No. 08-30236

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

FRANKS INVESTMENT COMPANY, L.L.C.,
Plaintiff-Appellant

v.

UNION PACIFIC RAILROAD COMPANY,
Defendant -Appellee.

Appeal from the
United States District Court for the Western District of Louisiana
Civil Action No. 08-97

EN BANC BRIEF OF APPELLEE, UNION PACIFIC RAILROAD COMPANY

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CERTIFICATE OF INTERESTED PERSONS

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STATEMENT OF ISSUES

Both the district court and a panel of this Court held that the state law possessory action filed by Franks Investment Company, L.L.C. against Union Pacific Railroad Company is expressly preempted by the plain language of the general jurisdiction provision of the Interstate Commerce Commission Termination Act ("ICCTA"), 49 U.S.C. § 10501(b), because, when applied to force a railroad to construct or permit the continued operation of private railway crossings, this state law action intrudes upon the exclusive jurisdiction granted by Congress to the Surface Transportation Board ("STB").

The issues presented are:

1. Did the district court and panel correctly hold that Franks' state law possessory action is expressly preempted by the ICCTA?
2. Should this Court defer to the STB's interpretation of the breadth of its exclusive jurisdiction under the ICCTA, and the corresponding scope of the ICCTA's preemption of state law, when the STB's view is not derived from the statutory language but instead from case law?
3. If Franks' state law possessory action is not expressly preempted by the ICCTA, is it nonetheless impliedly preempted because, on the undisputed facts of this case, the relief Franks seeks would unduly restrict Union Pacific's ability to conduct its operations?

STATEMENT OF THE CASE

Franks filed a state law possessory action against Union Pacific in Louisiana state court, claiming it had a property interest in the use of four rail crossings and seeking an injunction requiring Union Pacific to rebuild two of those crossings and leave the other two in place. Trial Ruling ("TR") 4. Union Pacific removed the case to federal district court on diversity grounds.

After a two-day bench trial, the district court ruled in favor of Union Pacific. The court held that § 10501(b) of the Interstate Commerce Commission Termination Act ("ICCTA")—which, among other things, grants the Surface Transportation Board ("STB") exclusive jurisdiction over "transportation by rail carriers"—preempts Franks' state law action. TR 5-6. The court credited trial testimony that rail crossings like those at issue here "affect[] safety, drainage and maintenance issues," and concluded accordingly that Franks' state law action "will necessarily impact" rail transportation. TR 7. Because "Franks' possessory action based on Louisiana law" intrudes upon the STB's exclusive jurisdiction over rail transportation, the court held that Franks' action was "preempted by the ICCTA." TR 9. On that basis, the court dismissed Franks' state law claim with prejudice. TR 9.

A panel of this Court affirmed that judgment. *Franks Inv. Co. v. Union Pac. R.R.*, 534 F.3d 443, 449 (5th Cir. 2008). The panel recognized that "the language

of the ICCTA's preemption provision . . . evinces an intent by Congress to broadly preempt state law as it relates to rail transportation." *Id.* Based on the "plain statutory language" of § 10501(b) and the district court's unchallenged factual findings, the panel agreed with the district court that "Franks' state-law possessory action impinges upon the STB's exclusive jurisdiction with regard to rail transportation." *Id.* at 446.

On March 11, 2009, this Court granted rehearing *en banc*.

STATEMENT OF FACTS

Union Pacific is the oldest and largest operating railroad network in the United States, spanning most of the United States west of Chicago and New Orleans. It owns and operates a main line railroad track between Alexandria and Shreveport Louisiana. TR 3. At least six Union Pacific freight trains—each up to 8,000 feet in length, Trial Transcript ("TT") 177—run along this track every day. TR 3.

Franks is a limited liability company that owns real estate and makes venture capital and equity investments. TT 28. It owns approximately 1,000 acres of land in Caddo Parish, Louisiana. TR 2. The property is bounded by Leonard Road in the south, Flournoy Lucas Road in the north, Sand Beach Bayou and Bayou Pierre in the west, and the Union Pacific right of way in the east. TR 2-3. Louisiana Highway 1 runs just to the east of the Union Pacific right of way. TR3. Franks' property has access to Highway 1 without crossing Union Pacific's tracks from at least two entrances to its property off of Flournoy Lucas Road in the north and one entrance off of Leonard Road in the south. TR 3.

Prior to 2007, there were four private rail crossings stretching from the Franks property, across the Union Pacific tracks and right of way, to Highway 1. TR 3. These rudimentary crossings consisted of wood planks nailed to railroad

ties with dirt approaches. TT 156-60. Union Pacific maintained the crossings, TR 3, and paid all taxes on the property on which the tracks are located, TT 236.

Trial testimony established that these kinds of private crossings significantly impact track drainage and maintenance. Union Pacific Director of Track Maintenance James Moeller (misspelled Miller in the trial transcript) called the maintenance of crossings like "these very ones" a "trackman's nightmare," given Louisiana's high water table and associated mud. TT 157, 158. The mud approaches to the crossings trap water beneath the railroad tracks, crushing the ballast that supports the track and causing subgrade problems. TT 157-58. The trapped water also causes an hydraulic pumping action within the ballast, which in turn draws more water into the track structure, further degrading track conditions and causing railroad ties to wear out more quickly. TT 157-60. According to Mr. Moeller, the majority of all track maintenance problems he sees are associated with "these type" of crossings. TT 159. In order to repair the damage caused by these types of crossings, Mr. Moeller testified that maintenance crews "have to remove the crossing, remove the approaches, [and] dig the mud out. It's very time consuming, it's very costly, and it's a very difficult task to perform." TT 157.

Until degraded crossings can be repaired, rail operations over the crossings are limited for safety reasons. TT 160. Trains must proceed along the affected portion of the tracks at reduced speed, under so called "slow order[s]" pending

completion of necessary maintenance. These slow orders increase a railroad's costs because trains must brake to slow down and then burn extra fuel to return to their previous speed. TT 174. Moreover, slow orders reduce fleet-wide average train speed, degrading the railroad's overall operating efficiency. TT 175. The marginal effect of changes in train speed on efficiency is dramatic. According to Buford Wayne Woodall, Manager of Union Pacific's Lavonia Terminal, an increase of just one mile per hour in this average speed would gain Union Pacific the equivalent of 250 locomotives or 5,000 rail cars, and decreases in train speed have the opposite effect. TT 175-76.

