City Ry. Co*., 785 F.3d 1182, 1192 (8th Cir. 2015). The Eighth Circuit explained that only complete preemption supports removal jurisdiction to federal court. *See id.* at 1189. The court carefully distinguished "complete preemption" from "ordinary preemption," explaining that ordinary preemption wipes out state law whereas complete preemption requires there be a federal cause of action replacing state law. *See id*. "It is the federal cause of action that ultimately supplants the state-law cause of action and effectuates complete preemption." *Id.* Ordinary preemption, on the other hand, is an affirmative defense and does not create federal jurisdiction.

See id. Because the ICCTA does not contain a "substitute federal cause of action that would embrace the [plaintiffs'] claims," the federal court lacked jurisdiction to rule on the affirmative defense of preemption. *Id.* at 1190.

The Eighth Circuit left open the door for the railroads to raise ICCTA preemption as a defense in state court. "Our holding is, of course limited to the issue of federal-question jurisdiction, and so we offer no views regarding any preemption defense that may be raised in state court." *Id.* at 1192. The court emphasized that, with respect to any affirmative preemption defense, "Congress has the power to eliminate state-law remedies and causes of action without providing federal substitutes . . . ." *Id.* at 1191. On May 29, 2015, the federal district court remanded the case to state court pursuant to the Eighth Circuit's mandate.

C. Judge Miller's Decision Granting Judgment on the Pleadings

Following remand to state court, the railroad defendants – Union Pacific and CRANDIC – moved for judgment on the pleadings based on ICCTA preemption. In opposing the motion, plaintiffs filed a proposed amended complaint that made further factual allegations regarding the flooding but that continued to rest on rail operations. After briefing and oral argument, the trial court granted the motions.

The trial court explained its reasons in a ten-page decision. *See* Ruling, 1-10 (JA 333-43.) At the outset, the court recognized that numerous courts have already

addressed preemption under the ICCTA. *See* Ruling at 4 (JA 336.) "[T]he Court has considered and reviewed all cases cited by the parties and has conducted its own research into these issues." *Id.* The trial court "narrow[ed] the cases down to a few" that it viewed to be the "most persuasive" and discussed those authorities at length in its opinion. *Id*.

The court concluded that these cases make clear "if a railroad is acting to protect its tracks and bridges from floodwaters and to keep the interstate shipment of goods moving, those actions are protected by federal law." (Ruling, at 9) (JA 341.) For example, the Missouri appellate court found that ICCTA preempted local authorities from using state flood plain laws to prevent the railroad from elevating its track despite valid flooding concerns.[3] Similarly, courts in Kentucky, South Dakota, Georgia, and Texas found that the ICCTA preempted state tort claims related to flooding allegedly caused by the railroad's failure to maintain its track or to maintain a culvert in its roadbed.[4] Finally, the Eighth Circuit found that ICCTA preempted of state tort claims similar to those presented in this case. *See*

[3] *See* Ruling at 4-5 (JA 336-37), discussing *Vill. Of Big Lake v. BNSF Ry. Co*., 382 S.W.3d 125 (Mo. Ct. App. 2012).

[4] *See* Ruling at 6-7 (JA 338-39), discussing *Maynard v. CSX Transp., Inc*., 360 F. Supp. 2d 836 (E.D. Ky. 2004); *Waubay Lake Farms Ass'n v. BNSF Ry. Co*., No. 12-4179-RAL, 2014 WL 4287086, at *6-7 (D. S.D. Aug. 28, 2014); *Jones Creek Investors, LLC v. Columbia County Ga*., 98 F. Supp. 3d 1279 (S.D. Ga. 2015); *A&W Properties, Inc. v. Kansas City S. Ry. Co*., 200 S.W.3d 342 (Tex. App. 2006).

Ruling at 8-9 (JA 340-41), discussing *Tubbs v. Surface Transp. Bd.*, 812 F.3d 1141 (8th Cir. 2015).

The court then found that, based on the legal framework and precedent, plaintiffs' claims were expressly preempted by the ICCTA. The court explained:

> Plaintiffs, having made complaints about how the railroad Defendants loaded and positioned their rail cars; as to where and when they parked their rail cars; and as to the design, construction and maintenance of the bridges, have stated claims that go directly to rail transport regulation. As in Big Lake, Maynard, A&W, Waubay, Jones Creek, and Tubbs, Plaintiffs are complaining about actions taken by the railroad Defendants that are an essential part of the railroads' operations and that would result in Plaintiffs managing or governing the operations of the railroads.

Ruling at 10 (JA 342). The Court further found that any attempt to amend the complaint would be futile. "Plaintiffs' claims currently stated and their proposed amended claims, at their core, are based on Defendants' rail operations, which requires express preemption of Plaintiffs' claims under the ICCTA." *Id.* at 10 (JA 342).

The trial court noted that plaintiffs still had active claims against ten remaining defendants – the Stickle defendants. *See id.* Plaintiffs, however, later voluntarily moved to dismiss the Stickle defendants without prejudice. (Pl. Motion.) (JA 345-46.) The trial court granted that motion and entered a final judgment in the case. (JA 348-49.) This appeal followed. (JA 350-53.)

ARGUMENT

I. THE TRIAL COURT PROPERLY GRANTED JUDGMENT ON THE PLEADINGS BASED ON EXPRESS PREEMPTION

A. Preservation of Error and Standard of Appellate Review

Union Pacific agrees with plaintiffs (Br. 14) that they preserved in the trial court their challenge to scope and application of ICCTA in their opposition to the motions for judgment on the pleadings. On appeal, however, plaintiffs have waived any challenge to the trial court's finding of express preemption under the ICCTA. (Ruling, at 10) (JA 342.)

This Court reviews the questions of ICCTA preemption *de novo*, but with deference to the federal agency's permissible interpretation of the statutory language. *See Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 714-15 (1985) (agency's statement "is dispositive on the question of implicit intent to pre-empt"); *Tubbs*, 812 F.3d at 1144; *B & S Holdings, LLC v. BNSF Ry. Co.*, 889 F. Supp. 2d 1252, 1257 (E.D. Wash. 2012).[5]

[5] Courts have uniformly found that the Surface Transportation Board's interpretation of 49 U.S.C. § 10501(b) is entitled to some deference, though there appears to be some debate in the lower courts as to the appropriate degree of deference owed. *See, e.g., Franks Invest. Co. v. Union Pac. R.R. Co.*, 593 F.3d 404, 413 (5th Cir. 2010) (*en banc*). This case, however, does not turn on how much deference should be given to the federal agency's views.

B. The ICCTA's Text and Purpose

For over a century, the law has been clear: States cannot directly regulate interstate railroad bridges or train operations in the absence of federal legislation granting them this power. In *Kansas City S. Ry. Co. v. Kaw Valley*, 233 U.S. 75, 78 (1914), the State of Kansas ordered the railroad to raise certain bridges over the Kansas River to higher heights and to remove older ones because the bridges were causing flooding onto neighboring properties. *Id*. at 76. The U.S. Supreme Court reversed, explaining that these interstate bridges were "under the exclusive control of Congress" and thus a state could not regulate them even under their police powers. *See id.* at 79. "It repeatedly has been said or implied that direct interference with commerce among the states could not be justified in any way." *Id*.; *see also Southern Pac. Co. v. Arizona*, 325 U.S. 761 (1945) (States may not regulate speed or lengths of trains operated in interstate commerce).

