IN THE SUPREME COURT OF IOWA

Case No. 16-1462

MARK GRIFFIOEN, et al.,
Plaintiff-Appellants

v.

CEDAR RAPIDS AND IOWA CITY RAILWAY CO., et al.
Defendants-Appellees

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

FINAL BRIEF
of Appellees Cedar Rapids and Iowa City Railway Company and Alliant Energy Corporation

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Statement of Issues

I. Federal law prohibits state law from managing or governing rail operations or facilities. The levy of millions of dollars against Cedar Rapids and Iowa City Railway Company (CRANDIC) would influence how that railroad does business. Do the state-law claims in the class-action petition have the effect of managing or governing rail transportation so as to fall within exclusive Surface Transportation Board (STB) jurisdiction and therefore be preempted by Interstate Commerce Commission Termination Act (ICCTA)?

Citations for preservation & standard and scope of review I(A) & I(B)

- *Brown v. Garman*, 364 N.W.2d 566 (Iowa 1985)
- *Hedlund v. State*, 875 N.W.2d 720 (Iowa 2016)
- *Young v. HealthPort Techs., Inc.*, 877 N.W.2d 124 (Iowa 2016)

Citations in merits argument I(C) & I(D):

- 49 U.S.C. § 10501
- *A&W Props., Inc. v. The Kan. City S. Ry. Co.*, 200 S.W.3d 342 (Tex. Ct. App. 2006)
- *Ackerman v. Am. Cyanamid Co.*, 586 N.W.2d 208 (Iowa 1998)
- *Avco Corp. v. Aero Lodge No. 735, Int'l Ass'n of Machinists & Aerospace Workers*, 390 U.S. 557 (1968)
- *Beneficial Nat'l Bank v. Anderson*, 539 U.S. 1 (2003)
- *Caterpillar Inc. v. Williams*, 482 U.S. 386 (1987)

- *Cedarapids, Inc. v. Chi., Cent. & Pac. R.R. Co.*, 265 F. Supp. 2d 1005 (N.D. Iowa 2003)
- *CSX Transp., Inc. v. Ga. Pub. Serv. Comm'n*, 944 F. Supp. 1573 (N.D. Ga. 1996)
- *Elam v. Kan. City S. Ry. Co.* 635 F.3d 796 (5th Cir. 2011)
- *Engelhard Corp. v. Springfield Terminal Ry. Co.*, 193 F. Supp. 2d 385 (D. Mass. 2002)
- *Friberg v. Kan. City S. Ry. Co.*, 267 F.3d 439 (5th Cir. 2001)
- *Grafton & Upton R.R. Co. v. Town of Milford*, 337 F. Supp. 2d 233 (D. Mass. 2004)
- *Gunter v. Farmers Ins. Co.*, 736 F.3d 768 (8th Cir. 2013)
- *In re Katrina Canal Breaches Consol. Litig.*, No. 05-4182, 2009 WL 224072 (E.D. La. Jan. 26, 2009)
- *Jones Creek Investors, LLC v. Columbia Cnty. Ga*, 98 F. Supp. 3d 1279 (S.D. Ga. 2015)
- *Kurns v. R.R. Friction Prods. Corp.*, 132 S. Ct. 1261 (2012)
- *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355 (1986)
- *Lundeen v. Canadian Pac. Ry. Co.*, 447 F.3d 606 (8th Cir. 2006)
- *Maynard v. CSX Transp. Inc.*, 360 F. Supp. 2d 836 (E.D. Ky. 2004)
- *Pejepscot Indus. Park, Inc. v. Me. Cent. R.R. Co.*, 215 F.3d 195 (1st Cir. 2000)
- *Railroad Ventures, Inc. v. Surface Transp. Bd.*, 299 F.3d 523 (6th Cir. 2002)
- *Rogers v. Tyson Foods, Inc.*, 308 F.3d 785 (7th Cir. 2002)
- *Rushing v. Kan. City S. Ry. Co.*, 194 F. Supp. 2d 493 (S.D. Miss. 2001)
- *S. Dakota ex rel. S. Dakota R.R. Auth. v. Burlington N. & Santa Fe Ry. Co.*, 280 F. Supp. 2d 919 (D.S.D. 2003)
- *Tubbs v. Surface Transp. Bd.*, 812 F.3d 1141 (8th Cir. 2015)
- *Union Pac. R.R. Co. v. Chi. Transit Auth.*, 647 F.3d 675 (7th Cir. 2011)

- *Village of Big Lake v. BNSF Ry. Co.*, 382 S.W.3d 125 (Mo. Ct. App. 2012)
- *Waubay Lake Farmers Ass'n v. BNSF Ry. Co.*, No. 12-4179-RAL, 2014 WL 4287086 (D.S.D. Aug. 28, 2014)
- *Wis. Cent. Ltd. v. City of Marshfield*, 160 F. Supp. 2d 1009 (W.D. Wis. 2000)

Citations in merits argument I(E):

- *Sebastian v. Wood*, 66 N.W.2d 841 (1954)
- *Giltner v. Stark*, 219 N.W.2d 700 (Iowa 1974)
- *Rodgers v. Penn. Life Ins. Co.*, 539 F. Supp. 879 (S.D. Iowa 1982)
- *Lala v. Peoples Bank & Trust Co.*, 420 N.W.2d 804 (Iowa 1988)

II. Incidental or indirect effects on rail commerce do not implicate ICCTA preemption. Plaintiffs' class-action petition sought relief that would directly and significantly affect CRANDIC. Can plaintiffs' attempts to limit ICCTA preemption to "direct regulation," to reclassify this action as asserting mere incidental tort claims, to characterize the lower court's decision as granting broad railroad tort immunity, to require a parallel federal remedy, to create the need to prove rail-transportation effects, or to maintain that claims for monetary remedies provide a refuge from federal preemption survive?

Citations for preservation & standard and scope of review II(A) & II(B)

- *Brown v. Garman*, 364 N.W.2d 566, 568, 570 (Iowa 1985)
- *Hedlund v. State*, 875 N.W.2d 720, 724 (Iowa 2016)
- *Young v. HealthPort Techs., Inc.*, 877 N.W.2d 124, 127 (Iowa 2016)

Citations in merits argument II(D), II(E), II(F), & II(G):

- 49 U.S.C. § 10501
- *A&W Props., Inc. v. The Kan. City S. Ry. Co.*, 200 S.W.3d 342 (Tex. Ct. App. 2006)
- *Adrian & Blissfield R. Co. v. Vill. of Blissfield*, 550 F.3d 533, 539 (6th Cir. 2008)
- *Adrian & Blissfield R. Co. v. Village of Blissfield*, 550 F.3d 533, 541
- *Anderson v. Union Pac. R.R. Co.*, No. 10-193-DLD (M.D. La. Sept. 16, 2011)

- *Ass'n of Am. R.R.s v. S. Coast Air Quality Mgmt. Dist.*, 622 F.3d 1094, 1097 (9th Cir. 2010)
- *Avco Corp. v. Aero Lodge No. 735, Int'l Ass'n of Machinists & Aerospace Workers*, 390 U.S. 557, 561 (1968)
- *Beneficial Nat'l Bank v. Anderson*, 539 U.S. 1, 8 (2003)
- *Caterpillar Inc. v. Williams*, 482 U.S. 386 (1987)
- *Elam v. Kansas City S. Ry. Co.*, 635 F.3d 796, 807, 813 (5th Cir. 2011)
- *Emerson v. Kansas City S. Ry. Co.*, 503 F.3d 1126, 1130 (10th Cir. 2007)
- *Fayard v. Ne. Vehicle Servs., LLC*, 533 F.3d 42, 44 (1st Cir. 2008)
- *Fla. E. Coast Ry. v. City of W. Palm Beach*, 266 F.3d 1324, 1331 (11th Cir. 2001)
- *Franchise Tax Bd. of State of Cal. v. Constr. Laborers Vacation Trust for S. Cal.*, 463 U.S. 1, 23 (1983)
- *Franks Inv. Co. v. Union Pacific R. Co.*, 593 F.3d 404, 410 (5th Cir. 2010)
- *Friberg v. Kan. City S. Ry. Co.*, 267 F.3d 439 (5th Cir. 2001)
- *Girard v. Youngstown Belt Ry. Co.*, 979 N.E.2d 1273, 1281 (Ohio 2012)
- *Griffioen v. Cedar Rapids and Iowa City Railway Co.*, 785 F.3d 1182, 1192 (8th Cir. 2015)
- *Guckenberg v. Wis. Cent. Ltd.*, 178 F. Supp. 2d 954, 958 (E.D. Wis. 2001)
- *Guild v. Kansas City S. Ry. Co.*, 541 F. App'x 362, 367 (5th Cir. 2013)
- *In re Vermont Ry.*, 769 A.2d 648, 503 (Vt. 2000)
- *Iowa, Chicago & Eastern Railroad Corp. v. Washington County*, 384 F.3d 557 (8th Cir. 2004)
- *Island Park, LLC v. CSX Transp.*, 559 F.3d 96, 104 (2d Cir. 2009)
- *Jones Creek Investors, LLC v. Columbia Cnty. Ga*, 98 F. Supp. 3d 1279 (S.D. Ga. 2015)
- *Kurns v. R.R. Friction Prods. Corp.*, 132 S. Ct. 1261 (2012)

- *Lundeen v. Canadian Pac. Ry. Co.*, 447 F.3d 606, 614 (8th Cir. 2006)
- *Maynard v. CSX Transp. Inc.*, 360 F. Supp. 2d 836 (E.D. Ky. 2004)
- *N.Y. Susquehanna & W. Ry. Corp. v. Jackson*, 500 F.3d 238 (3d Cir. 2007)
- *New Orleans & Gulf Coast Ry. Co. v. Barrois*, 533 F.3d 321 (5th Cir. 2008)
- *PCS Phosphate Co., Inc. v. Norfolk S. Corp.*, 559 F.3d 212 (4th Cir. 2009)
- *Pejepscot Indus. Park, Inc. v. Me. Cent. R.R. Co.*, 215 F.3d 195 (1st Cir. 2000)
- *People v. Burlington N. Santa Fe R.R. Co.*, 209 Cal. App. 4th 1513 (2012)
- *Rogers v. Tyson Foods, Inc.*, 308 F.3d 785, 789 (7th Cir. 2002)
- *Rushing v. Kansas City S. Ry. Co.*, 194 F. Supp. 2d 493 (S.D. Miss. 2001)
- *S.D. R.R. Auth. v. Burlington N. & Santa Fe Ry. Co.*, 280 F. Supp. 2d 919 (D.S.D. 2003)
- *Staley v. BNSF Railway Co.*, No. CV 14-136-BLG-SPW, 2015 WL 860802, at *6 (D. Mont. Feb. 27, 2015)
- *Tubbs v. Surface Transp. Bd.*, 812 F.3d 1141 (8th Cir. 2015)
- *Village of Big Lake v. BNSF Ry. Co.*, 382 S.W.3d 125 (Mo. Ct. App. 2012)
- *Waubay Lake Farmers Ass'n v. BNSF Ry. Co.*, No. 12-4179-RAL, 2014 WL 4287086 (D.S.D. Aug. 28, 2014)
- *Wis. Cent. Ltd. v. City of Marshfield*, 160 F. Supp. 2d 1009 (W.D. Wis. 2000)
- *Works v. Landstar Ranger, Inc.*, No. CV10-1383 DSF, 2011 WL 9206170 (C.D. Cal. April 13, 2011)

III. Arguments that are not made before an appeal are waived. The class-action petition never mentioned safety, and the arguments before the district court failed to raise a Federal Railroad Safety Act, 49 U.S.C. § 20106(b) (FRSA) exception to ICCTA preemption. Does the FRSA save plaintiffs' so-called safety complaints, first raised to this Court and never argued below, from ICCTA preemption?