Because of concerns about increased maintenance costs and diminished operating efficiency, TT 241-42, and consistent with federal policy favoring the closure of redundant private rail crossings, TT 238-249, in 2005, Union Pacific posted notices of its intent to close the four private crossings abutting Franks' property. TR 3. Union Pacific and Franks officials met to discuss the possibility of keeping one of the four crossings open, but the parties did not reach an agreement. TR 3; TT 323. Accordingly, in December 2007 Union Pacific closed and removed two of the four rail crossings. TR 3. This lawsuit followed.

SUMMARY OF THE ARGUMENT

The district court and a panel of this Court held that Franks' state law possessory action is expressly preempted by the ICCTA based on a straightforward reading of unambiguous statutory language. Because Franks cannot prevail under the plain text of the statute, it relies for this appeal on a mélange of contra-textual interpretive canons, legislative history, and pleas for agency deference. Those peripheral arguments should not distract this Court from the task at hand. Like the district court and panel, this Court should interpret the Interstate Commerce Commission Termination Act ("ICCTA") according to its plain and unambiguous language, and under that interpretation find Franks' state law possessory action expressly preempted.

The ICCTA grants the Surface Transportation Board ("STB") exclusive jurisdiction over the subject matter of Franks' state law action. Indeed, the text of the ICCTA could hardly be clearer on that point, as § 10501(b) explicitly vests the STB with exclusive jurisdiction over transportation by rail carriers and the operation of all railroad facilities. Transportation is defined broadly by the statute to include all property and equipment used to move people or equipment by rail, and the STB has defined "facilities" according to its ordinary meaning to include anything integrally related to the provision of interstate rail service—a definition that plainly includes a railroad's main line tracks. Because Franks' state law

possessory action seeking to require Union Pacific to construct two private crossings and permit the continued use of two others intrudes on the STB's exclusive jurisdiction over railroad property affecting its main line track operations, this action is expressly preempted.

Franks' brief contains no serious analysis of the ICCTA's text. Instead, it seeks to divert this Court's focus from that text with arguments about interpretive presumptions, legislative history, and principles of agency deference. That effort should be unavailing, because none of those tools of statutory interpretation can alter the plain meaning of the language used in the statute. Moreover, each of Franks' peripheral arguments is flawed on its own terms.

First, Franks protests that the general presumption against preemption should make this Court wary of finding Franks' action expressly preempted. However, that presumption does not apply to areas like rail regulation, where there is a significant history of federal presence. And in any event the presumption is just that; it cannot override the ICCTA's clear and unambiguous preemptive mandate.

Second, Franks argues that the ICCTA's legislative history demonstrates a congressional intent to preempt only states' direct economic regulation of railroads. This argument is also defeated by the text. Nothing in the language of the ICCTA indicates that the STB's exclusive jurisdiction is limited to economic

regulation or excludes from preemption general state laws that have the effect of regulating railroad operations—and terms used in committee reports cannot add new limitations to the statute's unambiguous prescriptions. Moreover, the drafters of the committee reports did not explain what they meant by "economic regulation," and Franks makes no effort to explore its boundaries. The courts and the STB have flatly rejected Franks' view that ICCTA preemption is limited to state laws that specifically target railroads, and courts that have tried to apply a distinction between economic and non-economic regulation have either quit that venture in exasperation or taken sharply different views on the relevant dividing lines, demonstrating graphically why legislative history should not be used to inject ambiguity into an otherwise clear statute.

Third, Franks relies on the STB's view of the limited scope of ICCTA express preemption. But this Court should not defer to the STB's view on that issue. The Supreme Court recently made clear that, absent an express delegation of interpretive authority—and there is none in the ICCTA—courts should not give *Chevron* deference to an agency's interpretation of the preemptive scope of its enabling statute. *See Wyeth v. Levine*, 129 S. Ct. 1187, 1201 (2009). And even if that rule were otherwise, the STB would receive no deference here because the statute's meaning is clear on its face and because the STB has never actually interpreted the relevant statutory text, instead relying on preexisting case law.

When an agency fails to grapple with the language of a statute, its views of that statute's meaning add nothing of value.

Finally, contrary to Frank's view, enforcing the plain meaning of § 10501(b) to preempt state law that intrudes upon the STB's exclusive jurisdiction over rail transportation and operations will not cause the sky to fall. Individuals whose state law claims are preempted may still seek redress from the STB, which is empowered to adopt its own substantive rules to regulate the respective rights of railroads and private parties. Indeed, where appropriate, the STB can adopt state substantive law as the rule of decision. Nor will a plain-language reading of § 10501(b) nullify the protections afforded by other federal statutes. Courts should—and do—read the ICCTA sensibly *in pari materia* with other federal statutes to ensure that the entire body of federal law is harmonized.

Even if this Court were to disagree with the district court's and panel's conclusion on express preemption, it nonetheless should hold Franks' claims impliedly preempted by the statute. The trial record amply demonstrates that the crossings at issue negatively affect track drainage, track maintenance, and rail operations, increasing the railroad's costs and substantially interfering with its operations.

ARGUMENT

The concept of preemption is fundamental to our federal system. The Constitution's Supremacy Clause provides that the "Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. CONST. art. VI, cl. 2. "It is basic to this constitutional command that all conflicting state provisions be without effect." *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981).

The preemption of state law can be express or implied. Congress expressly preempts state law by "indicat[ing] pre-emptive intent through a statute's express language or through its structure and purpose." *Altria Group, Inc. v. Good* , 129 S. Ct. 538, 543 (2008). Preemption may also be "inferred if the scope of the statute indicates that Congress intended federal law to occupy the legislative field, or if there is an actual conflict between state and federal law." *Id.* Courts will find the latter sort of implied preemption, termed "conflict preemption," where "compliance with both federal and state regulations is a physical impossibility . . . or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Pac. Gas & Elec. Co. v. State Energy Res. Conservation and Dev. Comm'n*, 461 U.S. 190, 204 (1983) (internal citations omitted).

In this case, the ICCTA preempts Franks' state law possessory action for two reasons. First, the ICCTA explicitly preempts any state law that seeks to regulate rail transportation or the operation of integral rail facilities. Second, the ICCTA impliedly preempts Franks' state law action because the remedy Franks seeks would interfere with the operation of Union Pacific's interstate railroad service and thereby frustrate the accomplishment of federal policy.

XIII. THE ICCTA EXPRESSLY PREEMPTS STATE LAW ACTIONS LIKE FRANKS' THAT INTERFERE WITH RAIL TRANSPORTATION AND MAIN LINE TRACK OPERATIONS

The district court and panel correctly concluded, upon a straightforward reading of the statute, that § 10501(b) of the ICCTA expressly preempts Franks' state law possessory action. They rightly anchored their statutory interpretation in the text, for "[w]hen the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms." *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000) (quotation omitted); *accord Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 438 (1999) ("[I]n any case of statutory construction, our analysis begins with the language of the statute. And where the statutory language provides a clear answer, it ends there as well." (citations omitted)). The primacy of statutory text is no different in cases involving the preemption of state law: when a statute contains an express preemption clause, the

"task of statutory construction must in the first instance focus on the plain wording of the clause, which necessarily contains the best evidence of Congress' pre-emptive intent." *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993).