In 1995, Congress enacted a statute with broad preemptive effect: the Interstate Commerce Commission Termination Act ("ICCTA"). The ICCTA sought to revitalize the railroad industry by reducing the burden of regulation. As Congress explained, over time "[t]he combination of * * * onerous Federal regulations and stiff competition from the motor carrier industry proved lethal for the railroads; by the 1970s, the railroad industry was on the brink of financial collapse." H.R. Rep. No. 104-331, at 90 (1995), *reprinted in* 1995 U.S.C.C.A.N.

793, 802. The ICCTA "builds on the deregulatory policies that have promoted growth and stability in the surface transportation sector. * * * The [Act] keeps bureaucracy and regulatory costs at the lowest possible level, consistent with affording remedies only where they are necessary and appropriate." *Id*. at 93, 1995 U.S.C.C.A.N. at 805. Thus, "freeing the railroads from state and federal regulatory authority was the principal purpose of Congress." *Wisconsin Central Ltd. v. City of Marshfield*, 160 F. Supp. 2d 1009, 1015 (W.D. Wis. 2000).

To accomplish this objective of deregulation, Congress pruned economic regulation at the federal level and eliminated direct state regulation over rail transportation altogether. Congress eliminated former Section 10501(c), which had expressly reserved the power in the states to regulate intrastate transportation. 49 U.S.C. § 10105 (1988) (repealed 1995). Also eliminated was former Section 10103, which had stated that the federal remedies provided were "in addition to remedies existing under another law or at common law." 49 U.S.C. § 10103 (1988) (repealed 1995) (emphasis added). Congress abolished the Interstate Commerce Commission (which governed railroads under the prior scheme) and created the Surface Transportation Board. 49 U.S.C. § 702.

"The ICCTA creates exclusive federal regulatory jurisdiction and exclusive federal remedies." *Elam v. Kansas City S. Ry. Co*., 635 F.3d 796, 804 (5th Cir. 2011). The ICCTA specifies that the Surface Transportation Board – a federal

agency within the U.S. Department of Transportation – shall have "exclusive" jurisdiction over "***transportation*** by rail carriers" ***and*** "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 . . . ." 49 U.S.C. § 10501(b) (emphasis added). The term "transportation" is defined broadly to include property, facilities, instrumentalities or equipment of any kind that are used for that transportation.[6] The same subsection expressly confirms that "*the remedies* provided under this part with respect to rail transportation are *exclusive* and *preempt* the remedies provided under Federal or State law." *Id.* (emphasis added). As Congress stressed, this broad preemption of state regulation is necessary to preserve the free flow of interstate commerce and to prevent the "balkanization" of rail transportation. H.R. Rep. No. 104-331, at 95-96 (1995), *reprinted in* 1995 U.S.C.C.A.N. 793, 807-08.

Despite plaintiffs' assertion that ICCTA preemption is narrow (Br. 13, 18), "[e]very court . . . has concluded that the preemptive effect of section 10501(b) is broad and sweeping." *City of Creede, Co.—Petition for Declaratory Order*, FD

[6] 49 U.S.C. § 10102(9). The ICCTA defines "railroad" to include any "bridge" and "track" used for transportation. 49 U.S.C. § 10102(6). "The statute also defines rail transportation expansively to encompass any property, facility, or equipment [including cars] related to the movement of passengers and property by rail . . . ." *City of Lincoln v. STB*, 414 F.3d 858, 861 (8th Cir. 2005) (citing 49 U.S.C. § 10102(9)). "Courts have recognized that Congress intended to give the [Surface Transportation] Board extensive authority in this area." *Id.*

34376, 2014 STB LEXIS 486 at *10 (Served May 3, 2005). "It is difficult to imagine a broader statement of Congress's intent to preempt state regulatory authority over railroad operations." *City of Auburn v. United States*, 154 F.3d 1025, 1030 (9th Cir. 1998) (quotations and citation omitted); *Ass'n Am. Railroads v. S. Coast Air Quality*, 622 F.3d 1094, 1096 (9th Cir. 2010) (Congress intended to preempt "a wide range of state and local regulation of rail activity"). "Congress' intent in the Act to preempt state and local regulation of railroad transportation has been recognized as broad and sweeping." *Union Pac. R.R. v. CTA*, 647 F.3d 675 (7th Cir. 2011); *see also Port City Properties v. Union Pac. R.R.*, 518 F.3d 1186, 1188 (10th Cir. 2008) (ICCTA contains a "broad jurisdictional grant" that is "coupled with an express preemption clause"). "Congress intended to preempt state and local laws that come within the [Surface Transportation] Board's jurisdiction." *Texas Cent. Business Lines v. City of Midlothian*, 669 F.3d 525, 530 (5th Cir. 2012); *see also Oregon Coast Scenic Railroad, LLC v. Oregon Dep't of State Lands*, 841 F.3d 1069, 1076 (9th Cir. 2016) ("the broad preemption provision of 49 U.S.C. § 10501(b)").

As discussed further below, the ICCTA preemption clause covers state tort damages as well as other forms of state regulation. *See Pace v. CSX Transp., Inc.*, 613 F.3d 1066, 1070 (11th Cir. 2010) (ICCTA preempts state nuisance action);

Elam, 635 F.3d at 807 (negligence per se action); *Friberg v. Kansas City S. Ry. Co.*, 267 F.3d 439 (5th Cir. 2001) (negligence and negligence per se actions).

C. Plaintiffs Have Waived on Appeal the Basis for the Trial Court's Ruling

The trial court ruled in Union Pacific's favor on express preemption. (Ruling, at 10) (JA 342.) On appeal, plaintiffs argue that this case concern conflict preemption and do not explicitly challenge the court's express preemption ruling. They therefore have waived the issue. *See Brown v. First Nat'l Bank of Mason City*, 103 N.W.2d 547, 551 (Iowa 1972) (court will not consider errors raised for the first time in reply briefs).

As the trial court explained, there are three different types of preemption: express preemption, field preemption, and conflict preemption. (Ruling, at 3) (JA 335.) The trial court then explicitly relied upon express preemption as the basis for its ruling. In fact, the court stated at least three separate times that its ruling was based on express preemption. *See* Ruling, at 10 (JA 342) ("Plaintiffs' state law claims are ***expressly preempted*** because the claims fall within the scope of the ICCTA preemption clause.") (emphasis added); *see id*. ("The uncontroverted facts, as stated in the pleadings, establish that the ICCTA ***expressly preempts*** the state law claims state by Plaintiffs.") (emphasis added); *see id.* ("Plaintiffs currently stated claims and their proposed amended claims, are their core, are based on

Defendants' rail operations, which requires ***express preemption*** of Plaintiffs' claims under the ICCTA.") (emphasis added).

The court also gave specific reasons for finding express preemption under the ICCTA. "Plaintiffs . . . have stated claims that go directly to rail transport regulation" because they complain about "how the railroad Defendants loaded and positioned their rail cars," "where and when they parked their rail cars," and "the design, construction and maintenance of the bridges . . . ." (Ruling, at 10) (JA 342.) The court further explained: "Plaintiffs are complain about actions taken by the railroad Defendants that are an essential part of the railroads' operations, and that would result in Plaintiffs managing or governing the operations of the railroads." (Ruling, at 10) (JA 342.) The court also discussed six decisions in which courts had found ICCTA preemption. (Ruling, at 6-10) (JA 338-43.)