Citations for preservation & standard and scope of review III(A) & III(B)

- *Bank of Am., N.A. v. Schulte*, 843 N.W.2d 876 (Iowa 2014)
- *DeVoss v. State*, 648 N.W.2d 56 (Iowa 2002)
- *In re C.S.*, 776 N.W.2d 297 (Iowa Ct. App. 2009)
- *In re K.C.*, 660 N.W.2d 29 (Iowa 2003)
- *Brown v. Garman*, 364 N.W.2d 566 (Iowa 1985)
- *Hedlund v. State*, 875 N.W.2d 720 (Iowa 2016)
- *Young v. HealthPort Techs., Inc.*, 877 N.W.2d 124 (Iowa 2016)

Citations in merits argument III(C)

- 49 U.S.C. § 20106
- *Island Park, LLC v. CSX Transp.*, 559 F.3d 96 (2d Cir. 2009)
- *Waubay Lake Farmers Ass'n v. BNSF Ry. Co.*, No. 12-4179-RAL, 2014 WL 4287086 (D.S.D. Aug. 28, 2014)
- *CSX Transp. Inc. v. Easterwood*, 507 U.S. 658 (1993)
- *Tyrrell v. Norfolk Southern Ry. Co.*¸ 248 F.3d 517 (6th Cir. 2001)

IV. *Iowa, Chicago & Eastern Railroad Corp. v. Washington County* affirmed that ICCTA did not preempt Iowa Code § 327F.2 in that matter due to incomplete state administrative proceedings and railroad/highway integration implications. 384 F.3d 557 (8th Cir. 2004). The facts and procedural posture of that case required an extremely narrow holding. Did the district court properly reject *Washington County* as dispositive of ICCTA § 327F.2 preemption?

Citations for preservation & standard and scope of review IV(A) & IV(B)

- *Brown v. Garman*, 364 N.W.2d 566 (Iowa 1985)
- *Hedlund v. State*, 875 N.W.2d 720 (Iowa 2016)
- *Young v. HealthPort Techs., Inc.*, 877 N.W.2d 124 (Iowa 2016)

Citations in merits argument IV(C)

- *Iowa, Chicago & Eastern Railroad Corp. v. Washington County*, 384 F.3d 557 (8th Cir. 2004)

Routing Statement

This Court should retain this appeal under Iowa Rule of Appellate Procedure 6-1101(2) because ICCTA preemption is a substantial issue of first impression in Iowa, despite the array of authority by other state and federal courts. In addition, the deregulation of the railroad industry and the application of ICCTA preemption to effect deregulation are fundamental issues of broad public importance which should be addressed by this Court.

Statement of Case

On June 10, 2008, an unprecedented flood inundated the Cedar Rapids area, causing citywide devastation, overflowing water ways, destroying bridges, and swamping property. [1] The deluge allegedly damaged plaintiffs' homes and personal property, as well as those of other similarly situated residents. (App.13-14) (Petition ¶ 47). Almost five years after the high water receded, plaintiffs sued, alleging that defendants' actions caused or exacerbated damages. (App.10-48) (Petition ¶¶ 42-125).

The class-action petition asserts state-law claims based on the construction, maintenance, and operation of bridges that carry trains across the Cedar River. (App.10-48) (Petition ¶¶ 42-125). Plaintiffs sought substantial compensatory, treble, and punitive damages against multiple defendants, including Alliant Energy Corporation and CRANDIC. (App.49-52) (Petition ¶¶ 126-135).

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[1] The magnitude and cause of the June 2008 flood can be judicially noticed, as known in this jurisdiction and recorded by sources, such as *A Watershed Year Anatomy of the Iowa Floods of 2008* (Cornelia L. Mutel ed., 2010) and the U.S. Army Corps of Engineers, *Cedar River, Cedar Rapids, Iowa, Flood Risk Management Project* (Jan. 2011). Plaintiffs cannot reasonably question the accuracy of this information. Iowa R. Evid. 5.201; *see also* Wright & Miller, *Federal Practice and Procedure* § 2409 (observing that "[f]acts about the weather and other atmospheric conditions" properly judicially noticed) (Rule 5.201 mirrors the federal judicial notice rule). Notably, plaintiffs premise their class-action petition on flooding.

Defendants removed the lawsuit from Iowa state court to the United States District Court for the Northern District of Iowa. (App.104-15; 206-07; 224-27) (Notice of Removal, 7/2/13; Alliant Energy and CRANDIC Consent, 7/10/13; Stickle Defendants Consent, 7/31/13). Defendants based that removal on complete federal preemption. (App.104-15) (Notice of Removal, 7/2/13).

The federal district court agreed, denied remand, and transferred the case to the STB. Opinion and Order, 9/18/13, *Griffioen, et al. v. Cedar Rapids and Iowa Railway Company*, No. 13-0066EJM (N.D. Iowa), Dkt. No. 53. The Honorable Edward J. McManus concluded that the ICCTA vested the STB with exclusive jurisdiction. (*Id.* at p.8).

Plaintiffs appealed, and the Eighth Circuit reversed, holding that complete preemption depended upon federal remedy availability and because none existed, remanded the case back to state court. *Griffioen v. Cedar Rapids and Iowa City Railway Co., et al.*¸ 785 F.3d 1182 (8th Cir. 2015).

On remand, the railroads and their parents asked the Linn County District Court, the Honorable Paul D. Miller presiding, to consider judgment on the pleadings. On June 22, 2015, CRANDIC and Alliant Energy filed that motion, and cross-briefing followed. (CRANDIC and Alliant Energy

Mot. for Judg. on the Pldgs., June 22, 2015). On October 30, 2015 a hearing on the motions convened, and on February 12, 2016, Judge Miller concluded that the ICCTA preempted substantive claims, which disposed of the derivative claims. (App.333-44) (Order of District Court, Feb. 12, 2016) (Order). Hence, Judge Miller dismissed all claims against the railroad defendants and their parents.

On March 11, 2016, plaintiffs appealed, but this Court deemed that appeal to be premature because claims, against non-railroad defendants still pended, meaning that Judge Miller's February 2016 order was not final. (Order of Iowa Supreme Court, 5/27/16).

Plaintiffs dismissed the remaining defendants on August 23, and on August 25, 2016 the district court entered final judgment. (App.345-49) (Plfs' Dismissal, 8/23/16; Order of Final Judg., 8/25/16). On September 1, 2016 plaintiffs appealed. (App.350-53) (Notice of Appeal, 9/1/2016).

Statement of Facts

I. The 2008 Cedar Rapids flood

The historic June 2008 flood of Cedar Rapids gives rise to this action. (*See supra* note 1). Weather conditions combined to produce the worst flooding in Eastern Iowa's history. (*Id.*) Rivers and creeks peaked at record levels. (*Id.*) The elevation of the Cedar River exceeded, by double, previous highs. (*Id.*) On June 13, the river crested at 31.12 feet – 19 feet above flood stage. (*Id.*) The river's surge reached an unprecedented 140,000 cubic feet per second; this massive flow exceeded, by five times, the prior year's average. (*Id.*)

The confluence of heavy winter snowfalls and intense spring rain produced the torrent. (*Id.*) The winter was among the snowiest in memory. (*Id.*) February 2008 snow depth averaged nearly a foot. (*Id.*) The ensuing melt overflowed the drainage networks and saturated the fields. (*Id.*) To make matters worse, in late May and early June, severe storms rolled into Eastern Iowa, dumping volumes of precipitation that the land that could not absorb. (*Id.*) Run off swelled waterways. (*Id.*)

Plaintiffs supposedly own real and personal property in Linn County. (App.4) (Petition ¶¶ 1-4). On behalf of themselves and other similarly situated property owners, plaintiffs sued numerous defendants, including

CRANDIC and Alliant Energy. (App.5-6) (Petition ¶¶ 6-22). The lawsuit alleges that in June 2008, the use, design, and maintenance of rail bridges traversing the Cedar River impeded the flow of rushing waters. (App.7-9) (Petition ¶¶ 24-41).

The complaint accuses defendants of various wrongdoings that caused or exacerbated the flooding.[2] (*Id.*) The federal railroad regulatory regime, however, forecloses claims against CRANDIC's rail facilities and rail operations, therefore derivative claims against Alliant Energy fail. (Alliant Energy and CRANDIC Answer, p.30).

II. Claims against CRANDIC

Plaintiffs alleged that CRANDIC owned all or part of two of the four complained-of structures: "CRANDIC owned a railroad bridge near Eighth Avenue SE by the Penford Plant" (Penford Bridge) and "all Defendants owned a railroad bridge near the Cargill Corn Milling Plant" (Cargill Bridge).[3] (App.7) (Petition ¶¶ 24, 26).

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[2] This brief recites petition facts, which, for purposes of this appeal, must be accepted as true. *See Brown v. Garman*, 364 N.W.2d 566, 568, 570 (Iowa 1985). This concession does not, however, waive the denials in CRANDIC and Alliant Energy's answer.

[3] For purposes of this appeal, CRANDIC admits to ownership, at least in part, of the Penford and the Cargill Bridges.

Plaintiffs charged that, on June 10, 2008, CRANDIC positioned railcars loaded with rock on the Penford Bridge. (App.7) (*Id.* at ¶ 29). Similarly, all defendants supposedly parked loaded railcars on the Cargill Bridge. (App.7-8) (*Id.* at ¶ 30). Curiously, that same petition alleged that defendants did not park railcars on the Cargill Bridge. (*Id.*) Either way, according to plaintiffs, the bridges and the loaded railcars "began to impede water on the Cedar River from flowing downstream" and further "divert[ed], obstruct[ed], and/or damm[ed] drains and/or other drainage improvements from being able to carry away water." (App.8) (*Id.* at ¶¶ 33, 34).

Two days later, on June 12, 2008, both bridges collapsed. (App.9) (*Id.* at ¶¶ 36, 38). The railcars and rocks fell into the Cedar River, allegedly obstructing the unprecedented flow. (App.9) (*Id.*) Plaintiffs complained about the rock filled railcars being on the bridges and about CRANDIC's "fail[ure] to build, maintain, inspect, and keep in good repair" the Penford Bridge and, likewise, about all defendants' similar Cargill Bridge failures. (App.9) (*Id.* at ¶¶ 37, 40).

Because of the supposedly inadequate bridge construction and maintenance and the placement of loaded railcars, plaintiffs blame defendants for "flooding and/or exacerbated flooding in Cedar Rapids, Linn

County, Iowa" and for "great and extensive property damage and other damage to Plaintiffs and all others similarly situated." (App.9) (*Id.* at ¶ 41).