Because the plain text in this case is a problem for them, Franks and its amici would rather not start there. Instead, they insist that the district court and panel should have begun their analyses with a strong bias against finding express preemption because—in their view— through the ICCTA, Congress legislated in a field traditionally occupied by the states. *See* Appellant Br. at 11; Constitutional Law Scholars Br. at 4-19. That evasive tactic is doubly unavailing, because the cited presumption against preemption is inapplicable here and, in any event, it would have no effect even if it applied.

The presumption against preemption does not apply in this case because it "is not triggered when the State regulates in an area where there has been a history of significant federal presence." *United States v. Locke*, 529 U.S. 89, 108 (2000). Federal regulation of the railroads dates back to the passage of the Interstate Commerce Act in 1887, and is "among the most pervasive and comprehensive of federal regulatory schemes." *Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 318 (1981); *see also Friberg v. Kan. City S. Ry.*, 267 F.3d 439, 443 (5th Cir. 2001) ("The regulation of railroad operations has long been a traditionally federal endeavor . . . ."); *City of Auburn v. United States*, 154 F.3d

1025, 1029 (9th Cir. 1998) ("Congress' authority . . . to regulate the railroads is well established . . . and the Supreme Court repeatedly has recognized the preclusive effect of federal legislation in this area.") (internal citations omitted). [1]

But even if the presumption against preemption applied in this case, it would not affect the outcome. Despite the exhaustive treatment that Franks and its amici accord this presumption, it is still only a presumption—not the get-out-of-text-free card they would need to prevail here. Where it applies, the presumption merely requires a showing that preemption was "the clear and manifest purpose of Congress." *Cipollone v. Ligget Group*, 505 U.S. 504, 516 (1992) (quotation omitted). The Supreme Court regularly makes that finding based on clear statutory text. *See, e.g.*, *Riegel v. Medtronic, Inc.*, 128 S. Ct. 999, 1006-07 (2008) (express preemption by Medical Device Amendments of 1976); *Egelhoff v. Egelhoff*, 532 U.S. 141, 146 (2001) (express preemption by ERISA).

Thus, the panel in this case correctly began its analysis "with the language of the ICCTA's preemption clause." *Franks*, 534 F.3d at 445. Upon recognizing that

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[1] In *New Orleans & Gulf Coast Ry. Co. v. Barrois*, this Court applied the presumption against preemption to a disagreement about grade crossings, relying on a 1928 Supreme Court case describing the primacy of state rail regulation at that point in time. 533 F.3d 321, 334 (5th Cir. 2008) (citing *Lehigh Valley R.R. v. Bd. of Pub. Util. Comm'rs*, 278 U.S. 24, 35 (1928). Because the federal presence in rail regulation has increased dramatically since 1928 and the Supreme Court now describes the federal scheme as among the most pervasive and comprehensive, *Barrois*' reliance on that 80 year-old precedent was misplaced.

"the statutory language in the ICCTA's preemption provision is unambiguous," *id.* at 449, and unambiguously preempts Franks' state law action, *id.*, the panel also correctly ended its inquiry there. *See BedRoc Ltd. v. United States*, 541 U.S. 176, 183 (2004) ("[O]ur inquiry begins with the statutory text, and ends there as well if the text is unambiguous."). That decision was no outlier. The district court's judgment would have been affirmed just the same by other courts of appeals that have interpreted and applied the language of the ICCTA's express preemption provision. This Court should do likewise, for, despite Franks' frenetic appeals to secondary sources, constructional canons, legislative committee reports and agency deference, we are left with the plain meaning of the ICCTA's statutory text. As the Supreme Court has "stated time and time again[,] . . . courts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 461-62 (2002) (quotation omitted).

A. The Plain Language of the ICCTA Expressly Preempts Franks' State Law Possessory Action

The task before this Court therefore rightly begins with the text of the ICCTA, which reads in relevant part as follows:

> 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),

This provision is divided functionally into two subparts. In the first, broader, subpart, § 10501(b) grants the STB exclusive regulatory jurisdiction[2] over (1) transportation by rail carriers, (2) the remedies provided in the ICCTA with respect to rates, classifications, rules, practices, routes, services, and facilities, and (3) the construction, acquisition, operation, abandonment, or discontinuance of

[2] "Jurisdiction" can refer either to formal adjudicatory jurisdiction (granting a forum exclusive power to hear particular claims) or to regulatory authority (granting a body the exclusive right to make substantive rules about particular subjects). *Compare Crowell v. Benson*, 285 U.S. 22 (1932) (recognizing adjudicatory jurisdiction in an administrative agency) *with Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 162 (2001) (considering the extent of an agency's jurisdiction to "*regulate*[] discharge of dredged or fill material into 'navigable waters'") (emphasis added). The context makes clear that § 10501(b) refers to the latter concept, granting the STB exclusive authority to regulate the stated subject matters. *See* 49 U.S.C. § 11704(c)(1) (giving aggrieved persons the option either to file a complaint with the Board *or* to bring a civil action in court); *Pejepscot Ind. Park, Inc. v. Me. Cent. R.R.*., 215 F.3d 195, 201-205 (1st Cir. 2000) (finding the STB shares concurrent adjudicatory jurisdiction with courts).

spur, industrial, team, switching, or side tracks or facilities. The import of this subpart is clear—the STB has dominion over the enumerated subject matters and that dominion is not shared with the states or other federal agencies.

The second subpart of § 10501(b) states that, except as otherwise provided in the ICCTA, the remedies afforded by the statute with respect to the regulation of rail transportation are exclusive and preempt other state and federal remedies. Although narrower than the first subpart, this subpart serves a distinct purpose. Before the ICCTA's enactment, "the remedies" provided by the predecessor Interstate Commerce Act were "in addition to remedies existing under another law or at common law." Act of Oct. 17, 1978, Pub. L. No. 95-473, § 10103, 92 Stat. 1337, 1340. The second subpart of § 10501(b) explicitly eliminates the pre-ICCTA scheme of concurrent regulation and clarifies that, because of the STB's exclusive regulatory jurisdiction, the ICCTA's remedies preempt parallel state and federal remedies.