While the trial court relied upon express preemption, plaintiffs argue that this appeal concerns "conflict preemption." (Pl. Br. 2-3.) Plaintiffs do not address in their opening brief the trial court's finding of express preemption or its reasons for finding express preemption.[7] And plaintiffs rely largely upon conflict preemption cases to support their argument that the trial court's ruling was in error.

[7] Plaintiffs complain about the trial court's finding that the ICCTA "grants the STB exclusive jurisdiction, using language that is even more powerful than that found in other jurisdictions that the Supreme Court has held to support complete preemption." Pl. Br. 18, quoting Order at 3. But this portion of the trial court's ruling was a quote from the Eighth Circuit's decision in this case. *See* Ruling at 3 (JA 335), quoting *Griffioen*, 785 F.3d at 1189.

See, e.g., Pl. Br. 28, citing *Emerson v. Kansas City Southern Ry. Co.*, 503 F.3d 1126 (10th Cir. 2007), *New Orleans & Gulf Coast Ry. Co. v. Barrios*, 533 F.3d 321 (5th Cir. 2008), and *Franks Invest. Co. v. Union Pac. R.R. Co.*, 593 F.3d 404 (5th Cir. 2010) (en banc). Thus, plaintiffs have forfeited the ground on which the trial court relied for its decision. Appellate courts do not "manufacture arguments for an appellant" because "[o]ur adversarial system relies on the advocates to inform the discussion and raise the issues to the court." *Independent Towers v. Washington*, 350 F.3d 925, 929 (9th Cir. 2003) (quotations and citations omitted). This should be the end of the matter. *See Holk v. Snapple Beverage Corp.*, 575 F.3d 329, 335-36 (3d Cir. 2009) (defendant waived express preemption by only raising conflict preemption in the trial court papers).

D. The Trial Court Applied the Correct Test for ICCTA Preemption

Even assuming the Court reaches the merits, the trial court correctly found that plaintiffs' claims are expressly preempted by the ICCTA. "In order for federal preemption to apply under the ICCTA, the activity in question must first fall within the statutory grant of jurisdiction to the Surface Transportation Board . . . : it must be (1) 'transportation' (2) 'by rail carrier' (3) 'as part of the interstate rail network.'" *Oregon Coast Scene Railroad*, 841 F.3d at 1073 (quoting 49 U.S.C.

§ 10501(b)).[8] Other decisions have clarified that ICCTA "does not preempt state or local laws if they are laws of general applicability that do not unreasonably interfere with interstate commerce," but it "preempts all 'state laws that may reasonably be said to have the effect of managing or governing rail transportation.'" *Ass'n of American Railroads*, 622 F.3d at 1097 (first citing *Bos. & Me. Corp. & Town of Ayer*, No. 33971, 2001 WL 458685, at *4-6 (STB May 1, 2001), and then quoting *N.Y. Susquehanna & W. Ry. Corp. v. Jackson*, 500 F.3d 238, 252 (3d Cir. 2007)).

Far from adopting a test that has been rejected the courts (Pl. Br. 24), the trial court found that the complaint was preempted under the ICCTA using these tests. The court found that plaintiffs' state-law claims amount to "direct[]" regulation of rail transportation and would have the effect of "managing or governing the operations of the railroad." (Ruling at 10) (JA 342.) As the trial court explained, "Plaintiffs are complaining about actions taken by the railroad Defendants that are an essential part of the railroads' operations," such as how the railroads may load their cars, where and when they can park their cars, and the maintenance of bridges. (*Id.*) (JA 342.)

Contrary to plaintiffs' assertion on appeal (Pl. Br. 23), ICCTA preemption turns on the effect of state regulation – not the state actor's intent. *All* of the

[8] Plaintiffs have never disputed that Union Pacific is a rail carrier or that its mainline track and bridges are part of the interstate rail network.

federal circuit courts that have addressed the issue agree that if a state remedy has "the effect of regulating" rail transportation, it is "expressly preempted" by 49 U.S.C. § 10501(b). *Elam v. Kan. City S. Ry.*, 635 F.3d 796, 806-07 (5th Cir. 2011); *City of Lincoln v. STB*, 414 F.3d 858, 860-61 (8th Cir. 2005).[9] In fact, plaintiffs admitted in the trial court that "[t]o the extent remedies are provided under [state] laws that have *the effect of regulating rail transportation*," those remedies are expressly preempted by the ICCTA. Pls. Memo. in Response to Motion for Judgment on Pleadings, at 21 (JA 77).

E. The Trial Court's Ruling is Consistent with the Precedent

The trial court's ruling is consistent with precedent of other trial and appellate courts. As an initial matter, plaintiffs complain about train and bridge operations.[10] Courts have repeatedly held that States cannot regulate train

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[9] *See also Union Pac. R.R. v. CTA*, 647 F.3d 675, 682 (7th Cir. 2011); *Norfolk S. Ry. Co. v. City of Alexandria*, 608 F.3d 150, 157-58 (4th Cir. 2010); *Fayus Enters. v. BNSF Ry. Co.*, 602 F.3d 444, 446 (D.C. Cir. 2010); *Pace v. CSX Transp., Inc.*, 613 F.3d 1066, 1070 (11th Cir. 2010); *Adrian & Blissfield R.R. Co. v. City of Blissfield*, 550 F.3d 533, 539 (6th Cir. 2008); *Port City Properties v. Union Pac. R.R. Co.*, 518 F.3d 1186, 1188 (10th Cir. 2008); *N.Y. Susquehanna & W. Ry. Corp. v Jackson*, 500 F.3d 238, 252 (3d Cir. 2007); *Green Mountain R.R. Corp. v. Vermont*, 404 F.3d 638, 643 (2d Cir. 2005); *City of Auburn v. U.S.*, 154 F.3d at 1030-31.

[10] In the Complaint, plaintiffs allege that Union Pacific is liable for choosing "to load two lines on connected railcars with heavy rock ballast weight" and "to place the two lines of rail cars side by side" on certain bridges. (Complt. at ¶¶ 81, 85, 91, 95, 109, 113, 119, 123) (JA 28, 32-33, 34-35, 40-41, 43, 45, 47-48.)

operations. "The language of the [ICCTA] statute could not be more precise, and it is beyond peradventure that regulation of KCS train operations . . . is under the exclusive jurisdiction of the STB . . . ." *Friberg v. Kansas City S. Ry. Co.*, 267 F.3d 439, 443 (5th Cir. 2001).[11] Similarly, a railroad bridge "is unquestionably" a facility within the meaning of ICCTA.[12] Train and bridge operations naturally encompass the usage of tracks and rail cars. Courts have therefore held that state regulation of the usage of tracks is preempted as well.[13] Courts have also found that ICCTA preempts challenges to where and when the railroad parks its trains.[14]

Plaintiffs also allege that Union Pacific "failed to build, maintain, inspect, and keep in good repair" certain bridges. (Complt. ¶ 40) (JA 9.)

[11] *See also Ridgefield Park v. N.Y., Susquehanna & W. Ry. Corp.*, 750 A.2d 57, 67 (N.J. 2000) (dismissing a state nuisance claim, holding that "states may not interfere with the operational aspects of railroading and that localized concerns may not burden the nationwide system of railroads.").

[12] *See City of Siloam Springs, Arkansas v. Kansas City S. Ry.*, Civil No. 12-5140, 2012 WL 3961346, at *3 (W.D. Ark. Sept. 10, 2012); *City of Cayce v. Norfolk S. Ry. Company*, 706 S.E.2d 6 (S.C. 2011) ("Bridges are expressly considered part of the railroad operations under the definitional section of the ICCTA").