Against CRANDIC and Alliant Energy, plaintiffs brought six Penford Bridge counts and five Cargill Bridge counts. (App.16-26) (*Id.* at ¶¶ 52-78, 109-128). The first three, regarding both bridges, sought to hold CRANDIC and Alliant Energy strictly liable for parking rock laden railcars. According to plaintiffs, such conduct constituted an "abnormally dangerous and/or ultrahazardous activity and/or extra-hazardous activity" (Count I), violated Iowa Code § 468.148, entitled plaintiffs to enhanced double or treble damages (Count II), and contravened Iowa Code § 327F.2 (Count III). (App.16-22; 40-47) (*Id.* at ¶¶ 52-64, 109-121).

The petition goes on to assert that CRANDIC and Alliant Energy "failed to properly build, maintain, inspect, and keep in good repair" the bridges. (App.16-22; 40-46) (*Id.* at ¶¶ 54(c), 57(c), 62(a), 110(c), 114(c), 120(a)). Count IV accused CRANDIC and Alliant Energy of negligence: the placement of loaded railcars "which led [those] bridge[s] to collapse" and the failure to properly build, maintain, and keep both bridges in good repair. (App.23-24; 47-49) (*Id.* at ¶¶ 65-69, 122-125).

Count V maintained that CRANDIC and Alliant Energy manifested "a willful, wanton, and reckless disregard for the rights and safety of Plaintiffs

and all others similarly situated," warranting punitive damages "to punish Defendants" and to deter similar future conduct. (App.24-25; 49) (*Id.* at ¶¶ 70-72, 126-128). And, based upon alleged Penford Bridge wrongs, plaintiffs hoped to pierce CRANDIC's corporate veil and reach the parent, Alliant Energy. (App.25-27) (*Id.* at ¶¶ 73-79).

III. Removal and remand

After plaintiffs sued, Union Pacific Railway Company and Union Pacific Corporation invoked complete preemption and removed to federal court. (App.104-15) (Notice of Removal, 7/2/13). The remaining defendants subsequently joined. (App.224-27) (Alliant Energy and CRANDIC Consent, 7/10/13; Stickle Defendants Consent, 7/31/13). The federal district court held that complete preemption afforded subject-matter jurisdiction. (Order and Opinion, 9/18/13, *Griffioen*, No. 13-0066EJM (N.D. Iowa) Dkt No. 53). Since the ICCTA controlled, the court transferred all claims to the STB. (*Id.* at p.8).

The Eighth Circuit reversed, holding that, although the ICCTA can have complete preemptive effect, federal jurisdiction had not been established. *Griffioen v. Cedar Rapids and Iowa City Railway Co.*, 785 F.3d 1182, 1192 (8th Cir. 2015). In other words, even though the ICCTA expressly preempts state law, the federal court lacked prerogative to give

effect to that displacement of state law. *Id.* at 1190. ("Complete and ordinary preemption are not necessarily coextensive.").

The ICCTA preemption provision, 49 U.S.C. § 10501, "does not address removal or explicitly provide for federal-question jurisdiction over all preempted state-law claims." *Griffioen*, 785 F.3d at 1190. The absence of a parallel federal remedy led the appellate court to conclude that Congress may not have had complete preemption intent, and congressional intent is the touchstone of preemption. *Id.* at 1189, 1192.

The court, nevertheless, emphasized the narrowness of the decision: "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 opinion recognized ICCTA preemption to be "a key factor in determining the extent of the statute's ordinary preemption, . . . as well as Congress's intent to completely preempt some claims." *Id.* at 1190 (internal citation omitted).

The absence of a federal cause of action, the jurisdictionally determinative consideration, does not prevent a state court from bringing ordinary preemption to bear: "Congress has the power to eliminate state-law remedies and causes of action without providing federal substitutes, but

when it does so, the presumption is that preemption serves only as a defense, not as a basis for removal to federal court." *Id.* at 1192.

IV. State court dismissal

After remand, CRANDIC, Alliant Energy, and the Union Pacific defendants moved to dismiss. (Alliant Energy and CRANDIC Mot. for Judg. on the Pldgs., June 22, 2015; Union Pacific Mot. for Judg. on the Pldgs., June 19, 2015). In response, the district court determined that ICCTA preemption prevailed and therefore disposed of all claims against the railroads and their parents. *See* (App.342-43) (Order pp.10-11).

Argument

The ICCTA deregulated rail transportation and expressly preempts state and federal laws that would have the effect of regulating railroad transportation, including rail operations and facilities. Plaintiffs scramble to evade ICCTA preemption by recasting the statute's reach and by labeling their claims as garden variety torts. But plaintiffs lack legal authority to redefine ICCTA's scope, and the pleaded facts reveal the class-action petition's regulatory ramifications.

The condemned acts—construction and maintenance of rail bridges as well as the movement of railcars onto those bridges—relate to the shipment of property by rail, which is an integral aspect of rail transportation. State-law-tort actions challenging railroad operations and facilities have significant regulatory implication, and plaintiffs' claims are anything but "garden variety" torts that evade preemption. Plaintiffs' pursuit of treble and punitive damages, intended to influence future railroad behavior, bolsters that conclusion. Try as plaintiffs might, they cannot avoid the ICCTA.

Despite the futility of the class-action petition, plaintiffs re-raise legal and policy arguments hoping to escape the ICCTA's preemptive reach, but those aspirations come up short. The district court correctly applied

preemption: direct regulation is not a prerequisite to preemption; a parallel federal remedy is not required; economic regulation alone is sufficient; and broad tort immunity has not been conferred. Besides that, plaintiffs' newest endeavor to recast their claims as Federal Railroad Safety Act (FRSA), instead of ICCTA, safety challenges comes too late and would be futile.

This Court should affirm the dismissal of CRANDIC and Alliant Energy.

I. The district court did not err in determining that plaintiffs' state-law claims would have the effect of managing or governing rail transportation so as to fall within exclusive STB jurisdiction and therefore be preempted by the ICCTA.

A. *Preservation of error*

CRANDIC and Alliant Energy agree that plaintiffs preserved the ICCTA preemption issue. *See* App.70-84; Plaintiffs' Combined Resistance to Motions for Judgment on the Pleadings, pp.14-28.

B. *Standard and scope of review*

Invoking Iowa Rule of Civil Procedure 1.954, the district court dismissed on the pleadings. This Court reviews such an order for correction of errors at law. *Young v. HealthPort Techs., Inc.*, 877 N.W.2d 124, 127 (Iowa 2016); Iowa R. App. P. 6.907. The Court "accept[s] as true the petition's well-pleaded factual allegations, but not its legal conclusions."

Hedlund v. State, 875 N.W.2d 720, 724 (Iowa 2016); *Brown*, 364 N.W.2d at 568, 570.

C. ***Express ICCTA preemption***

Congress exclusively vested railroad-regulatory authority with the STB, and ICCTA trumps all federal and state laws that have the consequence of managing or governing rail transportation.

Plaintiffs asserted several class-action claims challenging railroad-specific conduct. In particular, plaintiffs accused Alliant Energy and CRANDIC of abnormally dangerous, ultrahazardous, willful, wanton, reckless, and negligent behavior by parking loaded railcars on two bridges and by improperly building, maintaining, repairing, and inspecting those bridges. App.16-27; 40-49; Petition ¶¶ 52-79, 109-128. The complained-of conduct is inextricably intertwined with rail transportation. Federal regulations therefore govern. And without viable substantive causes of action, plaintiffs' alter ego and treble and punitive damages claims fail.

The Supremacy Clause, U.S. Constitution Article VI, empowers Congress to displace state laws. *Gunter v. Farmers Ins. Co.*, 736 F.3d 768, 771 (8th Cir. 2013); *Ackerman v. Am. Cyanamid Co.*, 586 N.W.2d 208, 211 (Iowa 1998). Federal law preempts in three ways: (1) explicitly, by prohibiting state regulation; (2) *per se*, by completely occupying the

regulatory field; and (3) conflict, by precluding contradictory state law. *Kurns v. R.R. Friction Prods. Corp.*, 132 S. Ct. 1261, 1265-66 (2012). "The critical question in any pre-emption analysis is always whether Congress intended that federal regulation supersede state law." *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 369 (1986).

Explicit or express preemption arises when Congress so specifies. *Caterpillar Inc. v. Williams*, 482 U.S. 386, 393 (1987) (citing *Metro. Life Ins. Co. v. Taylor*, 481 U.S. 58, 65 (1987)); *see also Ackerman*, 586 N.W.2d at 211 ("Preemption may be found where congress' intent to preempt the field is either expressly stated or implicit in congressional policies."); *Griffioen*, 785 F.3d at 1189 (recognizing that the ICCTA, 49 U.S.C. § 10501(b), expressly preempts state remedies and affords exclusive STB jurisdiction).

When Congress creates a singular remedy, the statute bars claims exceeding that prescription. *Beneficial Nat'l Bank v. Anderson*, 539 U.S. 1, 8 (2003); *see also Ackerman*, 586 N.W.2d at 211, 214 n.3. Importantly, the availability of an equivalent or parallel federal remedy is not a prerequisite to preemption. *Avco Corp. v. Aero Lodge No. 735, Int'l Ass'n of Machinists & Aerospace Workers*, 390 U.S. 557, 561 (1968) ("[T]he breadth or narrowness of the relief which may be granted under federal law . . . is a

distinct question from whether the court has jurisdiction over the parties and the subject matter."); *see also Caterpillar, Inc.*, 482 U.S. at 391 n.4; *Rogers v. Tyson Foods, Inc.*, 308 F.3d 785, 789 (7th Cir. 2002).

Thus a federal statute's preemptive "power"—not the availability of a federal remedy—determines defensive preemption. *Griffioen*, 785 F.3d at 1192 ("Congress has the power to eliminate state-law remedies and causes of action without providing federal substitutes, but when it does so, the presumption is that preemption serves only as a defense, not as a basis for removal to federal court."); *Lundeen v. Canadian Pac. Ry. Co.*, 447 F.3d 606, 614 (8th Cir. 2006) (vacated on other grounds) (holding that Congress can eliminate state-law remedies without a federal replacement).

Congress enacted the ICCTA to make rail transportation effective, efficient, and uniform. The 1996 statute revolutionized the rail regulatory regime by replacing the Interstate Commerce Commission with the STB and reordering railroad oversight. The ICCTA vests the STB with *exclusive* jurisdiction over nearly all aspects of railroad commerce, facilities, and operations:

> The jurisdiction of the [Surface Transportation] Board over
>
> (1) transportation by rail carriers, and the remedies provided in this part with

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

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

"The foregoing provision reflects a clear indication of Congress's preemptive intent." *Griffioen*, 785 F.3d at 1189. "The last sentence of § 10501(b) plainly preempts state law." *Pejepscot Indus. Park, Inc. v. Me. Cent. R.R. Co.*, 215 F.3d 195, 202, 204-05 (1st Cir. 2000). "It is difficult to imagine a broader statement of Congress's intent to preempt state regulatory authority over railroad operations." *CSX Transp., Inc. v. Ga. Pub. Serv. Comm'n*, 944 F. Supp. 1573, 1581 (N.D. Ga. 1996); *see also Griffioen*, 785 F.3d at 1190 (finding ICCTA express preemption to be "a key factor in determining the extent of the statute's ordinary preemption, . . . as well as

Congress's intent to completely preempt some claims"); *Friberg v. Kan. City S. Ry. Co.*, 267 F.3d 439, 443 (5th Cir. 2001) ("[T]he plain language of the statute itself, and in particular the preemption provision, is so certain and unambiguous as to preclude any need to look beyond that language for congressional intent.").