In holding Franks' state law possessory action expressly preempted, the district court and panel focused on the first subpart of § 10501(b)—granting the STB exclusive regulatory jurisdiction over a wide range of railroad-specific subject matters. They were correct in doing so. The plain text of the first subpart of § 10501(b) preempts Franks' state law action in at least two respects.

1. Franks' state law possessory action is preempted because it impermissibly intrudes upon the STB's exclusive jurisdiction over transportation by rail carriers

As the panel recognized, the ICCTA expressly grants the STB exclusive jurisdiction over "transportation by rail carriers." *Franks*, 534 F.3d at 445; *id.* at 449 ("The language of the ICCTA's preemption provision . . . evinces an intent by Congress to broadly preempt state law as it relates to rail transportation."); *see also Friberg*, 267 F.3d at 443 ("The language of the statute could not be more precise."); *City of Auburn*, 154 F.3d at 1030 ("It is difficult to imagine a broader statement of Congress' intent to preempt state regulatory authority over railroad operations."). Whether Franks' state law action is preempted thus turns on "whether railroad crossings fit within the purview of 'transportation by rail carriers.'" *Franks*, 534 F.3d at 445.

The district court and panel correctly answered the question in the affirmative. TR 6; *Franks*, 534 F.3d at 445. The statute defines "transportation" broadly to include "property . . . or equipment of any kind related to the movement of passengers or property, or both, by rail." § 10102(9)(A). Railroad crossings fall within that definition because they unquestionably *are* both "property" and equipment, and *are* quite directly "related to the movement of property or

passengers . . . by rail."[3] The STB acknowledges as much. *See* STB Br. at 6 (transportation "obviously covers railroad tracks, including the tracks located at the site of crossings with public or private roads"). In reaching that conclusion, the panel also relied on the district court's unchallenged findings that "crossings affect safety, drainage, and maintenance, which necessarily affect rail travel." 534 F.3d at 446. The panel emphasized that crossings "will necessarily impact and be involved in the movement of passengers and property passing over [railroad] tracks." *Id.* at 448 (internal quotation omitted). Because rail crossings fit squarely within the ICCTA's definition of transportation, the panel rightly held that "Franks' state-law possessory action impinges upon the STB's exclusive jurisdiction," *id.* at 446, and accordingly that its "Louisiana possessory action is expressly preempted by the ICCTA," *id.* at 449.

Although Franks trumpets *Island Park, LLC v. CSX Transp., Inc.*, 559 F.3d 96 (2d Cir. 2009), as contrary authority, Appellant Br. at 31-32, the Second Circuit in that case cited the panel's opinion here with approval and its reasoning supports

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[3] Franks' warning that the phrase "relates to" can be construed broadly is beside the point. *See* Appellant Br. at 15 (citing *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 385-86 (1992). *Morales* itself makes clear both that "the meaning of these words is a broad one," 504 U.S. at 383, and that the Supreme Court will give the phrase its appropriately broad effect when Congress uses it, *see id.* at 383-84. In any event, both courts below found that crossings are not just tangentially related to the movement of passengers or property by rail, but directly impact rail travel in a variety of ways.

the panel's decision. *Island Park* involved a reverse scenario in which a landowner sought to use the ICCTA's preemption provision to enjoin a railroad from carrying out a state agency order to close a private crossing. The court of appeals recognized that the STB's exclusive jurisdiction over rail "transportation" "does include 'property . . . related to the movement of passengers or property . . . by rail'" and that "a rail crossing does constitute 'an improvement to railroad tracks that allows vehicles, equipment, and persons to cross the tracks.'" 559 F.3d at 104 (internal citations omitted). But the court reasoned that whether state action relating to a crossing is preempted depends on "what . . . the state seek[s] to regulate" and whether "the proposed regulation burden[s] rail transportation." *Id.* In that case, where the state sought "to *terminate* the use of a private roadway that traverses railroad tracks," the court found that the state was "not seek[ing] to impose its authority over the tracks themselves or over 'rail carriers' that use the tracks," but instead to affect only "the movement of people and property *across* railroad tracks." *Id.* (emphasis added). Because the state agency order did not regulate rail transportation, it was not preempted. *Id.* But the court contrasted the case before it with the circumstances of this case, "involv[ing] a private individual's attempt to prevent a railroad from closing private rail crossings, thereby interfering with railroad operational decisions." *Id.* The Second Circuit brooked no disagreement with the analysis or outcome of the panel's decision here,

which it viewed as perfectly consistent with its own understanding of the scope of the ICCTA's preemption clause.

2. Franks' state law possessory action is preempted because it impermissibly intrudes on the STB's exclusive jurisdiction to regulate the operation of railroad facilities

This Court may also affirm the district court's decision on narrower grounds than those relied on by the panel, thereby avoiding the need to delineate the full breadth of the STB's exclusive jurisdiction over "transportation by rail carriers." *See* 49 U.S.C. § 10501(b). Section 10501(b) also grants the STB exclusive regulatory jurisdiction over the operation of railroad "facilities," which as a matter of plain language and structure includes a carrier's main line tracks. Under this narrower and more specific subpart of § 10501(b), state law—including state common law causes of action—may not be used to regulate main line track operations. Any state law action that does so is expressly preempted.

As noted, § 10501(b) provides the STB exclusive jurisdiction over "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)(2) (emphasis added). As a matter of ordinary English usage, main line track operations are at the heart of the "operation" of railroad "facilities," and that

unexceptional conclusion is confirmed here by the structure of the clause in which these terms appear.

"In the absence of an indication to the contrary, words in a statute are assumed to bear their 'ordinary, contemporary, common meaning.'" *Walters v. Metro. Educ. Enters., Inc.*, 519 U.S. 202, 207 (1997) (citation omitted). The word "facility" means "something . . . that is built, constructed, installed, or established to perform some particular function." *Websters Third New International Dictionary of the English Language, Unabridged* 812-13 (1993). The STB has construed the word "facility" broadly, consistent with that ordinary meaning, to include things "integrally related to the provision of interstate rail service." *Borough of Riverdale – Pet. for Decl. Order*, Finance Dkt No. 33466, 1999 STB LEXIS 531, at *23 (STB Sept. 10, 1999); *accord Green Mountain R.R. Corp. v. Vermont*, 404 F.3d 638, 645 (2d Cir. 2005) ("[T]he plain language of Section 10501 reflects clear congressional intent to preempt state and local regulation of integral rail facilities."). Congress has since acquiesced in that broad construction, carving out specific narrow exceptions where it has seen fit without changing its overarching text. *See* Clean Railroads Act of 2008, Pub. L. No. 110-432, § 603, 122 Stat. 4848, 4900 (amending 49 U.S.C. § 10908(a) and subjecting solid waste transfer facilities to state and federal requirements even if owned or operated by a rail carrier). As no specific exception applies here, and a railroad's main line

tracks unquestionably are "integrally related to the provision of interstate rail service," a railroad's elimination of crossings that it believes interfere with its main line track operations is plainly an aspect of the railroad's "operation" of its "facilities" within the meaning of the statute.