[13] *See Oregon Coast Scene Railroad*, 2016 WL 6892213, at *6-7; *Tex. Cent. Bus. Lines Corp. v. City of Midlothian*, 669 F.3d 525, 533 (5th Cir. 2012) (holding that the ICCTA grants "exclusive jurisdiction" over the operation of rail tracks to the STB, "*leaving no room for local regulation*") (emphasis added); *City of Auburn v. United States*, 154 F.3d 1025, 1028-30 (9th Cir. 1988) (ICCTA expressly preempts state and local laws providing for environmental review as they relate to the operation of rail facilities); *Estate of Roberson, II v. Iowa Interstate R.R., Ltd.*, No. 04781 LACV 100030, 2010 WL 5632765 (Iowa Dist. Ct.- Pottawattamie

Furthermore, as the trial court recognized, courts have specifically found that railroad actions to preserve its infrastructure – including the tracks and bridges – are protected by federal law (ICCTA) even if those actions divert water onto neighboring property. (Ruling, at 6-10) (JA 338-42). Plaintiffs have repeatedly admitted that Union Pacific's actions were taken to "protect" the rail infrastructure from the rising waters. (Pl. Br. 1.) The case most directly on point is the Eighth Circuit's opinion in *Tubbs v. Surface Transp. Board*, 812 F.3d 1141 (8th Cir. 2015). While the trial court highlighted this precedent (JA 8-9), plaintiffs do not address or even acknowledge the *Tubbs* decision in their opening brief.

In both this case and in *Tubbs*, the plaintiffs are landowners who complain that the railroad's efforts to protect its tracks and infrastructure diverted water onto their property. *See Tubbs*, 812 F.3d at 1143, 1146. In *Tubbs*, the plaintiffs complained about "the height" of the railroad's embankment and asserted that the embankment created an artificial damn, preventing the water from flowing

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County Nov. 19, 2010) ("ICCTA prevents interference with a railroad's ability to use its track and operate its intermodal facility by giving exclusive jurisdiction over these areas to the STB.").

[14] *See Estate of Roberson, II v. Iowa Interstate R.R., Ltd.*, No. 04781 LACV 100030, 2010 WL 5632765 (Iowa Dist. Ct.- Pottawattamie County Nov. 19, 2010); *Elam v. Kansas City S. Ry. Co.*, 635 F.3d 796, 806-08 (5th Cir. 2011); *Friberg v. Kansas City S. Ry. Co.*, 267 F.3d at 443; *Burlington N. & Santa Fe Ry. Co. v. DOT*, 206 P.3d 261 (Or. App. 2009); *Vill. of Mundelein v. Wisconsin Central R.R.*, 882 N.E.2d 544, 552, 555 (Ill. 2008).

through. *Id.* In this case, the plaintiffs complain about the height of the railroad's bridges and argue that the bridges with weighted rail cars on them created an artificial damn.[15]

In *Tubbs*, the state trial court stayed the litigation so that the parties could seek the views of the Surface Transportation Board on the preemption question. *Tubbs*, 812 F.3d at 1143. Based on the pleadings, the STB "analyze[d] the facts and circumstances of the case" and found that the state tort claims were preempted by the ICCTA. *Id*. at 1145-46. According to the STB, "Plaintiffs' state law claims are federally preempted, whether they are viewed as 'categorical' or 'as applied,' because they have the effect of regulating and interfering with rail transportation." *Thomas Tubbs – Petition for Declaratory Order*, Docket No. FD 35792, 2014 WL 5508153, at *4 (Oct. 31, 2014). The STB explained:

> Whether BNSF took its actions before and during an emergency resulting from a massive flood, as here, or during normal circumstances, state and local regulation of actions based on the railroad's design, construction, and maintenance standards for railroad track are preempted under § 10501(b). This is so even where the attempted regulation is a tort claim under state law, because damages awarded under state laws can manage and regulate a railroad as

[15] *See, e.g.*, Pl. Br. 1; Complt. ¶¶ 95(c)-(d) (JA 35) (alleging Union Pacific bridges were not built or maintained to permit rising floodwaters to flow unobstructed); Complt. ¶¶ 81(a)-(c) (JA 28-29) (alleging Union Pacific prevented or diverted water from going downstream by loading weighted rail cars side-by-side on the bridge); Complt. ¶ 82(b) (JA 29) (alleging Union Pacific's actions obstructed drains and/or other drainage improvements); Compt. ¶¶ 85-86, 91-92, 109-10, 113-14, 119, 123, 128 (JA 30-31, 32-33, 40-41, 43-44, 45, 47-48, 49.)

> effectively as the application of any other type of state statute or regulation.

Id. (citations omitted).

A unanimous panel of the Eighth Circuit agreed. The panel endorsed the STB's views that (1) ICCTA's definition of rail transportation "clearly" includes the design, construction, and maintenance of an active rail line and (2) a state common law action directed at an integral part of rail transportation interferes with rail operations and is therefore preempted under the ICCTA. *See Tubbs*, 812 F.3d at 1146. Significantly, the panel found that the STB's findings of preemption "are supported by the Tubbses' pleadings." *Id.* "The Board could reasonably infer that the Tubbses' state-law claims would unreasonably burden or interfere with rail transportation based *on their assertion* that BNSF's conduct fell below its standard of care by not meeting required width and drainage specifications from the embankment." *Id*. (emphasis added). Thus, according to the Eighth Circuit, ICCTA preemption could be found based on "the assertion" that the railroad should have followed state tort standards in conducting interstate rail operations.

This case presents an even more compelling case for ICCTA preemption. In this case, plaintiffs similarly complain the height and drainage of railroad facilities – railroad tracks and bridges spanning the Cedar River. They also seek to impose state standards on activities that are even more integral to rail transportation – the

operation of rail cars, including where those cars can be parked and when. Under the *Tubbs* decision, these assertions are clearly preempted by the ICCTA.

Other courts have reached the same conclusion. In May 2011, for example, the freight railroads elevated their roadbeds for miles in an effort to keep their mainline tracks above floodwaters from the Missouri River. *See Vill. Of Big Lake v. BNSF Ry. Co.*, 382 S.W.3d 125 (Mo. Ct. App. 2012). Local authorities sought to require the railroads to lower their tracks, believing that the build up from the raised track would divert water onto neighboring property in violation of state law, but the Missouri appellate court found that the ICCTA preempted the state laws and ordinances. *Id.* When landowners sued a different railroad for flooding and property damages following Hurricane Katrina, the Louisiana federal courts granted the railroad's motion to dismiss based on ICCTA preemption.[16] Similarly, courts in South Dakota, Georgia, and Texas found that the ICCTA preempted state tort claims related to flooding allegedly caused by the railroad's failure to maintain a culvert in its roadbed.[17] The federal court in Kentucky found that the ICCTA preempts negligence claims related to flooding allegedly caused by the

[16] *See Pere Marquette Hotel Partners, L.L.C. v. United States*, 2010 WL 925297 (E.D. La. Mar. 10, 2010); *In re Katrina Canal Beaches Consol. Litig.*, 2009 WL 224072 (E.D. La. 2009).