The ICCTA "preempt[s] all state efforts to regulate rail transportation." *Wis. Cent. Ltd. v. City of Marshfield*, 160 F. Supp. 2d 1009, 1013 (W.D. Wis. 2000); *see also Grafton & Upton R.R. Co. v. Town of Milford*, 337 F. Supp. 2d 233, 238 (D. Mass. 2004) ("The statutory language indicates an express intent on the part of Congress to preempt the entire field of railroad regulation, including activities related to but not directly involving railroad transportation."); *Engelhard Corp. v. Springfield Terminal Ry. Co.*, 193 F. Supp. 2d 385, 389 (D. Mass. 2002) ("The concluding sentence of section 10501(b) is an unmistakable statement of Congress's intent to preempt state laws touching on the substantive aspects of rail transportation."); *Cedarapids, Inc. v. Chi., Cent. & Pac. R.R. Co.*, 265 F. Supp. 2d 1005, 1013 (N.D. Iowa 2003) ("[I]n enacting the ICCTA, Congress intended to occupy completely the field of state economic regulation of railroads.")

The ICCTA establishes "direct and complete pre-emption [sic] of State economic regulation of railroads." H.R. Rep. No. 104-311, at 95 (1995), *reprinted in* 1995 U.S.C.C.A.N. 793, 807. As the House committee reported: "The former disclaimer regarding residual State police powers is eliminated as unnecessary, in view of the *Federal policy of occupying the entire field of economic regulation of the interstate rail transportation system.*" H.R. Rep. 104-311 at 95-96, 1995 U.S.C.C.A.N. 807-08 (emphasis added).[4]

State law saving provisions in other regulatory schemes demonstrate the exclusivity of STB dominion over rail facilities and operations. For example, the ICCTA governance of motor carriers specifies: "the remedies provided under this part are in addition to remedies existing under another law or common law." 49 U.S.C. § 13103. Similarly, regarding pipeline

[4] In fact, the House version of the ICCTA stated: "Except as otherwise provided in this part, the remedies provided under this part are exclusive and preempt the remedies provided under Federal or State-law." H.R. Rep. 104-311 at 3, 1995 U.S.C.C.A.N. 793. The committee report noted that "this provision is conformed to the bill's direct and general pre-emption [sic] of State jurisdiction over economic regulation of railroads. As used in this section, 'State or Federal law' is intended to encompass all statutory, common law, and administrative remedies addressing the rail-related subject matter jurisdiction of the Transportation Adjudication Panel." H. Rep. 104-311 at 95, 1995 U.S.C.C.A.N. at 807.

oversight, the ICCTA does not expressly preempt state-law claims. *See* 49 U.S.C. § 15301 *et seq*.

In contrast, the ICCTA affords no solicitude for state-law regulation of railroads. Rather the statute exclusively charges the STB with that responsibility.

D. ***The district court properly applied ICCTA preemption***

Despite the preclusion of non-STB remedies, plaintiffs marshal inapposite state law to complain about CRANDIC's response to a natural disaster. CRANDIC supposedly "failed to properly build, maintain, inspect, and keep in good repair" bridges and by parking loaded railcars on those bridges, allegedly engaged in abnormally dangerous and ultrahazardous activities in violation of two state statutes. App.16-27; 40-49; Petition ¶¶ 52-79, 109-128.

1. *Plaintiffs' claims fall squarely within the STB's regulatory sphere*

The district court found: "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 under federal law." App.341; Order p.9. Relying on the uncontroverted petition facts, the lower court continued, "[t]he bridges at issue with respect to Plaintiffs' claims are . . . inextricably

intertwined with the railroad Defendants' tracks, which affects rail transportation." App.342; *Id.* at p.10. Accusations about railroads' loading and positioning of railcars on bridges, including "where and when they parked their rail cars" as well as criticisms of "the design, construction and maintenance of the bridges . . . go directly to rail transport regulation." *Id.*

ICCTA subjects that very conduct to STB oversight:

> [I]t [is] manifestly clear that Congress intended to preempt . . . state statutes, and any claims arising therefrom, to the extent that they intrude upon the STB's 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."

Railroad Ventures, Inc. v. Surface Transp. Bd., 299 F.3d 523, 563 (6th Cir. 2002) (quoting 49 U.S.C. § 10501(b)).

The bridges,[5] about which plaintiffs complain, enable locomotives and railcars to pass over the river—*i.e.*, rail transportation. *See Waubay*

[5] Rail "facilities" unquestionably encompass bridges. 49 U.S.C. § 10102(6) and (9); 2 Fed. Ry. Admin., *Track and Rail and Infrastructure Integrity Compliance Manual* 2.1.24 (January 2014), *available at* http://www.fra.dot.gov/eLib/details/L04404 (defining "[d]rainage facilities" to include "bridges, trestles, or culverts") (last visited Nov. 22, 2016); *see also Union Pac. R.R. Co. v. Chi. Transit Auth.*, 647 F.3d 675, 676-77, 681 (7th Cir. 2011) (treating bridges as "joint facilities" for preemption analysis purposes).

Lake Farmers Ass'n v. BNSF Ry. Co., No. 12-4179-RAL, 2014 WL 4287086, *5-6 (D.S.D. Aug. 28, 2014) (holding that the ICCTA preempts claims against rail facility (railroad bed) design and maintenance). The STB has absolute authority over the regulation of such bridges, precluding state law actions.

The ICCTA defines "railroad" as:

> (A) *a bridge*, car float, lighter, ferry, and intermodal equipment *used by or in connection with a railroad*;
>
> (B) the road used by a rail carrier and owned by it or operated under an agreement; and
>
> (C) a switch, spur, *track*, terminal, terminal facility, and a freight depot, yard, and ground, *used or necessary for transportation*[.]

49 U.S.C. § 10102(6) (emphasis added).

The ICCTA's definition of "transportation" includes:

> (A) a locomotive, car, vehicle, vessel, warehouse, wharf, pier, dock, yard, *property*, *facility*, instrumentality, or equipment of any kind *related to the movement of passengers or property, or both, by rail*, regardless of ownership or an agreement concerning use; and
>
> (B) *services related to that movement*, including receipt, delivery, elevation, transfer in transit, refrigeration, icing, ventilation, storage, handling, and interchange of passengers and property[.]

49 U.S.C. § 10102(9) (emphasis added).

To move property, trains travel on tracks over the Cedar River. In fact, plaintiffs' allegations establish that those bridges bear tracks and that

rail cars traverse the river on those tracks. App.7-8; Petition ¶¶ 24-31. Thus plaintiffs seek redress against "rail transportation": bridges that are inextricably intertwined with CRANDIC transport network.

Modification of the bridges would undoubtedly take the rail line out of service, interfere with the tracks, and disrupt rail transportation. *See Waubay Lake*, 2014 WL 4287086, at *5-6. Penalizing the parking of loaded railcars on a rail bridge—an industry-accepted means of safeguarding against flood waters—amounts to economic regulation, which Congress reserved for the STB.

2. *The weight of authority supports dismissal*

Case law establishes that state-law claims with regulatory effects implicate ICCTA preemption. For example, in *Waubay Lake*—found persuasive by the district court—a putative class of landowners complained that undersized and negligently maintained roadbed culverts caused water to back up. 2014 WL 4287086, at *2 (*cited by* App.339; Order p.7). Plaintiffs contended that the culverts should accommodate all manner of drainage. *Id.* But the court found that culvert replacement "logically would require BNSF to halt use of its tracks to remove the existing culvert beneath the track and indeed beneath the current level of water, which likely would mean some demolition and rebuilding of its railway and roadbed." *Id.* at *6.

Culvert attacks therefore attempted to "manage or govern" track construction and operation. *Id.* Because Congress vested the STB with exclusive power over rail transportation and because the regulatory ramifications of state-tort law interference with that delegation, the ICCTA preempted. *Id.* at *5-6. "Requiring Plaintiffs' claims to be raised before the STB, not this Court, is consistent with Congress's broad grant of jurisdiction to the STB." *Id.* at *7.

Relying in part on *Waubay Lake*, a Georgia federal court gave effect to Congress's ICCTA purposes. *Jones Creek Investors, LLC v. Columbia Cnty. Ga*, 98 F. Supp. 3d 1279, 1293 (S.D. Ga. 2015). To remedy golf course flooding, the owners sued, among others, a railroad. *Id.* The *Jones Creek* plaintiffs accused the railroad of providing inadequate drainage under a rail roadbed. *Id.* at 1292. In response, the railroad raised ICCTA preemption. *Id.*

The court agreed: "ICCTA preempts Plaintiffs' state-law claims against [the railroad]" because the culvert was not "merely a 'remote or incidental'" aspect of rail transportation but is "inextricably linked to rail transportation"; a replacement would involve "an integral and necessary repair to the railway infrastructure." *Id.* at 1291, 1293-94. Condoning state-tort claims would "effectively govern[] [the railroad's] ability to keep its rail

lines in safe, working order." *Id.* at 1294. The ICCTA therefore preempts state law complaints about the "failure, construction, design, and operation of the culvert." *Id*.

The district court found *Tubbs v. Surface Transportation Board*, to be "especially relevant." 812 F.3d 1141 (8th Cir. 2015). *See* App.340; Order p.8. In *Tubbs*, the Eighth Circuit rejected a petition to review an STB decision. *Thomas Tubbs et al.—Petition for Declaratory Order*, S.T.B. No. FD 35792, 2014 WL 5508153, at *1 (Oct. 31, 2014). The STB had exercised jurisdiction over state-law flooding claims premised the impact of a rail roadbed on Missouri River overflows; the ICCTA therefore preempted. *Id.*

Despite railroad efforts to fortify the rail embankment, the rising river breached the elevated roadbed, and surging water washed over Tubbses' farmland. *Id.* The Tubbses complained first in a Missouri state court and then before the STB, challenging the railroad's raising of tracks on state law grounds. *Id.* at *2.

ICCTA preemption prevailed because the Tubbses' claims were "based on alleged harms stemming directly from the actions of a rail carrier . . . in designing, constructing, and maintaining an active rail line—actions that clearly are part of 'transportation by rail carriers' and therefore

subject to the Board's exclusive jurisdiction under § 10501(b)." *Id.* at *4. A contrary conclusion would foment "a patchwork of state and local regulation [to] unreasonably interfer[e] with interstate commerce" and inhibit railroads from "uniformly design[ing], construct[ing], maintain[ing], and repair[ing] its railroad line." *Id.* at *5.

The Eighth Circuit denied the petition, affirming that the STB had properly followed the "unreasonable-burden-or-interference analysis" and "rejected the Tubbses' contention that preemption applies only when there is a federal equivalent of the preempted state-law remedy." *Tubbs*, 812 F.3d at 1143. Notably, the challenged conduct extended to actions taken in anticipation of flooding, rather than just facilities that had been in service for decades.