Interpreting the operation of "facilities" to include a railroad's operation of its main line tracks also makes sense in context, accounting for the structure of the statutory clause in which the term appears. The word "facilities," in § 10501(b)(2), is preceded by "spur, industrial, team, switching, or side tracks." Each type of track is used in a railroad's ordinary operations. For instance, "[s]ide tracks are used to park a train going one direction on a main line while a train going the opposite direction passes." *Friberg*, 267 F.3d at 440 n.1. "Under the principle of *ejusdem generis*, when a general term follows a specific one, the general term should be understood as a reference to subjects akin to the one with specific enumeration." *Norfolk & W. R. Co. v. Train Dispatchers*, 499 U.S. 117, 129 (1991). The main line tracks themselves are of course at the very heart of a railroad's operation, and including them among the railroad's integral "facilities," within the overall list of tracks subject to the STB's exclusive jurisdiction, is the most sensible reading of the clause.

That reading is also consistent with the history and purpose of the statute. Indeed, the statutory history of increasingly expansive exclusive federal

jurisdiction culminating in federal control even of smaller, wholly intrastate tracks argues strongly against any construction that would uniquely subject main line track operations to state regulation. Before 1995, the STB's predecessor, the Interstate Commerce Commission ("ICC") had been expressly forbidden any jurisdiction over "the construction, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks if the tracks are located, or intended to be located, entirely in one state." Pub. L. No. 95-473, § 10907(b)(1) (1978), 92 Stat. at 1407; *see also* Transportation Act of 1920, Pub. L. No. 66-152 § 402(18), 41 Stat. 456, 477. And for decades the ICC had only non-exclusive jurisdiction even with respect to interstate rail transport. *See* Pub. L. No. 95-473, § 10501, 92 Stat. at 1359. The ICCTA broke significant new ground in granting the STB "exclusive jurisdiction" over "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)(2) (emphasis added). The ICCTA thus granted the STB exclusive jurisdiction over the type of purely intrastate tracks over which the ICC previously had no jurisdiction at all and made that jurisdiction exclusive. There is no reason to believe that Congress intended to leave main line, interstate track operations uniquely subject to state regulation.

Franks' state law possessory action is preempted because it seeks to directly regulate Union Pacific's operation of its main line rail tracks.[4] Franks seeks an injunction that would require Union Pacific to rebuild two rail crossings and prevent the railroad from closing another two. As the district court found, that relief would affect Union Pacific's main line track operations, because crossings affect "safety, drainage, and maintenance." TR 7; *see also id.* ("Any physical improvement made to railroad tracks, such as those made to construct a crossing, will necessarily impact . . . the movement of passengers and property passing over those tracks."). That sort of state law interference with a railroad's main line track operations is facially incompatible with the ICCTA's express grant of exclusive jurisdiction to the STB.

3. Franks and its amici make no serious effort to refute the district court's and panel's understanding of the plain language of § 10501(b)

In its brief to this Court, Franks makes no effort to seriously engage with the plain text of the statute. Bypassing the bulk of § 10501(b), Franks focuses only on its final sentence, evidently because it is the only part of the provision that

[4] It is well established that, like state regulatory statutes, civil suits under state law may establish requirements that conflict with or are otherwise preempted by federal law. *See Riegel*, 128 S. Ct. at 1007-08 (citing cases). As the Eleventh Circuit has explained, "the pivotal question is not the nature of the state regulation, but the language and congressional intent of the specific federal statute." *City of Auburn*, 154 F.3d at 1031.

specifically uses the word "preemption." *See* Appellant Br. at 13; *see also* Constitutional Law Scholars Br. at 24. Franks thus steadfastly ignores the greater text of the provision that defines the scope of exclusive STB jurisdiction, on which the district court and panel primarily relied. *See* TR 5-6; *Franks*, 534 F.3d at 445 (focusing on exclusive STB jurisdiction over "transportation by rail carriers"). It is of course "a cardinal rule of statutory construction that significance and effect shall, if possible, be accorded to every word." *Regions Hosp. v. Shalala*, 522 U.S. 448, 467 (1998). Because Franks ignores that teaching and construes only the final sentence of § 10501(b), Franks fails to make any sense of the provision as a whole or to explain what Congress meant when it used the term "exclusive jurisdiction" in the first subpart if it did not intend by that term to preempt state regulation.

Moreover, Franks' brief is schizophrenic in its interpretation of the one sentence it does address. On the one hand, Franks argues that this sentence preempts only state law remedies that amount to regulation "specifically directed toward transportation." Appellant Br. at 15; *see also* Appellant Br. at 29. On the other hand, Franks claims that its test and the STB's test for express preemption are one and the same. *See* Appellant Br. at 18-19. Yet under the STB's test the ICCTA expressly preempts "any form of state or local permitting or preclearance," including general permitting schemes that are *not* specifically directed at railroads or transportation. *See CSX Transp. Inc.—Pet. for a Decl. Order*, Finance Dkt. No.

34662, 2005 WL 1024490, at *2 (STB May 3, 2005) (citing *City of Auburn*, 154 F.3d at 1030-31); *see generally* Part I.D, *infra.* Thus, even as to this single sentence, Franks' statutory interpretation lacks the coherence necessary to provide this Court useful guidance.

B. The Statute's History Supports a Broad Interpretation of the STB's Exclusive Jurisdiction

The evolution of the Interstate Commerce Act and ICCTA supports a broad construction of the STB's exclusive jurisdiction. As amici acknowledge, the federal presence in railroad regulation has gone from practically non-existent before 1887 to pervasive today. *See* Constitutional Law Scholars Br. at 12-16. Congressional expansion of federal control has accelerated during the last thirty years, and that expansion is especially evident in the changes to the preemption provisions of the Interstate Commerce Act made by the ICCTA.