[17] *See Waubay Lake Farms Ass'n v. BNSF Ry. Co.*, No. 12-4179-RAL, 2014 WL 4287086, at *6-7 (D. S.D. Aug. 28, 2014); *Jones Creek Investors, LLC v. Columbia County Ga.*, 98 F. Supp. 3d at 1291-94; *A&W Properties, Inc. v. Kansas City S. Ry. Co.*, 200 S.W.3d 342 (Tex. App. 2006).

construction and maintenance of tracks, and the Sixth Circuit affirmed.[18] As these cases demonstrate, there is nothing more integral to the provision of rail service than ensuring interstate shipments can continue by protecting tracks and rail facilities from floodwaters. Plaintiffs do not address the controlling legal principles established in this wall of precedent.

Plaintiffs' primary argument is that their tort claims do not amount to direct regulation because they "make no demands on how the Defendants operate in the future" but rather "seek money damages for past wrongful conduct [that] has damaged their property." (Pl. Br. 7.) The U.S. Supreme Court has rejected this very argument, explaining that state "regulation can be as effectively exerted through an award of damages as through some form of preventive relief." *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 247 (1959). "As we have recognized, state 'regulation can be . . . effectively exerted through an award of damages,' and '[t]he obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy.'" *Kurns v. R.R. Friction Products Corp.*, 132 S. Ct. 1261, 1269 (2012) (quoting *Garmon*, 539 U.S. at 247); *see also Riegel v. Medtronic*, 552 U.S. 312, 325 (2008) (finding that state tort law, applied by juries, is "less deserving of preservation" from

[18] *Maynard v. CSX Transp., Inc.*, 360 F. Supp. 2d 836 (E.D. Ky. 2004), *aff'd*, No. 04-5448 (6th Cir. Feb. 7, 2005) (the Sixth Circuit's unpublished decision is available in Union Pacific's Addendum at 37-48, filed in the trial court on June 19, 2015).

preemption than other forms of state regulation). Indeed, it strains credulity to suggest that the requested award of over "six billion dollars in property damages" will have little or no impact on Union Pacific's rail operations. (Pl. Br. 1.)

Courts applying ICCTA have likewise rejected this argument. In *A&W Properties, Inc. v. Kansas City S. Ry. Co.*, 200 S.W.3d 342 (Tex. Ct. App. 2006), the plaintiff landowner argued that the payment of damages "would not require construction on the railroad itself" or "require shutting the railroad down" and thus "would not impact railroad operations at all." *Id.* at 349. The Texas appellate court rejected this argument: "Litigants would be able to circumvent completely Congress's attempt to deregulate the railroad industry. This cannot be the law." *Id*. "Instead, we agree with courts that have stated that when a state requires a railroad to pay damages to a civil litigant for a claim related to the railroad's operations, that claim is the equivalent of state regulation of the railroad." *Id.*

Similarly, in *Pace v. CSX Transp., Inc.*, 613 F.3d 1066 (11th Cir. 2010), the landowners urged the court to "take a remedy-centered approach and find an action is only preempted [by ICCTA] where a remedy is sought that would demand changes in the railroad's core operations." *Id*. at 1069. The Eleventh Circuit found that the landowners could not circumvent ICCTA preemption. "[T]o permit monetary liability to accrue under a state nuisance law where that liability is based on decisions that the ICCTA purposefully freed from outside regulation would

contradict the language and purpose of the ICCTA." *Id.* at 1070. Numerous lower courts and the STB have reached the same conclusion.[19] Thus, in *Waubay Lake Farmers,* the district court found that "[e]ven if Plaintiffs' complaint could be construed as seeking damages only, such a suit would still be a form of regulation." *Waubay Lake Farmers*, 2014 WL 4287086, at *5 n.5 (citing the Supreme Court's opinions in *Kurns* and *Garmon*).

Plaintiffs' arguments are belied by their own complaint as well. While plaintiffs now argue that they make no demands on future operations, their complaint specifically seeks sufficient damages to "deter[] and discourag[e] the UP Defendants and all others from taking similar actions in the future . . . ." Complt. pps. 35, 38, 47-48 (JA 37, 40, 49-50.) If plaintiffs' claims were not preempted under 49 U.S.C. § 10501(b), Union Pacific would be forced to change its future conduct regarding how it operates its cars, tracks and bridges in the State of Iowa based upon the results of the state tort action – or potentially be subject to additional damages claims. Plaintiffs suggest that Union Pacific's actions were driven by a one-time event (Pl. Br. 31), but their complaint takes the opposition

[19] *See, e.g., Guckenberg v. Wisconsin Cent. Ltd*., 178 F. Supp. 2d 954, 958 (E.D. Wis. 2001); *Maynard v. CSX Transp., Inc*., 360 F. Supp. 2d 836, 840 (E.D. Ky. 2004); *San Luis Cent. R.R. v. Springfield Terminal Ry. Co.*, 369 F. Supp. 2d 172, 177 (D. Mass. 2005); *Pejepscot Indus. Park, Inc. v. Maine Cent. R.R. Co*., 297 F. Supp. 2d 326, 332 (D. Me. 2003); *Thomas Tubbs—Petition for Declaratory Order*, FD 35792, 2014 WL 5508153 (Served Oct. 31, 2014) ("damages awarded under state tort law can manage or regulate a railroad as effectively as the application of any other type of state statute or regulation").

position. The complaint alleges that Union Pacific has "on a number of occasions" loaded weighted rail cars with ballast and placed such cars on their bridges "in downtown Cedar Rapids, Iowa and elsewhere." Complt. ¶ 88 (JA 32.) In any event, ICCTA does not have any "one-time free zone" for state regulation.

Plaintiffs resort to another argument that has been repeatedly rejected by the courts – namely, that laws of general application survive ICCTA preemption. (Pl. Br. 4.) Plaintiffs are wrong. Courts and the STB have repeatedly rejected the idea that laws of general application that do not specifically target railroads cannot be preempted by ICCTA. Indeed, the great majority of cases finding ICCTA preemption actually preempt state laws of general applicability. *See Tubbs,* 812 F.3d at 1143, 1146 (state-law torts, including trespass, nuisance, negligence, inverse condemnation, and statutory trespass); *Fribert v. Kansas City S. Ry.*, 267 F.3d 439, 441 (5th Cir. 2001) (common law negligence and negligence per se claims); *Pace v. CSX Transp. Inc*., 613 F.3d 1066 (11th Cir. 2010) (state law nuisance claim); *Maynard v. CSX Transp*., Inc., 360 F. Supp. 2d 836, 841-42 (E.D. Ky. 2004) (common law negligence and nuisance claims), *aff'd*, No. 04-5448 (6th Cir. Feb. 7, 2005).[20] ICCTA preemption is defined not by the state law's purpose but by its effect on rail "transportation." 49 U.S.C. § 10501(b).