Like regulation of rail facilities, the STB's exclusive purview encompasses rail *operational interference*. The *Friberg v. Kansas City Southern Railway Co.* court concluded that the ICCTA preempted a state anti-blocking statute. 267 F.3d at 443-44. The *Friberg* plaintiffs complained that increased train parking obstructed access to their business. *Id.* at 442. The lower court concluded that crossing blocking had no economic railroad impact.

The Fifth Circuit reversed: "Regulating the time a train can occupy a rail crossing impacts, in such areas as train speed, length, and scheduling, the way a railroad operates its trains, with concomitant economic ramifications." *Id.* at 443. "Nothing . . . in the ICCTA provides authority for a state to impose operating limitations on a railroad . . . nor does the all-encompassing language of the ICCTA's preemption clause permit the federal statute to be circumvented by allowing liability to accrue under state common law." *Id.* at 444.

As acknowledged by Judge Miller, other courts have similarly deferred to STB jurisdiction. *See* App.336-40; Order pp.4-8 (citing *Maynard v. CSX Transp. Inc.*, 360 F. Supp. 2d 836, 841 (E.D. Ky. 2004) (preempting state-law drainage claims); *Village of Big Lake v. BNSF Ry. Co.*, 382 S.W.3d 125, 129 (Mo. Ct. App. 2012) (holding that the ICCTA preempted because "[c]ertainly, a roadbed for tracks constitutes 'property . . . related to the movement [of] passengers or property . . . by rail'"); *A&W Props., Inc. v. The Kan. City S. Ry. Co.*, 200 S.W.3d 342 (Tex. Ct. App. 2006) (determining that the ICCTA preempts common-law and statutory claims seeking to enlarge a railroad culvert)); *see also Elam v. Kan. City S. Ry. Co.* 635 F.3d 796, 807 (5th Cir. 2011) (holding that ICCTA preempts economic repercussions of state anti-blocking statute); *In re Katrina Canal*

Breaches Consol. Litig., No. 05-4182, 2009 WL 224072, at *6 (E.D. La. Jan. 26, 2009) (finding that the ICCTA preempts flooding claims because "the design and construction of a railroad crossing and the roadbed for tracks [are] necessarily inextricably intertwined with the design and construction of the railroad tracks . . . [which] relates directly to . . . rail activity."); *S. Dakota ex rel. S. Dakota R.R. Auth. v. Burlington N. & Santa Fe Ry. Co.*, 280 F. Supp. 2d 919 (D.S.D. 2003) (preempting state-law contract claims bearing on track use); *Cedarapids, Inc.*, 265 F. Supp. 2d 1005 (ICCTA preempts state law claim).

3. *The class petition smacks of regulatory intent*

Tellingly, plaintiffs not only complain about the very type of conduct preempted by the referenced precedents, their lawsuit wants to change CRANDIC's operations. Plaintiffs demand treble and punitive damages for the purpose of effecting hollowly disavowed regulatory results. App.23; 25; 35; 37; 47; Petition ¶¶ 71, 72, 79, 100, 107, 128 (seeking "damages sufficient to punish Defendants while deterring and discouraging Defendants and all others from taking similar action in the future"); *see also Brown*, 364 N.W.2d at 569 (noting that preemption analysis turns "on the legal consequences of the allegations of plaintiff's petition").

The magnitude of damages (billions) the class-action petition demands would inevitably affect rail rates, routes, and services and thus constitutes regulation. *See Waubay Lake*, 2014 WL 4287086, at *5 n.5 ("Even if Plaintiffs' complaint could be construed as seeking damages only, such a suit would still be a form of regulation."); *S. Dakota ex rel. S. Dakota R.R. Auth. v. Burlington N. & Santa Fe Ry. Co.*, 280 F. Supp. 2d 919, 934 (D.S.D. 2003) ("The complaint seeks also a tort recovery and punitive damages. Any extremely high award for punitive damages could well seriously impact the ability of BNSF to serve the shipping public in South Dakota and elsewhere. Economic recoveries sought could well impact rates, routes, and services."); *see also Kurns*, 132 S. Ct. at 1269 ("The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy."); *Rushing v. Kan. City S. Ry. Co.*, 194 F. Supp. 2d 493, 499 (S.D. Miss. 2001) (explaining how state tort lawsuits regulate).

"[T]his case involves tort claims that challenge a railroad's design, construction, and maintenance of its track. Because claims like these seek to manage or govern railroad operations, allowing them to go forward would unreasonably interfere with rail transportation." *Tubbs*, 2014 WL 5508153,

at *5. These plaintiffs' causes of action would unquestionably have an impact on "railroad transportation."

The ICCTA mandates procedures and exclusively affords relief. *See* 49 U.S.C. § 11704(a) (providing civil cause of action to enforce STB orders); 49 U.S.C. § 11704(c)(1) (enabling parties to file a STB complaint or to sue to enforce the ICCTA). Plaintiffs' dissatisfaction with the remedies the statute affords does not negate what ICCTA prescribes: Congress "grant[ed] the STB exclusive jurisdiction" and "has the power to eliminate state-law remedies and causes of action without providing federal substitutes." *Griffioen*, 785 F.3d at 1189, 1192.

In sum, rail facility disputes have no place in a judicial forum; ICCTA makes the STB the exclusive arbiter.

E. ***The district court properly dismissed the punitive damages claim and claims against Alliant Energy***

Because the district court dismissed plaintiffs' substantive tort action, claims for punitive damages and for corporate veil piercing flounder.

Punitive damages are a mere element of damages: "[they] are not recoverable as a matter of right and are only incidental to the main cause of action." *Sebastian v. Wood*, 66 N.W.2d 841, 844 (Iowa 1954), *cited in Giltner v. Stark*, 219 N.W.2d 700, 708 (Iowa 1974) and *Rodgers v. Penn.*

Life Ins. Co., 539 F. Supp. 879, 885 (S.D. Iowa 1982); *see also Lala v. Peoples Bank & Trust Co.*, 420 N.W.2d 804, 807 (Iowa 1988) ("Punitive damages are . . . incidental to the main cause of action and are not recoverable as of right.").

Likewise, the failure of underlying claims moots corporate veil piercing. Parent veil-piercing liability is not an independent cause of action, but rather a means of expanding from whom substantive judgment can be collected. *C. Mac Chambers Co. v. Iowa Tae Kwon Do Academy, Inc.*, 412 N.W.2d 593, 597 (Iowa 1987) (considering alter ego claim only after underlying entity's liability affirmed). Without a viable underlying tort and with no basis for CRANDIC liability, plaintiffs cannot pierce the corporate veil.

II. The district court did not err in rejecting plaintiffs' attempts to redefine the scope of ICCTA preemption, to masquerade their claims as merely incidental, to recast the railroads' preemption defense as broad tort immunity, to require a parallel federal remedy, to establish a factual burden of proof, and to pretend that by only seek monetary relief they evade preemption.

A. *Preservation of error*

CRANDIC and Alliant Energy agree that plaintiffs preserved error regarding whether ICCTA preemption requires direct regulation, conflicting state and federal relief, an equivalent federal remedy, or a factual showing of interstate transportation burden; whether plaintiffs asserted mere garden-variety-tort claims with an incidental impact on rail transportation; and whether the district court's application of ICCTA preemption created broad tort immunity. Plaintiffs raised these various arguments below, and the district court rejected each. *See* App.70; 72-79; 86-87; 335-36; 342-43; Plaintiffs' Combined Resistance to Motions for Judgment on the Pleadings, pp.14, 16-23, 30-31; Order pp.3-4, 10-11.

B. *Standard and scope of review*

This Court reviews arguments about the ICCTA's preemptive effects to correct errors at law. *Young*, 877 N.W.2d at 127; Iowa R. App. P. 6.907. Because a dismissal on the pleadings is being reviewed, the Court must "accept as true the petition's well-pleaded factual allegations, but not its

legal conclusions." *Hedlund*, 875 N.W.2d at 724; *Brown*, 364 N.W.2d at 568, 570.

C. ***Summary***

Despite the ICCTA's preemptive language and on point guidance in parallel cases, plaintiffs chastise the district court for purportedly relying on a minority-preemption rule, ignoring requirements that state law must "directly regulate" before preemption can be brought to bear, and mischaracterizing plaintiffs' claims as going beyond garden-variety-tort claims with mere incidental transportation effects. Appellants' Br. pp.22, 35.

Plaintiffs further contend that the district court's reliance on an errant "minority" rule immunizes railroads from liability—beyond what Congress ever intended—denies all remedies, and overlooks requisite factual burdens. *Id.* at pp.18, 24, 29, 39-45, 49.

Each of these arguments wants for merit.

D. ***Defensive preemption does not require direct regulation***

Plaintiffs would narrow ICCTA preemption to bar only those state laws that "purport to directly regulate or interfere with rail transportation." Appellants' Br. p.22. Plaintiffs go so far as to dissemble that "many state and federal courts agree." *Id.* They fault the district court for rejecting

"direct regulation" in favor of the *A&W Properties, Inc. v. Kansas City S. Ry. Co.* "minority test." 200 S.W.3d 342, 346 (Tex. App. 2006). Appellants' Br. p.24. For several reasons, this argument misses the mark.

First, 49 U.S.C. § 10501(b) does not restrict the displacement of state laws to *direct* regulation. The statute grants the STB exclusive authority over "transportation by rail carriers," including "the remedies provided in this part with respect to . . . practices, routes, services, and facilities of such carriers," as well as over "the construction [and] operation . . . of . . . tracks, or facilities." *Id.*

Second, the case law—including authority embraced by plaintiffs—contradicts any "direct regulation" prerequisite to ICCTA preemption. For example, *Franks Inv. Co. v. Union Pacific R. Co.* did not turn on direct regulation; instead whether a state law "'may reasonably be said to have the effect of 'manag[ing]' or 'govern[ing]' rail transportation was the test.'" 593 F.3d 404, 410 (5th Cir. 2010) (*en banc*) (quoting *Fla. E. Coast Ry. v. City of W. Palm Beach*, 266 F.3d 1324, 1331 (11th Cir. 2001)) (alterations original). Laws having "the effect of managing or governing rail transportation will be expressly preempted." *Id.*

Staley v. BNSF Railway Co. similarly repudiated the necessity of direct regulation: "[T]he ICCTA preempts all state laws that may

reasonably be said to have the effect of managing or governing rail transportation. . . . This preemptive effect is *not limited to direct economic regulation*." No. CV 14-136-BLG-SPW, 2015 WL 860802, at *6 (D. Mont. Feb. 27, 2015) (internal quotations and citations omitted) (emphasis added). "The ICCTA also preempts state common law duties that impact how a railroad operates their lines." *Id*. (citing *Friberg*, 267 F.3d at 444).

The other cited cases echo the criterion that direct regulation need not be demonstrated. Plaintiffs' authority consistently holds that "ICCTA preempts all state laws that may reasonably be said to have the effect of managing or governing rail transportation." Appellants' Br. pp.22-24 (citing *Ass'n of Am. R.R.s v. S. Coast Air Quality Mgmt. Dist.*, 622 F.3d 1094, 1097 (9th Cir. 2010) (concluding "ICCTA preempts all state laws that may reasonably be said to have the effect of managing or governing rail transportation"); *Island Park, LLC v. CSX Transp.*, 559 F.3d 96, 104 (2d Cir. 2009) (same); *PCS Phosphate Co., Inc. v. Norfolk S. 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); *N.Y. Susquehanna & W. Ry. Corp. v. Jackson*, 500 F.3d 238, 252 (3d Cir. 2007) (same); *Girard v. Youngstown Belt Ry. Co.*, 979 N.E.2d 1273, 1281 (Ohio 2012) (same); *People v. Burlington N. Santa Fe R.R. Co.*, 209 Cal. App. 4th 1513, 1528 (2012)

(same)). Not one of the touted cases circumscribes ICCTA preemption to state laws that "directly regulate" rail transportation. *See* Appellants' Br. at pp.22-23.