Prior to 1980, states could exercise regulatory jurisdiction over intrastate rail travel subject to the ICC's jurisdiction unless the state requirements were inconsistent with an order of the ICC or the terms of the Interstate Commerce Act. Pub. L. No. 95-473 § 10501(c), 92 Stat. at 1359. In the 1980 Staggers Rail Act, Congress required states to exercise their jurisdiction over rail travel "exclusively in accordance" with federal standards. Pub L. No. 96-448 § 214(b)(1), 94 Stat. 1895, 1913 (amending 49 U.S.C. § 11501). Moreover, only states that were certified to apply federal standards could exercise this concurrent jurisdiction over "transportation by rail carriers, and the remedies provided in this title with respect to the rates, classifications, rules, and practices of such carriers." Pub L. No. 96-448 § 214(c)(5), 94 Stat. at 1914. In the 1995 ICCTA, Congress eliminated even that limited species of concurrent state regulation in favor of exclusive federal

jurisdiction, *Compare* Pub L. No. 96-448 § 214, 94 Stat. at 1913-14 *with* 49 U.S.C. § 10501(b)(1), and broadened the sphere of exclusive federal jurisdiction to include remedies over rail carriers' "routes, services, and facilities," *see* 49 U.S.C. § 10501(b)(1). And, whereas "the remedies" provided by the Interstate Commerce Act were "in addition to remedies existing under another law or at common law," Pub. L. No. 95-473 § 10103, 92 Stat. at 1340, under the ICCTA, "[e]xcept as otherwise provided[,]" remedies "are exclusive and preempt the remedies provided under Federal or State law." 49 U.S.C. § 10501(b).

The ICCTA also now grants the STB exclusive jurisdiction over construction, acquisition, abandonment, operation, and discontinuance of certain types of rail lines and facilities "even if the tracks are located, or intended to be located, entirely in one state." 49 U.S.C. § 10501(b). In contrast, the Supreme Court had previously recognized exclusive ICC jurisdiction only over abandonment. *Compare* § 10501(b)(2) *with Kalo*, 450 U.S. at 323 ("*at least* as to abandonments, [the ICC's] authority is exclusive") (emphasis added). And, as noted above, prior to the ICCTA, the ICC had been forbidden jurisdiction over that category of intrastate tracks altogether. *See* Pub. L. No. 95-473 § 10907, 92 Stat. at 1407; Pub. L. No. 66-152 § 402(18), 41 Stat. at 477.

Cumulatively, the ICCTA provisions effected a broad shift from concurrent state and federal regulation to exclusive federal regulation,[5] preempting state laws in the interest of uniformity and greater regulatory efficiency. *See, e.g.*, *Friberg*, 267 F.3d at 444 (preempting state operating limitations); *City of Auburn*, 154 F.3d at 1030-31 (preempting state environmental permitting).

Franks largely ignores this statutory history, which demonstrates Congress' overarching purpose to federalize the regulation of rail operations, and instead focuses narrowly on the committee reports attending the ICCTA's enactment, which according to Franks limit the scope of STB's exclusive jurisdiction to "economic" regulation. *See* Appellant Br. at 16-18; *see also* Constitutional Law Scholars Br. at 15. This approach to statutory construction is fundamentally misguided. Although courts "appropriately may refer to a statute's legislative history to resolve statutory ambiguity," clear statutory language "obviates the need for any such inquiry." *Patterson v. Shumate*, 504 U.S. 753, 761 (1992). Indeed, this Court has already recognized that "the plain language" of the ICCTA preemption provision "is so certain and unambiguous as to preclude any need to

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[5] Amici Constitutional Law Scholars miss this point entirely when they insist that that the states' historically significant role in the regulation of railroads indicates a *continued* substantial role. The statutory evolution that amici themselves recognize, *see* Constitutional Law Scholars Br. at 12-16, does not suggest that "federal regulatory authority over railroads" remains "particularized." *Id.* at 16. To the contrary, the regulation of railroads, once solely the province of state law, is now primarily a federal exercise.

look beyond that language for congressional intent." *Friberg*, 267 F.3d at 443. Accordingly, the panel here properly rejected Franks' proposed limitation of preemption to "economic regulation" after concluding that "[n]owhere in the statutory text has Congress expressed an intent to limit the [preemption of] regulation to the economic realm." *Franks*, 543 F.3d at 449. Other courts of appeals have likewise interpreted the ICCTA to preempt state laws that are not commonly viewed as economic regulations. *See, e.g., City of Lincoln v. STB*, 414 F.3d 858, 862 (8th Cir. 2005) (ICCTA preempts state condemnation action); *R.R. Ventures, Inc. v. STB*, 229 F.3d 523, 562 (6th Cir. 2002) (ICCTA preempts enforcement of railroad's agreement with township to build overpass or underpass); *City of Auburn*, 154 F.3d at 1030 (ICCTA preempts application of state environmental permitting scheme).

In any event, the legislative history gloss that Franks seeks to apply would do more to obfuscate than illuminate Congress's intentions. "[G]iven the broad language of [Section 10501(b)] . . . the distinction between 'economic' and [non-economic] regulations begins to blur." *City of Auburn*, 154 F.3d at 1031. Although Franks insists that the regulation of the relations between, and the respective property rights of, railroads and adjacent landowners is not "economic" regulation, that proposition is completely unexplained and far from self-evident. In *Friberg*, this Court referred to regulatory decisions concerning "train length, speed,

or scheduling" as "economic." 267 F.3d at 444. If the term is that expansive, it rightly should encompass regulation of crossings that affect track drainage and maintenance as well. Indeed, trial testimony established that private crossings like those at issue detrimentally affect train speed, TT 160, 174-76, so Franks' state law action enforcing private crossing rights *is* a form of economic regulation under *Friberg*.

Although it should not affect the outcome of this case (and perhaps most others), the case law suggests that application of a legislative history-based "economic regulation" gloss on § 10501(b) is not merely doctrinally unsound but also jurisprudentially unhelpful, because it introduces ambiguity not present in the actual statutory language. *See Hubbard v. United States*, 514 U.S. 695, 708 (1995) ("Courts should not rely on inconclusive statutory history as a basis for refusing to give effect to the plain language of an Act of Congress … .").

C. Enforcing the Plain Meaning of the Statute as Written Would Not Lead to Absurd Results

Even where statutory language otherwise appears plain, courts will of course avoid construing a statute in a manner that would lead to absurd results. *See, e.g. In re Trans Alaska Pipeline Rate Cases*, 436 U.S. 631, 643 (1978). Franks advances this interpretive principle as another excuse to ignore the plain language of § 10501(b). However, the counter-textual absurdity canon applies sparingly, only where "context *requires* a different result." *Gonzales v. Carhart*, 550 U.S.

124, 152 (2007) (emphasis added). That situation does not exist here. Applying the text as written to affirm the district court's judgment that Franks' state law possessory action is expressly preempted would lead to no absurdities. To the contrary, in keeping with Congress' goals under the ICCTA, it would ensure federal control over the regulation of Union Pacific's rail transportation and main line track operations.