[20] *See also Norfolk S. Ry. Co. v. City of Alexandria*, 608 F.3d 150, 154-55 (4th Cir. 2010) (municipal land use and traffic laws); *Fayus Enterprises v. BNSF Ry. Co.*, 602 F.3d 444 (D.C. Cir. 2010) (state law antitrust, unfair competition and

Plaintiffs argue that the defendants must come forward with proof of actual interference with rail operations. (Pl. Br. 13.) However, courts have dismissed actions based on ICCTA preemption where, as here, the claims fall within the scope of the express preemption clause. *See, e.g., Pere Marquette*, 2010 WL 92597 (granting motion to dismiss claims regarding a rail crossing and roadbed because such claims were preempted by the ICCTA); *In re Katrina Canal Breaches Consol. Litig.*, 2009 WL 224072, at *6; *Rushing v. Kansas City S. Ry. Co.*, 194 F. Supp. 2d at 493 (granting motion to dismiss state law nuisance claims

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unjust enrichment claims); *Port City Properties v. Union Pac. R.R. Co.*, 518 F.3d 1186, 1187 (10th Cir. 2008) (tortious interference with business relations and defamation); *PCI Transp., Inc. v. Fort Worth & W. R.R. Co.*, 418 F.3d 535, 538 (5th Cir. 2005) (intentional interference with contractual relations); *City of Lincoln v. STB*, 414 F.3d 858 (8th Cir. 2005) (state condemnation law); *Green Mountain R.R. Corp. v. Vermont*, 404 F.3d 638, 639 (2d Cir. 2005) (state environmental land use law); *City of Auburn v. United States*, 154 F.3d 1025, 1027-28 (9th Cir. 1998) (state and local environmental land use laws); *Ridgefield Park v. N.Y. Susquehanna & W. Ry. Corp.*, 750 A.2d 57, 67 (N.J. 2000) (municipal nuisance law); *Pejepscot Indus. Park, Inc. v. Maine Cent. R.R. Co.*, 297 F. Supp. 2d 326, 333-34 (D. Me. 2003) (tortious interference and exemplary damages); *Rushing v. Kansas City S. Ry. Co.*, 194 F. Supp. 2d 493, 499500 (S.D. Miss. 2001) (state nuisance and negligence claims); *Guckenberg v. Wisconsin Central Ltd.*, 178 F. Supp. 2d 954, 958-59 (E.D. Wis. 2001) (common law nuisance claims); *Soo Line R.R. v. City of Minneapolis*, 38 F. Supp. 2d 1096, 1097-98 (D. Minn. 1998) (municipal historic preservation and demolition permitting laws); *North San Diego County Transit Dev. Bd. – Pet. for Dec. Order*, 2002 WL 1924265, at *2 (Aug. 19, 2002) (state environmental laws); *Friends of the Aquifer – Pet. for Dec. Order*, 2001 WL 928959, at *4 (Aug. 10, 2001) (state and local environmental laws); *Cities of Auburn and Kent, WA – Pet. for Dec. Order – Burlington N. R.R. Co. Stampede Pass Line*, 1997 WL 362017, at *7 (July 1, 1997) (state environmental and local land use law).

regarding railroad's switching operations because such claims were preempted by the ICCTA). In *Tubbs*, the Eighth Circuit held that the STB's finding of preemption was "supported by the Tubbses pleadings." *Tubbs*, 812 F.3d at 1146. The court quoted the plaintiffs' allegations that BNSF's embankment had only 134 feet of drainage openings and that applicable state standards of care required additional openings to reduce the damming effect. *See id*. The Eighth Circuit found that these state law claims, if allowed to proceed, "would have a significant impact on the construction and maintenance of a rail line" and would *necessarily* interfere with the railroad's ability to seamlessly operate in multiple states. *Id.* Similarly, here, plaintiffs advance a standard of care that would, in essence, subject the construction and maintenance of Union Pacific's bridges to state regulation for height and drainage via negligence actions. Based on these assertions, ICCTA preempts. *See Tubbs*, 812 F.3d 1146.

In short, the trial court properly granted judgment on the pleadings based on ICCTA preemption. The court's ruling is supported by the clear weight of authority applying ICCTA preemption to similar efforts to regulate railroad operations and equipment.

II. Plaintiffs' Arguments on Appeal Lack Merit

A. The Cases Cited By Plaintiffs Are Not on Point

None of the cases cited in plaintiffs' opposition brief support their argument against the application of ICCTA preemption here. The cases cited by plaintiff stand for the unremarkable proposition that the ICCTA does not preempt state regulation of activities having no transportation purpose.

In *Emerson v. Kanas City S. Ry.*, 503 F.3d 1126 (10th Cir. 2007), the court held that the activity at issue there – "discarding old railroad ties into a wastewater drainage ditch adjacent to tracks" – did not have a transportation purpose. *Id.* at 1130. *See also Florida East Coast Ry. Co. v. City of West Palm Beach*, 266 F.3d 1324, 1331-32 (11th Cir. 2001) (finding no transportation purpose where a *non*-railroad used property leased from a railroad for "non-rail transportation purposes"); *Guild v. Kansas City S. Ry.*, 541 F. App'x 362, 368 (5th Cir. 2013) (railroad failed to show a transportation purpose in storing heavy equipment on a private side track that was no longer being used and was not part of the mainline); *Franks Invest. Co. v. Union Pac. R.R. Co.*, 593 F.3d 404 (5th Cir. 2010) (en banc) (grade crossing dispute – i.e., a landowner claiming a simple right to cross *over* the railroad tracks – does not interfere with rail operations and thus is not preempted); *New Orleans & Gulf Coast Ry. Co. v. Barrios*, 533 F.3d 321 (5th Cir. 2008) (same); *In re Appeal of Vermont Ry.*, 769 A.2d 648, 655 (Vt. 2000) (city could not

regulate operations at the railroad's salt shed storage facility but could regulate traffic accessing and leaving the facility); *State ex rel. Oklahoma Corp. v. Burlington N. & Santa Fe Ry. Co*., 24 P.3d 368 (Okla. 2000) (fence used for grazing cattle does not have a transportation purpose).[21]

These cases have been repeatedly distinguished in situations where the activity at issue has a rail transportation purpose – like the railroad's efforts to preserve its infrastructure in the face of rising floodwaters. *See, e.g., Tubbs*, 812 F.3d at 1156 (distinguishing *Emerson* and *Guild*); *Waubay Lake Farms Ass'n v. BNSF Ry. Co*., 2014 WL 4287086, at *7 (distinguishing *Emerson* and *Franks*); *Pere Marquette Hotel Partners, L.L.C.*, 2010 WL 925297, at *6 (distinguishing *Emerson*); *Thomas Tubbs – Petition for Declaratory Order*, 2014 WL 5508153, at *5 (STB Oct. 13, 2015) (distinguishing *Emerson* and *Guild*); *A&W Properties, Inc. v. Kansas City S. Ry. Co*., 200 S.W.3d at 347 (distinguishing *Vermont Ry.* and *State ex rel. Oklahoma Corp*.).

[21] Plaintiffs also cite cases that address whether complete preemption exists for purposes of removal to federal court. *See, e.g., Fayard v. Northeast Vehicle Services, LLC*, 553 F.3d 42 (1st Cir. 2008); *Battley v. Great West Casualty Ins. Co*., 2015 WL 1258147 (M.D. La. Mar. 18, 2015); *Staley v. BNSF Ry. Co*., 2015 WL 860802 (D. Mont. Feb. 27, 2015). Those cases are not on point. As Union Pacific explained above, whether complete preemption exists to allow for removal of a case from state to federal court is a different question than whether a state law claim is preempted by federal law – the question presented here. *See Griffioen*, 785 F.3d at 1190-91 (even if complete preemption for removal does not exist, plaintiffs' claims may still be preempted when preemption is raised as a defense by the railroad).