Lastly, the district court's reliance on *A&W Properties* was neither singular nor misplaced. Appellants' Br. pp.24-25. Plaintiffs argue that this lone, state appellate court decision caused Judge Miller to adopt the minority test of ICCTA preemption. *Id.* But the analysis below did not hang on just one case or a minority rule.

To the contrary, the district court cited and discussed numerous precedents from a variety of jurisdictions applying the same ICCTA preemption standard employed in *A&W Properties*. *See* App.336-41; Order pp.4-9 (discussing *Village of Big Lake*, 382 S.W.3d at 125; *Maynard*, 360 F.Supp.2d at 842-43; *A&W Props.*, 200 S.W.3d at 342; *Waubay Lake*, 2014 WL 4287086, at *5-6; *Jones Creek Investors*, 98 F. Supp. 3d at 1292-93; *Tubbs*, 812 F.3d at 1144-45).

Appellants' brief fails to acknowledge or distinguish these cases, but merely ignoring this breadth of authority does not undermine the principle that the ICCTA preempts state-law complaints about the design, construction, maintenance, and operation of railroad facilities–exactly the supposed wrongs that the class-action petition sought to redress.

E. *This action goes beyond incidental tort claims of general application; plaintiffs' claims can only be asserted against railroads*

To escape ICCTA preemption, plaintiffs compare the class petition to cases in which preemption has not prevailed. Appellants' Br. p.35 ("The claims asserted by Plaintiffs are of the same nature as those upheld in *Emerson*, *Barrois*, *Guild*, *Franks*, and the other cases cited above."). But none of those authorities involved regulatory ramifications like those that plaintiffs would inflict on CRANDIC.

Tort liability can be levied against conduct that goes beyond the STB's operations and facility regime. *See, e.g.*, *Guild v. Kansas City S. Ry. Co.*, 541 F. App'x 362, 367 (5th Cir. 2013) (unpublished) (discussing claim for private side track damage caused by too heavy cars); *Fayard v. Ne. Vehicle Servs., LLC*, 533 F.3d 42, 44 (1st Cir. 2008) (considering preemption of a nuisance claim emanating from an automobile distribution facility near rail property); *Emerson v. Kansas City S. Ry. Co.*, 503 F.3d 1126, 1130 (10th Cir. 2007) (addressing flooding caused by refuse disposal and vegetation management); *Staley*, 2015 WL 860802, at *7 (determining preemption of a specific, individual hazard combined with failure to warn); *Battley*, 2015 WL 1258147, at *4-5 (assessing preemption of a unique,

specific, and individual hazard); *In re Vermont Ry.*, 769 A.2d 648, 503 (Vt. 2000) (analyzing salt shed permitting preemption).

Property actions applicable to any landowner and involving property beyond STB oversight are equally inapposite. *Fla. E. Coast Ry. Co.*, 266 F.3d at 1331 (denying preemption of non-railroad entity's leasehold-zoning claim); *Girard v. Youngstown Belt Ry. Co.*, 979 N.E.2d 1273, 1281 (Ohio 2012) (determining eminent-domain action over vacant land that happened to be owned by a railroad not categorically ICCTA preempted).

Several other of plaintiffs' cases miss the point because they address federal subject matter jurisdiction implicated by complete preemption—not defensive preemption—and therefore apply an entirely different standard.[6] *See Elam v. Kansas City S. Ry. Co.*, 635 F.3d 796, 807, 813 (5th Cir. 2011) (completely preempting anti-blocking statutes, but remanding negligence

[6] Complete preemption for removal purposes involves showing that not only is a specific state law or claim subsumed by federal law, but that Congress has so occupied the entire area so as to displace state claims and create federal jurisdiction. *Griffioen*, 785 F.3d at 1190; *Fayard*, 533 F.3d at 47. In contrast, ICCTA defensively preempts when a state-law claim interferes with the regulation of rail transportation. *Friberg v. Kansas City S. Ry. Co.*, 267 F.3d 439, 444 (5th Cir. 2001). Hence, judicial findings of complete preemption result in defensive preemption, but complete preemption denial does not end the defensive preemption inquiry. The Eighth Circuit acknowledged as much by leaving open the question of whether defensive preemption obviated plaintiffs' claims. *Griffioen*, 785 F.3d at 1192.

claim for a defensive preemption determination); *Fayard*, 533 F.3d at 49 ("[P]reemption may well be a defense to the Fayards' nuisance claims [challenging the operation of an automotive distribution facility abutting a rail line], but the conditions have not been met to authorize removal through the extreme and unusual outcome of complete preemption."); *New Orleans & Gulf Coast Ry. Co. v. Barrois*, 533 F.3d 321, 334-36 (5th Cir. 2008) (denying complete preemption and remanding); *Battley v. Great W. Cas. Ins. Co.*, No. CIV.A. 14-494-JJB, 2015 WL 1258147 (M.D. La. Mar. 18, 2015) (concluding that the blocking first responder access not completely preempted); *Staley*, 2015 WL 860802 at *6 (denying complete preemption against a charge that a railroad negligently blocked one crossing and obstructed the view of a second); *Anderson v. Union Pac. R.R. Co.*, No. 10-193-DLD (M.D. La. Sept. 16, 2011) (rejecting federal subject matter jurisdiction over train derailment action because "ICCTA does not completely preempt simple negligence claims for personal injuries" but noting that "defendant may have a defense to the plaintiffs' claims based on federal law or regulation").[7]

[7] Plaintiffs cite *Works v. Landstar Ranger, Inc.*, to suggest ordinary negligence claims escape preemption, *see* Appellants' Br. pp.34-35, but the *Works* court never discussed ICCTA and exclusively focused upon lading damage claims against a motor carrier. *See Works*, No. CV10-1383 DSF,

When regulations are rooted in highway safety, other cited authority discounts ICCTA preemption. *See Iowa, Chicago & Eastern Railroad Corp. v. Washington County*, 384 F.3d 557 (8th Cir. 2004) (rejecting preemption due to rail-highway federal safety law implications, among other grounds); *Adrian & Blissfield R. Co. v. Village of Blissfield*, 550 F.3d 533, 541 (rejecting facial preemption of rail-highway statute and requiring further factual analysis).

Latching on to *Emerson,* plaintiffs argue that ICCTA "was not broad enough to reach claims that a railroad's mismanagement of its property caused flooding on adjacent property." Appellants' Br. p.29 (citing *Emerson*, 503 F.3d at 1129-30). This argument dumbs down *Emerson* and ignores key distinctions.

The *Emerson* plaintiffs accused a railroad of dumping discarded railroad ties in and failing to clear vegetation and debris from a drainage ditch. 503 F.3d at 1130-31. In other words, the railroad's disposal practices and non-rail property maintenance, not transportation operations or facilities, caused flooding.

2011 WL 9206170 (C.D. Cal. April 13, 2011) (analyzing preemption of a lading damage claim under the Motor Carrier Act, 49 U.S.C. § 14501(c)(1)).

The gravamen of the *Emerson* complaint concerned neither the placement of railcars nor the design and maintenance of rail bridges. *Id.* at 1130 (the complained-of conduct involved "discarding old railroad ties into a wastewater drainage ditch adjacent to the tracks and otherwise failing to maintain the ditch").

ICCTA does not govern refuse disposal or vegetation control; such conduct goes beyond railroad regulation. Instead, those undertakings "are possibly tortious acts committed by a landowner who happens to be a railroad company." 503 F.3d at 1129-30. Interference with the drainage from a non-rail-transportation facility is not unique to railroads; multifarious entities could be charged with dumping debris and letting brush grow wild. *Id.* "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.*

In the end, *Emerson* did not implicate train travel, ICCTA's transportation regulations, or a state-tort law's imposition of railroad-specific standards of care. *Id.* at 113.

Several other cases relied upon by plaintiffs also reach beyond rail operations and facilities and therefore can be distinguished. *See, e.g.*, *Island Park*, 559 F.3d at 104 (holding that railroad's closure of private crossing

does not encompassed rail "transportation" and therefore not preempted); *Fla. E. Coast Ry.*, 266 F.3d at 1339 (finding city ordinance not preempted when zoning only restricted lessee's non-transportation use of railroad property); *Guild*, 541 F. App'x at 367 (concluding privately-owned side track damage claims have not rail transportation implications).

A claim's burdening of railroad-specific standards of care helps determine whether rail transportation would be regulated. For example, Iowa Code § 327F.2 only applies to railroads; the statute is not a "law[] of general application, which [has] only an incidental impact on railroad operations." Appellants' Br. p.35. Not just any landowner can violate that law; only railroads must comply.

Likewise, the remainder of plaintiffs' substantive claims are railroad-specific. App.15-17; 21; 38-39; 41-42; 45-46; Petition ¶¶ 53-54, 109-10 (strict liability for parking rail cars on rail bridges), *id.* at ¶¶ 57, 113 (double or treble damages for railcar obstruction of river flow), *id.* at ¶¶ 67, 113-14, 123 (liability for failing to build, maintain, and keep rail bridges in good repair and for damming waterway with loaded rail cars from rail bridges).

Because the controlling standards and complained-of conduct only concern rail operations and facilities, ICCTA preempts. *See Maynard*, 360 F. Supp. 2d at 843; *A&W Props.*, 200 S.W.3d at 347 ("[T]he state retains its

traditional police power in terms of public health and safety *except* where the state's actions *regulate rail transportation*.") (second emphasis added).

Like with other irrelevant citations, plaintiffs' reliance on *Franks* goes for naught. Appellants' Br. p. 33. The *Franks* plaintiff argued that state property law prohibited a railroad from closing private crossings. 593 F.3d at 406. An *en banc* Fifth Circuit reasoned that a general-servitude cause of action "governed by Louisiana property laws and rules of civil procedure that have nothing to do with railroad crossings had been asserted." *Id.* at 411. Such claims eluded ICCTA preemption because servitude law binds all property owners, not just railroads.

Like in *Emerson*, the court emphasized that the STB jurisdiction question asked whether the crossing dispute involved laws "that have the effect of managing or governing, and not merely incidentally affecting, rail transportation." *Id.*[8] The state law in question only directs what railroads do "when the servitude happens to cross a railroad," and the right to be

[8] Although *Franks* concluded that preempted laws must apply singularly to railroads, other courts reject such circumscription: "Limiting preemption to state-laws aimed specifically at railroad regulation would arbitrarily limit the purposefully broad language chosen by Congress in the ICCTA." *Wis. Cent. Ltd. v. City of Marshfield*, 160 F. Supp. 2d 1009, 1012-15 (W.D. Wis. 2000).

enforced was not exclusive to railroads. Since the state-law remedy did not regulate railroads, ICCTA did not preempt. *Id.*[9]

This lawsuit presents precisely the opposite circumstances. Plaintiffs' petition challenges the operation of trains—specifically parking railcars on bridges and the constructing and maintaining of bridges on which trains cross rivers.