Giving the full preemptive effect that Congress intended to the STB's exclusive jurisdiction over rail transportation and the operation of integral railroad facilities (such as main line tracks) would not change the outcome of most of the cases on which Franks relies and would, in most circumstances, leave state law causes of action unaffected. For instance, a landowner's claim against a railroad that disposed of old rail ties in a drainage ditch next to its tracks would still not be preempted, because enjoining that disposal would not regulate matters relating to movement of people or property by rail or otherwise affect the operation of core railroad facilities. *See Emerson v. Kan. City S. Ry.*, 503 F.3d 1126, 1131 (10th Cir. 2007). Similarly, a "private entity leasing property from a railroad for non-rail transportation purposes," *Florida E. Coast Ry. v. City of West Palm Beach*, 266 F.3d 1324, 1331 (11th Cir. 2001), would still be subject to municipal zoning laws, both because the application of those laws to a non-railroad lessee "is not sufficiently linked to rules governing the operation of the railroad," *id.*, and

because that entity's activities are "not 'rail transportation,'" *id.* at 1336. Indeed, even a state law order requiring that crossings be removed might not be preempted because, as the Second Circuit found, such a state order "does not seek to impose [state] authority over the tracks themselves or over 'rail carriers' that use the tracks." *See Island Park*, 559 F.3d at 104.

Moreover, individuals whose state law claims are preempted would not be left without an avenue for redress. As the panel recognized, "[p]reemption deprives Franks of a state-law remedy. It is free, however, to seek relief from the STB." *Franks*, 534 F.3d at 449. The ICCTA grants the STB broad authority to "prescribe regulations in carrying out" its administration of the Act. *See* 49 U.S.C. § 721(a). The STB could therefore issue notice and comment regulations (or, alternatively, make law through adjudication[6]) to provide substantive rules in any circumstances where Congress has preempted previously applicable state law. Indeed, should it so choose, the STB could promulgate rules in appropriate circumstances adopting state law as the substantive rule of decision.

Nor would following Congress's express direction on preemption overwhelm the limited resources of the Board. *Contra* STB Br. at 17. An individual complaining of a violation of the STB's rules may bring an action either

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[6] *See SEC v. Chenery Corp.*, 332 U.S. 194, 203 (1947) ("The choice made between proceeding by general rule or by individual, *ad hoc* litigation is one that lies primarily in the informed discretion of the administrative agency.").

before the Board or in federal district court, *see* 49 U.S.C. § 11704(c)(1). As the STB notes, "[t]o date, only a few preemption cases involving railroad/private road or sewer crossings have been brought to the Board," STB Br. at 17, and there is little reason to believe that plaintiffs by and large would prefer a hearing in that forum to redress in federal court.

Ultimately, the most significant difference between the regime that the district court and panel found express in the statute and the alternative envisioned by Franks is that the district court's and panel's approach better comports with Congress's goal of federalizing rail regulation. Under Franks' view, a plaintiff can challenge matters going to the core of rail transportation or main line track operations in state court under a state law cause of action and the defendant railroad can only remove such a cause of action to federal court if the parties are diverse and the amount in controversy is greater than $75,000. *See* 28 U.S.C. §§ 1332(a), 1441. By contrast, an interpretation faithful to the text of the statute would guarantee the railroads a federal forum, consistent with the ICCTA's purpose to "federalize . . . disputes" about its subject matter. *See Pejepscot Ind. Park, Inc. v. Main Central R.R. Co.*, 215 F.3d 195, 204 (1st Cir. 2000); *cf.* 16 James W. Moore et al., Moore's Federal Practice – Civil § 107.3 (2009 ed.) ("[R]emoval jurisdiction was designed to protect nonresident defendants from any

perceived prejudice or preference of the state court regarding the resident plaintiffs").

Contrary to Franks' argument, moreover, enforcing the plain language of the ICCTA's exclusive jurisdiction provision would not impliedly repeal other federal statutes that regulate aspects of rail transportation. *See* Appellant Br. at 34-35. For instance, the Federal Railway Safety Act ("FRSA")—administered by the Federal Railway Administration ("FRA")—has the purpose of "promot[ing] safety in every area of railroad operations and reduc[ing] railroad-related accidents and incidents." 49 U.S.C. § 20101. The FRSA has its own express preemption provision which states that "[a] State may adopt or continue in force a law . . . related to railroad safety . . . until the Secretary of Transportation . . . prescribes a regulation or issues an order covering the subject matter of the state requirement." *Id.* § 20106. Courts have sensibly held that the ICCTA's express preemption provision—granting the STB exclusive jurisdiction over a broad subject matter—does not nullify the FRSA provision granting states some authority over rail safety. Courts have instead read the two statutes "*in pari materia*" and recognized that "Congress vested the FRA with primary authority over national rail safety policy." *Tyrell v. Norfolk S. Ry.*, 248 F.3d 517, 523 (6th Cir. 2001). Thus, as to state regulation that addresses rail safety, "FRSA provides the applicable standard for assessing federal preemption." *Id.* at 524; *see also Island Park*, 559 F.3d at 107 ("[T]he federal statutory scheme places principal federal regulatory authority for rail safety with the Federal Railroad Administration . . . not the STB."); *cf. FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) ("[T]he meaning of one statute may be affected by other Acts, particularly, where Congress has spoken . . . more specifically to the topic at hand."). [7]

[7] The STB has recognized that it and the FRA can "exercise their respective statutory responsibilities in complementary fashion." STB Br. at 6. Indeed, the STB works closely with the FRA when considering safety issues related to rail consolidation. *See* 49 C.F.R. § 1106.1; 63 Fed. Reg. 7225 (Feb. 12, 1998). The ICCTA can and should similarly be read *in pari materia* with other federal statutes, whenever they are implicated. *See, e.g.*, *Boston & Me. Corp. and Town of Ayer – Joint Pet. for Decl. Order*, Finance Dkt. No. 33971, 2001 WL 45865, at *5 (STB Apr. 30, 2001) ("[N]othing in section 10501(b) is intended to interfere with the role of state and local agencies in implementing Federal environmental statutes.").