The other cases cited by plaintiffs to argue against ICCTA preemption are distinguishable. Plaintiffs rely upon an Eighth Circuit "bridge" case in *Iowa, Chicago & R.R. Corp v. Washington County, Iowa*, 384 F.3d 557 (8th Cir. 2004). (Pl. Br. 53-56.) In *Washington County*, the Eighth Circuit addressed a specific kind of bridge over which Congress has authorized limited state regulation. The dispute arose when the county sought funding from the railroad pursuant to Iowa Code § 327F.2 to replace four bridges that had created "substandard highway safety conditions at all four sites." *Washington County*, 384 F.3d at 558. Of the four bridges at issue, two bridges carried the rail line over county highways, and the other two bridges carried highways over the rail line. *See id*. The county had responsibility for the roads that crossed over or under these railroad bridges, and it had concluded that the bridges had inadequate and unsafe clearances for current highway traffic. *See id*. Thus, *Washington County* concerned a specific type of bridge – one supporting a rail-highway crossing for motor vehicles.

The Eighth Circuit explained in painstaking detail the federal-state cooperation in the realm of highway safety. *See Washington County*, 384 F.3d at 560-61. The court reviewed various federal statutes dealing with rail-highway crossings, emphasizing that these federal statutes were enacted before ICCTA and that Congress left them intact in enacting the ICCTA. *See id*. at 559-61. "Congress for many decades has forged a federal-state regulatory partnership to

deal with problems of rail and highway safety," which was not disturbed by ICCTA. *See id.* at 561. The Eighth Circuit concluded preemption in its case would depend upon an implied repeal of the Federal Highway Act (23 U.S.C. § 144(p)) and its implementing regulations. *Id.* "Implied repeals are not favored." *Id.* It was this federal framework that permitted some regulation of railroad crossings. The Eighth Circuit emphasized that its "holding is necessarily narrow because . . . the States do not operate in this arena free of federal involvement." *Id.*

There is no similar conflict with federal law in this case. The bridges at issue here serve railroad purposes only and do not also support a highway crossing for motor vehicles. Thus, the trial court properly found that *Washington County* is "distinguishable because it involved bridges that intersected with highways, which is a highway safety issue that incorporates state regulations" whereas the bridges involved here "serve railroad purposes only and do not support a highway crossing for motor vehicles." (Ruling, at 10) (JA 342.) Other courts have distinguished *Washington County* in cases where the particular type of state regulation is not authorized by federal law. *See A&W Properties, Inc. v. Kansas City S. Ry. Co.*, 200 S.W.3d 342, 348 (Tex. App. 2006) (distinguishing *Washington County* in flooding case because "[w]e find no such history in federal law (whether in statute or case law) relating to potential flooding"); *People v. Burlington N. Santa Fe R.R.*, 209 Cal. App. 4th 1513, 1527 (2012) (*Washington County* turned on the potential

conflict with other federal laws if ICCTA preemption applied, and "[t]here is no similar conflict in this case").

B. ICCTA Preempts Even if the STB Does Not Actively Regulate this Area

Plaintiffs argue that there is no ICCTA preemption unless the Surface Transportation Board actively regulates the particular activity involved. In other words, in plaintiffs' view, 49 U.S.C. § 10501(b) preempts only state law "remedies" that are otherwise provided for in the ICCTA. However, the ICCTA provides that remedies authorized in the Act are "exclusive" in the realm of rail operations. Thus, where the Surface Transportation Board cannot provide a particular remedy, it is because Congress deliberately chose not to provide that remedy as part of its nationally uniform rail operations regulatory scheme. The courts have repeatedly confirmed this interpretation.

Soon after ICCTA's enactment in 1995, a federal court in Georgia was presented with the same argument – i.e., that the State should be free to act because the Surface Transportation Board had no regulatory authority to provide the remedy the State was seeking. *See CSX Transp., Inc. v. Georgia Public Service Corp.*, 944 F. Supp. 1573, 1581 (N.D. Ga. 1996). Reviewing the plain language of ICCTA and its deregulatory purpose, the federal court found that the State's argument "reflects a misunderstanding not only of the plain language of Section 10501(b)(2), but also of the ICC Termination Act generally." *Id*. The court held

that when Congress mandated in Section 10501(b) that the "remedies" provided in ICCTA were "exclusive," it meant that those remedies were exclusive of any state law remedies that might be used to regulate rail transportation, *regardless of whether a federal remedy was available to a particular plaintiff with a particular claim*. *See id.* This broad reading of the statute has been endorsed repeatedly by federal and state courts across the country, as well as by the Surface Transportation Board – the federal agency charged with administering the statute.[22]

Plaintiffs wrongly assert that ICCTA preemption is limited to economic regulation. The circuit courts have uniformly rejected the argument that ICCTA preempts only economic regulation. *E.g., Ass'n Am. Railroads v. S. Coast Air Quality*, 622 F.3d 1094, 1098 (9th Cir. 2010) ("Both we and our sister circuits have

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[22] *See, e.g., Franks Invest. Co. v. Union Pac.*, 593 F.3d 404, 449 (5th Cir. 2010) (en banc); *Green Mountain R.R. Corp. v. Vermont*, 404 F.3d 638, 645 (2d Cir. 2005); *Railroad Ventures, Inc. v. Surface Transp. Board*, 299 F.3d 523, 562-63 (6th Cir. 2002); *City of Auburn v. United States*, 154 F.3d 1025, 1027-30 (9th Cir. 1998); *City of Seattle v. Burlington N. R.R. Co*., 41 F.3d 1171-72 (Wash. 2002); *Pejepscot Indus. Park, Inc. v. Maine Cent. R.R. Co.*, 297 F. Supp. 2d 326, 332-33 (D. Me. 2003); *Rushing v. Kansas City Southern Ry. Co.*, 194 F. Supp. 2d 493, 499 (S.D. Miss. 2001); *Guckenberg v. Wisconsin Central Ltd.*, 178 F. Supp. 2d 954, 958-59 (E.D. Wis. 2001); *Wisconsin Central Ltd. v. City of Marshfield*, 160 F. Supp. 2d 1009, 1013 (W.D. Wis. 2000); *Soo Line R.R. v. City of Minneapolis*, 38 F. Supp. 2d 1096 (D. Minn. 1998); *Burlington N. Santa Fe Corp. v. Anderson*, 959 F. Supp. 1288, 1295 (D. Mont. 1997); *North San Diego County Transit Dev. Bd. – Pet. for Dec. Order*, 2002 WL 1924265, at *4-5 (Aug. 19, 2002); *Friends of the Aquifer – Pet. for Dec. Order*, STB Fin. Dkt. No. 33966, 2001 WL 928959, at *3-4 (Aug. 10, 2001); *Cities of Auburn and Kent, WA – Pet. for Dec. Order – Burlington N. R.R. Co. Stampede Pass Line*, 1997 WL 362017, at *7 (July 1, 1997).

rejected the argument—advanced by the District here —that ICCTA preempts only economic regulation."); *N.Y. Susquehanna & W. Ry. Corp.*, 500 F.3d 238, 252 (3d Cir. 2007) ("Contrary to New Jersey and the *amici*'s argument, the Termination Act does not preempt only explicit economic regulation."); *City of Lincoln v. STB*, 414 F.3d 858, 861 (8th Cir. 2005).