Beyond that, the complained-of track-bearing facilities are integral—not merely incidental—to rail operations. *See* Federal Railroad Administration's Track and Rail and Infrastructure Integrity Compliance Manual, Volume II: Track Safety Standards, Chapter 1, § 213.33, p. 2.1.24 (July 2012), *available at* https://www.fra.dot.gov/eLib/details/ L04404 (drainage "facilities" include *bridges*, trestles, and culverts); *Jones Creek Investors*, 98 F. Supp. 3d at 1292-94 (water carrying facility integral to rail transportation); *Waubay Lake*, 2014 WL 4287086, *5-6 (same).

Likewise, the movement of railcars and parking of loaded rail cars on railroad bridges are "practices" that Congress charged the STB with regulating. 49 U.S.C. § 10501(b); *Friberg*, 267 F.3d at 444.

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[9] Besides that, the *Franks* defendant failed earlier to raise preemption: "For the first time before the *en banc* court, [defendant] argues that tracks are railroad facilities under Section 10501(b)(2). Today is too late; this argument is waived." *Id.* at 409.

In sum, plaintiffs' claims have regulatory effects and are therefore preempted.[10]

F. *Preemption does not afford CRANDIC broad tort-liability immunity*

In criticizing the district court for rejecting a direct-regulation requirement, plaintiffs contend that the result below affords rail carriers with tort immunity that Congress never intended. Appellants Br. pp.39-45. According to plaintiffs, ICCTA "says nothing about totally immunizing railroads form tort liability in all 50 states." *Id.* pp.40 & 43.

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[10] Plaintiffs again argue that the resolution of preemption would be premature because defendants failed to carry allegedly necessary evidentiary burdens. Appellants' Br. pp.16, 26-28. According to plaintiffs, before preemption can supplant, railroads must prove that the asserted state-law claims unreasonably interfere with rail transportation. *Id.* p.13. But such a burden only applies to *implied* preemption—not express preemption. *Emerson*, 503 F.3d at 1133; *Franks*, 593 F.3d at 415. As explained in *Elam*, the burden arose only because "our inquiry is whether Mississippi's negligence [failure to warn] law, *as applied* to the facts of this case, would have the effect of unreasonably burdening or interfering with KCSR's operations." 635 F.3d at 813.

And in any event, the railroad operation and facility impairment that this litigation would inflict is self-evident: the bridges are part of the infrastructure supporting tracks over which cargo moves in interstate commerce; a financial penalty to induce bridge modifications would result in operational changes or even transportation corridor reconstruction. The modifications compelled by monetary damages would have significant regulatory impacts. *See Waubay Lake*, 2014 WL 4287086, at *5-6.

The decision below does not provide the railroad defendants wholesale protection against tort claims, and CRANDIC never sought such shielding. This Court should decline plaintiffs' invitation to so characterize the decision below.

The district court holding reflects CRANDIC's argument that challenges to a railroad's design, construction, and maintenance of tracks and facilities or challenges to rail operations have regulatory effects. *See* CRANDIC Brief in Support of Motion for Judgment on the Pleadings. pp. 15-19. In such circumstances, the STB offers singular remedies. *Id.* pp.6, 9, 12, 19. Exclusive jurisdiction does not equate with broad tort immunity, but rather courts must implement ICCTA's preemptive scope as the statutory language mandates.

As plaintiffs acknowledge, Congress enacted ICCTA to deregulate rail transportation. Appellants' Br. p.39 ("the Congressional purpose in passing the ICCTA was primarily to abolish the ICC and to deregulate Railway Companies."). That deregulation encompasses state-tort claims, as well as statutes and ordinances, affecting rail transportation. *See* App.67; Plaintiffs' Combined Resistance to Motion for Judgement on Pleadings, p.11.

If state-tort litigation were allowed to manage rail transportation, state-law standards of care would dictate how railroads operate and how they construct and maintain facilities. *See Friberg*, 267 F.3d at 444. Such oversight would sacrifice the national uniformity envisioned by Congress. This case implicates deregulation, not broad tort immunity.

In misrepresenting the effects of the decision below, plaintiffs speculate about how a passenger train derailment might be resolved. *See* Appellants' Br. pp.44-45 (referencing an Amtrak derailment allegedly caused by excessive speed and suggesting that preemption would deny victim recoveries, but overlooking that speeding violates federal regulation and surmising that "the District Court's apparent position is that the person injured and the families of the person killed have no remedy at all against the railroad").

The petition raises state-law claims "that may reasonably be said to have the effect of managing or governing rail transportation." ICCTA preempts such claims, and this Court is not required to consider broader tort-immunity ramifications.

G. ***A parallel federal remedy need not exist before a court can defensively preempt state-law claims***

Part and parcel of plaintiffs' mischaracterization of Judge Miller's decision are complaints about the lack of a substitute federal remedy. According to plaintiffs, the preemptive language of 49 U.S.C. § 10501(b) "*only* preempts *remedies* duplicative of those provided by ICCTA." Appellants' Br. p.18 (emphasis added). Thus plaintiffs contend that, if ICCTA does not offer relief, then the state remedy prevails. *Id.* In other words before ICCTA can bar plaintiffs' claims a parallel federal remedy must be afforded. *Id.*

That argument, notably devoid of legal citation, is unfounded. When Congress creates an exclusive remedy, the statute displaces claims exceeding that prescription. *Beneficial Nat'l Bank v. Anderson*, 539 U.S. 1, 8 (2003); *see also Ackerman*, 586 N.W.2d at 211, 214 n.3. Importantly, the availability of an equivalent federal recovery is not a prerequisite to state-

law claim preemption.[11] *Avco Corp. v. Aero Lodge No. 735, Int'l Ass'n of Machinists & Aerospace Workers*, 390 U.S. 557, 561 (1968) ("[T]he breadth or narrowness of the relief which may be granted under federal law . . . is a distinct question from whether the court has jurisdiction over the parties and the subject matter."); *see also Caterpillar, Inc.*, 482 U.S. at 391 n.4; *Rogers v. Tyson Foods, Inc.*, 308 F.3d 785, 789 (7th Cir. 2002).

A federal statute's preemptive "power"—not the availability of a like federal remedy—determines defensive preemption. *Griffioen*, 785 F.3d at 1192 ("Congress has the power to eliminate state-law remedies and causes of action without providing federal substitutes, but when it does so, the presumption is that preemption serves only as a defense, not as a basis for removal to federal court."); *see also Lundeen*, 447 F.3d at 614 (vacated on other grounds).

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[11] For example, section 301 of the Labor Management Relations Act precludes state-law claims involving the same subject matter, even though the collectively-bargained-for-dispute-resolution process – a far cry from a state-court lawsuit – is the only means for resolving such controversies. *Avco Corp.*, 390 U.S. at 558-59. "[T]he necessary ground of decision was that the preemptive force of § 301 *is so powerful* as to displace entirely any state cause of action. . . ." *Franchise Tax Bd. of State of Cal. v. Constr. Laborers Vacation Trust for S. Cal.*, 463 U.S. 1, 23 (1983) (emphasis added).

H. ***The ICCTA preempts all economic regulation of railroads***

Plaintiffs dissemble that a suit for monetary damage does not regulate rail operations: "Plaintiffs do not seek to change the rates the 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 negligence conduct." Appellants' Br. p.49. But monetary claims *do* regulate rail transportation, and plaintiffs seek not only compensation but also penalties that would dictate how railroads operate.

Money damages would compel changes—reconstructing tracks and bridges, reordering interstate-transportation, and modifying the securement of bridges against high water—and an economic recovery would certainly influence railroad rates, routes, and services. The *Kurns v. R.R. Friction Prods. Corp.* Court left no doubt about damages being a form of regulation. 132 S. Ct. 1261, 1269 (2012); *see also Waubay Lake*, 2014 WL 4287086, at *5 n.5.

The *A&W Properties* plaintiffs sought refuge from ICCTA preemption, making the same argument that was rejected below. 200 S.W.3d at 349 ("A & W takes the position that the Railroad can avoid any impact on its operations by compensating A & W in cash."). The court would have none of it: "If A&W were correct, and payment of damages

could somehow allow a claim to escape preemption, then no civil claim would ever be preempted. Litigants would be able to circumvent completely Congress's attempt to deregulate the railroad industry. This cannot be the law." *Id.* "[W]hen 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.* (citing *Guckenberg v. Wis. Cent. Ltd.*, 178 F. Supp. 2d 954, 958 (E.D. Wis. 2001); *Pejepscot Indus. Park*, 297 F. Supp. 2d at 332).

The reasoning of the *A&W* court is particularly compelling: plaintiffs in this case assert that "Defendants' actions" worsened "a nearly biennial, minor flood" so as to cause "six billion dollars of property damage." Appellants' Br. p.1. Such monumental financial impacts on two railroads would be anything but "incidental."

If that were not enough, plaintiffs admittedly seek to punish CRANDIC's train operations and facilities (*i.e.*, bridges) management through treble and punitive damages. Despite pretenses about plaintiffs merely seeking recovery for past conduct and not wanting to alter future railroad activities, an award of the magnitude that plaintiffs seek would inevitably influence rail transportation services. *S.D. R.R. Auth.*, 280 F. Supp. 2d at 934 ("Any extremely high award for punitive damages could

well seriously impact the ability of BNSF to serve the shipping public in South Dakota and elsewhere. Economic recoveries sought could well impact rates, routes and services.").

The petition reveals the sought-after regulatory effects and the desire to decree railroad operations: plaintiffs demand "damages sufficient to punish Defendants and all others from taking similar action in the future." App.23; 25; 35; 37; 47; Petition ¶¶ 71, 72, 79, 100, 107, 128. Plaintiffs cannot circumvent preemption when the class-action petition seeks an industry-wide change of how railroads protect bridges and how such facilities are designed, constructed, and maintained.

The absence of a request for injunctive relief does not exempt plaintiffs' claims from the inherent regulatory ramifications. As explained by the *Waubay Lake* court, a lawsuit's controlling implications do not hinge on injunctive relief: "Even if Plaintiffs' Complaint could be construed as seeking damages only, such a suit would still be a form of regulation." 2014 WL 4287086, at *5 n.5 (citing *Kurns*, 132 S. Ct. at 1269; *Rushing v. Kansas City S. Ry. Co.*, 194 F. Supp. 2d 493, 499 (S.D. Miss. 2001)).

III. Plaintiffs' newly raised FRSA argument does not defeat ICCTA preemption.

A. *Preservation of error*

Plaintiffs never preserved error regarding Section V(C) of their Proof Brief. Plaintiffs failed to raise FRSA preemption before Judge Miller and therefore that issue should not be considered on appeal. A question must be asked below before this Court may answer. *Bank of Am., N.A. v. Schulte*, 843 N.W.2d 876, 883 (Iowa 2014) (issues must be "raised and decided by the district court" to preserve an error); *DeVoss v. State*, 648 N.W.2d 56, 61 (Iowa 2002) ("Our cases have been consistent . . . requiring error preservation in such matters as motions to dismiss."); *In re C.S.*, 776 N.W.2d 297, 299 (Iowa Ct. App. 2009) ("An issue that is not raised at the trial court may not be raised for the first time on appeal."); *In re K.C.*, 660 N.W.2d 29, 38 (Iowa 2003) ("Even issues implicating constitutional rights must be presented to and ruled upon by the district court in order to preserve error for appeal.").

Plaintiffs now pretend that their claims "involve rail safety rather than economic issues, and as such preemption should be examined under the FRSA rather than the ICCTA." Appellants' Br. p.45. Pages 22 and 23 of plaintiff's combined resistance supposedly raise the "issue of the impact of

the FRSA rather than ICCTA." A careful review of those pages, however, does not reveal any argument about FRSA, rather than ICCTA, preemption. Instead, the briefing below merely discussed the interplay between ICCTA and FRSA presented by two cases: *Tyrrell v. Norfolk Southern Ry. Co.*¸ 248 F.3d 517 (6th Cir. 2001) and *Washington County*, 384 F.3d at 560. Plaintiffs never suggested that FRSA preemption should be brought to bear and made no attempt to demonstrate how petition allegations justified such an argument.

The brief to Judge Miller merely noted that when the facts involve state-safety laws, courts have considered FRSA's savings clause. App.79-80; Plaintiffs' Combined Resistance to Motions for Judgment on the Pleadings, pp.22-23. Likewise, at the October 30, 2015 hearing plaintiffs failed to raise any argument regarding FRSA-preemption applicability. *See generally* App.258-332; Hearing Transcript, 10/30/15 (FRSA preemption neither raised nor discussed). And the absence of any mention of FRSA preemption in Judge Miller's decision confirms that prior to this appeal plaintiffs were silent regarding FRSA.

Without prior consideration by the lower court, this Court should not take up plaintiffs' newly minted FRSA plea.

B. ***Standard and scope of review***

This Court reviews a dismissal on the pleadings for correction of errors at law. *See Young*, 877 N.W.2d at 127. But because plaintiffs failed to preserve the FRSA issue, no review is warranted. *See Bank of Am.*, 843 N.W.2d at 883; *DeVoss*, 648 N.W.2d at 61. Nevertheless, should review be afforded, this Court "accept[s] as true the petition's well-pleaded factual allegations, but not its legal conclusions." *Hedlund*, 875 N.W.2d at 724; *Brown*, 364 N.W.2d at 568, 570.

C. ***FRSA does not apply***

If the Court addresses the newly raised FRSA preemption argument, plaintiffs' contentions fail on the merits. ICCTA and FRSA are two components of a multi-faceted, federal-regulatory partnership governing the railroad industry. 49 U.S.C. §§ 10501(b), 20106(a). In appropriate circumstance, both ICCTA and FRSA preempt state statutes and regulations. *Id.*

When a state statute addresses rail safety, courts often analyze FRSA preemption. *See Island Park, LLC v. CSX Transp.*, 559 F.3d 96, 107 (2d Cir. 2009). When, however, state-law actions challenge the construction or operations, and not safety, the ICCTA presents the proper preemption analysis. *See Waubay Lake*, 2014 WL 4287086, at *4 (complaint alleged a

violation of a federal-safety regulation but preemption analyzed under the ICCTA because claims were based on culvert size and maintenance).

Plaintiffs' common factual allegations do not raise a single safety complaint, *see* App.4-12; Petition ¶¶ 1-46. The class-action pleadings, *see* App.13-16; *id.* ¶¶ 47-51, and the strict liability and negligence counts against CRANDIC and Alliant Energy, *see* App.16-24; 40-48; *id.* ¶¶ 52-69, 109-125, are similarly devoid of safety concerns. The only count mentioning safety is "Count V: Punitive Damages." *See* App.25; 36-37; 49; *id.* ¶¶ 71, 99, 127 (generically alleging that defendants' conduct constituted a "willful, wanton, and reckless disregard for the rights and safety of Plaintiffs and all others similarly situated"). Not one of plaintiffs' substantive claims accuse any defendant of acting unsafely.

Plaintiffs nevertheless seek a sanctuary from ICCTA preemption by characterizing underlying state statutes as safety related. Even if a cited statute involved safety concerns, plaintiffs' reliance on that law to question the construction, design, maintenance, or operation of rail facilities compels an ICCTA, not FRSA, preemption assessment. *See Waubay Lake*, 2014 WL 4287086, at *4 (alleging violation of a federal safety regulation, but failing to raise safety concerns; therefore ICCTA preemption controls). The petition focuses on the railroads' alleged failure to "properly build, maintain,

inspect, and keep in good repair" bridges and alleged negligence of placing loaded railcars on those bridges. App.17; 19; 21; 23-24; 41; 43-44; 45-48; Petition ¶¶ 54(c), 57(c), 62(a), 65-69, 110(c), 114(c), 120(a), 122-125. Plaintiffs cannot now ask this Court to substitute FRSA, rather than ICCTA, standards, under the guise of safety trumping the previously relied upon design, maintenance, and operations claims.

Lastly, even if, plaintiffs had pled safety concerns, the FRSA savings clause only preserves state-law claims to the extent not subsumed by federal standards. *CSX Transp. Inc. v. Easterwood*, 507 U.S. 658, 658-59 (1993) (preemption lies if "federal regulations substantially subsume the subject matter of the relevant state law"). Several federal regulations cover the design, construction, and operation of bridges, leaving no room for state legislation. *Tyrrell*, 248 F.3d at 524 (finding that if the Federal Railroad Administration has issued regulations covering the subject matter state claim not saved); *see* Federal Register, Vol. 75, No. 135 Rules and Regulations 41282-41309 (July 15, 2010), *available at* https://www.fra.dot.gov/eLib/details/L03212 (Federal-safety requirements for railroad bridges including inspection schedules, audit requirements, safe-load capacity, and other special inspections); 49 C.F.R. Parts 213 and 237

(same). Federal law encompasses rail bridge safety standards. Congress provided no space for state-law interference.

IV. The district court did not error in rejecting *Iowa, Chicago & Eastern Railroad Corp. v. Washington County* as dispositive.

A. *Preservation of error*

Plaintiffs preserved error regarding whether *Iowa, Chicago & Eastern Railroad Corp. v. Washington County*, 384 F.3d 557 (8th Cir. 2004) forecloses ICCTA preemption of Iowa Code § 327F.2. *See* App.57-70; Plaintiffs' Combined Resistance to Motions for Judgment on the Pleadings, pp.1-14. Nonetheless, plaintiffs failed to preserve error regarding whether FRSA preemption avoids ICCTA preemption. *See* Section III(A).

B. *Standard and scope of review*

The district court's rejection of *Washington County* as dispositive of ICCTA preemption is reviewed for corrections of error at law. *See* Iowa R. App. P. 6.907. On a judgment on the pleadings appeal, such as this one, the facts of the complaint are assumed to be true, but legal conclusions are not. *Hedlund*, 875 N.W.2d at 724; *Brown*, 364 N.W.2d at 568, 570.

C. Washington County *does not preclude ICCTA preemption*

Plaintiffs denounce the district court for rejecting *Iowa, Chicago & Eastern Railroad Corp. v. Washington County*, 384 F.3d 557 (8th Cir. 2004). According to plaintiffs, *Washington County* conclusively established

that Iowa Code § 327F.2 "was *not* preempted by the ICCTA", and the district court "ignore[d] the central holding . . . that proper construction of bridges is a rail safety issue and, as such, preemption is governed by the *FRSA* rather than the *ICCTA*." Appellants' Br. p.54,56.

Despite plaintiffs' insistence, *Washington County* does not determine the outcome. Washington County had contended that section 327F.2 required the railroad to replace railroad/highway bridges. *Id.* at 558. The railroad brought a declaratory judgment action asserting that ICCTA preempted section 327F.2. Maintaining that ICCTA "occupie[d] the field," the railroad insisted that a state law could not compel bridge reconstruction. *Id.* at 559.

The Eighth Circuit held that ICCTA does not broadly preempt section 327F.2. *Id.* at 561. In coming to that conclusion, the appellate court reviewed the interplay between the ICCTA and the FRSA, as well as various federal highway laws. *Id.* at 560. Because numerous federal schemes deal with railroad/highway integration, the court found that broad section 327F.2 preemption would mean that by enacting the ICCTA Congress impliedly repealed other federal rail-safety and railroad/highway integration statutes. *Id.* at 560-61. Notably, the opinion focused on federal highway oversight,

never indicating that the decision had precedential ramifications beyond railroad/highway-safety relationships.

The court concluded that "on this record, [the railroad] has failed to establish ICCTA's preemption provision preempts the state administrative proceedings commenced by [the Iowa Department of Transportation] in response to the County's petition that [the railroad] be ordered to replace the four bridges at its own expense pursuant to Iowa Code § 327F.2." *Id.* at 561. This holding was "necessarily narrow" because the record was incomplete regarding federal funding and cost apportionment. *Id*. at 561-62.

Tellingly, the administrative procedures had not run their course, and the information that would determine preemption had yet to be developed – *e.g.* the railroad's share of bridge replacement costs. *Id*. at 562. The court went no further than ruling that ICCTA did not preempt the ongoing administrative proceedings. The railroad had not been ordered to do anything, except participate in the process. Accordingly, the court determined that ICCTA preemption at that stage of the proceedings would go too far.

The *Washington County* court never exempted section 327F.2 from ICCTA preemption in all cases; the Eighth Circuit simply noted that until

the completion of the administrative proceedings a "more narrow federal preemption or supremacy issues are premature." *Id*.

Besides the *Washington County* court's focus on prematurity, plaintiffs overlook concerns about railroad/highway integration. Plaintiffs insist that, if the state has power to ensure rail bridges do not harm highway travelers, "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." Appellants' Br. p.56, n.8. Yet railroad/highway integration causing safety angst for motorists does not mirror concerns regarding independent railroad facilities not integrated with a highway and not alleged to have the potential to cause personal injuries. Simply put, plaintiffs' reliance on *Washington County* is misplaced.

As the district court observed, *Washington County* "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." Order p.10.

In sum, *Washington County* does not compel the rejection of ICCTA preemption.

Conclusion

This Court corrects errors of law. Judge Miller made none. The district court properly held that the ICCTA preempts claims about bridge construction and maintenance and a railroad's attempt to safeguard bridges against surging water. A contrary holding would subject railroads to state regulation. Besides that, nothing about the decision below affords railroads broad immunity from tort liability and nothing requires that a replacement federal remedy be afforded before a state-law claim can be precluded.

Finally, this case does not involve an incomplete administrative proceeding or the federally governed railroad/highway relationship. Instead the flood waters have receded, and the railroad's design and defense of railroad bridges with no highway implications terminated long ago.

The district court's ruling should be affirmed.

Request for Oral Submission

CRANDIC and Alliant Energy request oral argument.

Dated: February 15, 2017 By: /s/ Kevin Collins

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I certify that the actual cost of printing or duplicating this document was $0.00 (due to electronic filing).

/s/ Kevin H. Collins

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Date: February 15, 2017

/s/ Kevin H. Collins

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On February 15, 2017, I certify that I electronically served the FINAL BRIEF of Appellees Cedar Rapids and Iowa City Railway Company and Alliant Energy Corporation and Request for Oral Argument on all parties.

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