C. The Presumption Against Preemption Does Not Apply or Help Plaintiffs

Third, plaintiffs argue that the Court should rely upon "the presumption against preemption" when evaluating the preemptive effect of ICCTA in this case. (Pl. Br. 14.) The presumption against preemption is a tool of statutory interpretation and arises in subject matter areas "traditionally occupied by the states." *United States v. Locke*, 529 U.S. 89, 108 (2000). As explained above, the U.S. Supreme Court held over a century ago that States cannot use their police powers to regulate railroad bridges and the trains operating over them because such facilities are under the exclusive control of Congress. See *Kansas City S. Ry. Co. v. Kaw Valley*, 233 U.S. at 78. The presumption against preemption "is not triggered when the State regulates in an area where there has been a history of significant federal presence." *Locke*, 529 U.S. at 108; *see also Norfolk S. Ry Co. v. City of Alexandria*, 608 F.3d 150, 160 n.12 (4th Cir. 2010)*; Railroad Ventures, Inc. v. Surface Transp. Board*, 299 F.3d 523, 562 (6th Cir. 2002); *CSX Transp., Inc. v. City of Plymouth*, 92 F. Supp. 2d 643, 648 (E.D. Mich. 2000).

In any event, the application of a presumption against preemption would have had no impact here. Where Congress's preemptive intent is clear from the statutory language, the presumption against preemption is irrelevant. *See, e.g.*, *City of Auburn,* 154 F.3d at 1031 n.7 ("When a court finds the terms of a statute unambiguous, judicial inquiry is complete"). Because Congress has given *exclusive* jurisdiction to the Surface Transportation Board and *expressly* preempted state law in 49 U.S.C. § 10501(b), there is no doubt that state law must give way.

D. Plaintiffs' Policy Concerns Have No Merit

Finally, plaintiffs raise policy concerns about Union Pacific's position, saying that persons injured by a railroad's negligence would be left without a remedy. (Pl. Br. 4.) However, Congress has already balanced the competing interests and concluded that the national interests are best served through uniform and preemptive federal law. 49 U.S.C. § 10501(b). Union Pacific's trains cross multiple state boundaries every day and are simply not positioned to meet the shifting and individualized demands of all 23 states in which they travel, each with their own state tort standards and remedies. As the federal agency explained, "[t]he interstate rail network could not function properly if states and localities could impose their own potentially differing standards for these important

activities, which are an integral part of, and directly affect, rail transportation."[23] Congress may preempt state law remedies without providing a corresponding remedy under federal law. *See Griffioen*, 785 F.3d at 1192. Plaintiffs point to a fatal passenger accident and argue that a state claim should be permitted. (Pl. Br. 44.) But there, Amtrak conceded negligence because the train was in violation of the *federal* speed regulations. Here, plaintiffs allege that Union Pacific violated duties under *state* law, not federal law. Plaintiffs also point to 49 U.S.C. § 28103, but that statute governs liability of passenger trains, not freight railroads.

E. The FRSA Does Not Apply Here or Help Plaintiffs

As a fall back, plaintiffs cite the Federal Rail Safety Act (FRSA) as authorizing state regulation in these circumstances. (Pl. Br. 46.) Even assuming this argument was adequately preserved below (see CRANDIC Br. 61-62), plaintiffs' argument lacks merit. The FRSA expressly preempts state regulation where there are federal regulations covering the same subject matter. *See* 49 U.S.C. § 20106; *Henning v. Union Pac. R.R.*, 530 F.3d 1206, 1211-16 (10th Cir. 2008). The FRSA does not authorize state regulation that is otherwise preempted by the ICCTA. 49 U.S.C. § 10501(b); *Maynard v. CSX Transp., Inc.*, 360 F. Supp. 2d 836, 843 (E.D. Ky. 2004) ("the ICCTA is a separate and distinct statute from

[23] *Thomas Tubbs—Petition for Declaratory Order*, FD 35792, 2014 WL 5508153 (STB served Oct. 31, 2014).

the FRSA. * * * [E]ven if the Plaintiffs were able to satisfy the savings provisions of the FRSA, the express preemption set forth in 49 U.S.C. § 10501(b)(2) would still be controlling.").

Plaintiffs argue that the FRSA saves claims alleging that the railroad violated state law. *See* Pl. Br. 46, citing 49 U.S.C. § 20106(b)(1)(C). But courts have repeatedly rejected this same argument. Every court to interpret Section 20106(b)(1)(C) has held that it does not save state law claims generally or limit preemption to those state laws that are incompatible with federal laws. *See Nickels v. Grand Trunk Western R.R., Inc*., 560 F.3d 426, 430 (6th Cir. 2009), *cert. denied*, 130 S. Ct. 1136 (2010); *Southern California Regional Rail Authority v. Superior Court*, 163 Cal. App. 4th 712 (Calif. App. 2008) (third exception does not limit preemption to only state laws incompatible with federal ones), *review denied* (Sept. 17, 2008); *accord Kill v. CSX Transp*., 923 N.E. 2d 1199 ¶ 36 (Ohio App. 2009). Section 20106(b)(1)(C) simply refers to the entirety of the earlier subsection in 20106(a)(2), which contains the original (1970) test for FRSA preemption. *See Smith v. Burlington N. Santa Fe Ry*. Co., 187 P.3d 639, ¶ 23 (Mont. 2008) (plain language of the third exception does nothing more than save the claims already preserved in subsection (a)(2)); *Van Buren v. Burlington Northern Santa Fe Ry. Co*., 544 F. Supp. 2d 867, 876 (D. Neb. 2008) (subpart (C) "merely restates the general preemption rule and the exception found within section 20106(a)(2)");

Murrell v. Union Pac. R.R., 544 F. Supp. 2d 1138, 1150 (D. Or. 2008) (exception (C) "was presumably added to be consistent with subpart (a)"). Thus, the FRSA does not save plaintiffs' state-law claims from preemption.

F. Congress is Not Required to Provide a Remedy

Plaintiffs complain that preemption of their state tort claims would leave them without a remedy. However, the Eighth Circuit made clear in this case that ordinary preemption does not require a federal remedy. "Congress has the power to eliminate state-law remedies and causes of action without providing federal substitutes . . . ." *Griffioen*, 785 F.3d at 11192.

G. Any Attempt to Replead Would Be Futile

As the trial court found, repleading is futile because plaintiffs cannot cure the basic *legal* flaw in their complaint by providing a better factual account of their claims. (Ruling at 10) (JA 342.) Plaintiffs' claims are still based on Union Pacific's rail operations – activities within the STB's exclusive jurisdiction – and no attempt to replead the claims can avoid their preemption. When an amendment would be futile, dismissal is appropriate. *See Baliff v. Adams County Conference Bd.*, 650 N.W.2d 621, 626 (Iowa 2002) (agreeing with the district court's refusal to permit an amendment that would have been futile). The federal government has already given the State of Iowa over $4 billion in disaster relief for the 2008 floods but these tort claims against Union Pacific are expressly preempted.

CONCLUSION

The Court should affirm the district court's entry of judgment for defendants.

ORAL ARGUMENT

Union Pacific desires oral argument time.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(*g*)(1) and Iowa R. App. P. 6.1103(4) because this brief contains 11,864 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(*g*)(1).

2. This brief complies with the typeface requirements of Iowa R. App. P. 6.903(1)(*e*) and the type-style requirements of Iowa R. App. P. 6.903(1)(*f*) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in 14 point Times New Roman.

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CERTIFICATE OF FILING

The undersigned hereby certifies that the foregoing Final Brief was filed with the Supreme Court of Iowa using the electronic filing system on February 15, 2017.

/s Bruce Johnson
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CERTIFICATE OF SERVICE

I, hereby certify that on February 15, 2017, the foregoing instrument was filed with the Clerk of the Court using the electronic filing system which sent notification of such filing to all registered users and parties to this proceeding.

/s Bruce Johnson
Bruce Johnson