Of course, the particulars of federal statutory harmonization are not at issue here, because this case does not implicate any other federal statutes. Franks' state law cause of action is not in any way related to safety, the environment, or any other area concurrently regulated by another federal law. Notwithstanding Franks' attempts at distraction, § 10501(b) of the ICCTA should be interpreted and applied as it was drafted. Under a plain, straightforward reading of that text the STB's grant of exclusive jurisdiction preempts Franks' state law possessory action. [8]

D. The STB's Interpretation of the ICCTA's Express Preemption Provision is Too Narrow and is Not Entitled to Deference

This Court should not defer to the STB's narrow view of the scope of ICCTA express preemption. Even if the issue were one on which the STB might otherwise merit *Chevron* deference—and, for the reasons explained below, it is not—the Board has never grappled with the actual language of § 10501(b). Instead, the Board assembled its express preemption test as an amalgam of prior case law, much of which predates the current statute, and consequently its test

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[8] Franks also argues that Congress could not have meant what it said in § 10501(b) because applying the plain language of that provision to cases like this one would create massive government liability for takings of private property. Appellant Br. At 35-36. That conclusion is surely premature, since the STB has the authority to provide substantive rules of its own where state law is preempted and may grant property owners the ability to enforce their property rights under federal law. In any event, to the extent that the ICCTA has *any* preemptive effect, some state property rights inevitably will be affected, leaving the federal government exposed to possible takings claims. This Court has previously rejected the notion that the potential for such claims should preclude ICCTA preemption. *See Friberg*, 267 F.3d at 444 n.18.

cannot be reconciled with the statutory text. Because the STB failed meaningfully to interpret the language of § 10501(b), its views are undeserving of this Court's deference.

1. The STB's view of the scope of ICCTA express preemption is atextual and unduly narrow

According to the STB, "courts have found two broad categories of state and local actions to be preempted regardless of the context or rationale for the action." *CSX Transp. Inc.*, 2005 WL 1024490, at *2. First, there can be no "form of state or local permitting or preclearance that, by its nature, could be used to deny a railroad the ability to conduct some part of its operations or to proceed with activities that the Board has authorized." *Id.* And second, "there can be no state or local regulation of matters directly regulated by the Board—such as the construction, operation, and abandonment of rail lines . . . railroad mergers, line acquisitions, and other forms of consolidation . . . and railroad rates and service." *Id.* When the state regulation at issue is not permitting or preclearance and does not overlap active Board regulation, the STB uses a fact-specific, as-applied conflict preemption test, under which the ICCTA preempts a state "action that would have the effect of foreclosing or unduly restricting a railroad's ability to conduct any part of its operations." *Id.* at *4.

Union Pacific has no quarrel with the STB's standard for conflict preemption insofar as it goes. However, to the extent the STB's two-pronged test for categorical preemption is meant to describe the entire scope of the ICCTA's express preemption provision, it is substantially underinclusive. As the Supreme Court has held, the inquiry into express preemption must begin with the language of the preemption clause itself. *See Easterwood*, 507 U.S. at 664. Yet, instead of stepping back and analyzing the scope of § 10501(b)'s express preemption clause based on the statutory text, the STB has constructed its standard as a conglomeration of types of state laws that "courts have found" preempted in particular cases. *See CSX Transp. Inc*, 2005 WL 1024490, at *2. Moreover, none of the cases on which the STB relies themselves purported comprehensively to delineate the express preemption effected by the ICCTA; indeed, some actually predate the statute's enactment. *See id.* (citing *Kalo*, 450 U.S. at 318 and *Deford v. Soo Line R.R.*, 867 F.2d 1080, 1088-91 (8th Cir. 1989)). As a result, the two categories the STB cites under which state activities are expressly preempted fail to track, and are considerably narrower than, the scope of preemption that the language of § 10501(b) requires.

For instance, under the STB's first category, federal law preempts any form of state permitting or preclearance that could deny a railroad the ability to conduct rail operations. While this is undoubtedly true, § 10501(b) reaches much further

than permitting or preclearance; it vests the STB with exclusive regulatory jurisdiction over *all* aspects of rail transportation and the operations of railroad facilities. Any state regulation purporting to govern rail transport or operations—not just permitting or preclearance—is expressly preempted. Similarly, in its second category, the STB recognizes that there can be no state or local regulation of matters directly regulated by the Board, including operation of rail lines. Again, that is true insofar as it goes. But § 10501(b)'s grant of exclusive jurisdiction does not depend on whether the Board has actively regulated rail operations; state laws that attempt to regulate such operations are preempted even when the STB has chosen not to regulate.

Ignoring the plain language of § 10501(b), the STB nonetheless opines that the two under-inclusive categories it has discerned from case law describe the full scope of the statute's express preemption. According to the Board, state laws that otherwise regulate rail transportation or operations—including state laws affecting crossing disputes—are preempted only to the extent that they "would have the effect of foreclosing or unduly restricting a railroad's ability to conduct any part of its operations." *CSX Transp. Inc.*, 2005 WL 1024490, at *3. In other words, state regulation of rail transportation and railroad facility operations is permissible if it does not go too far. But by its plain terms the statute vests the STB with *exclusive*

jurisdiction over the enumerated subject matters; it provides no exception permitting "minor" state regulation of rail transportation or operations.

As this Court recently observed, "[t]he STB's position with respect to . . . routine crossing cases is consistent with the historical, pre-ICCTA rule governing these crossing disputes." *New Orleans & Gulf Coast Ry. Co. v. Barrois*, 533 F.3d 321, 333 (5th Cir. 2008). In particular, the STB's approach reflects guidance from pre-ICCTA cases like *Lehigh Valley Railroad v. Board of Public Utility Commissioners*, which held that the 1920 Transportation Act should not be read "to thrust upon the Interstate Commerce Commission investigation into parochial matters" like rail crossings that could hardly be seen to "interfere with or impair economical management" of a railroad. 278 U.S. 24, 35 (1928). But that guidance is outdated. The Board cannot reflexively rely on pre-ICCTA understandings of concurrent ICC-state jurisdiction over rail operations at crossings in light of the sea change brought about by the ICCTA itself. Unlike the framework of the previous statutes, the ICCTA grants the Board *exclusive* jurisdiction over transportation by rail carriers, *see* 49 U.S.C. § 10501(b)(1) and the operations of railroad facilities, *see* § 10501(b)(2). This current statute's language admits of no ambiguity: unlike the prior statutory scheme, the STB's jurisdiction under the ICCTA is in no way shared. [9]

[9] *Barrois* involved a suit brought in federal court by a Louisiana railroad against Louisiana property owners, challenging the landowners' right to bring a state law

2. The STB's interpretation of the scope of ICCTA express preemption is not entitled to deference

In *Wyeth v. Levine*, 129 S. Ct. 1187 (2009), the Supreme Court recently addressed whether agencies should receive *Chevron* deference when interpreting the preemptive scope of their enabling statutes. The Court held that "agencies have no special authority to pronounce on preemption absent delegation by Congress." *Id.* at 1201.[10] The Court emphasized that it never had deferred "to an agency's

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cause of action compelling the railroad to provide private crossings. 533 F.3d at 326-27. A panel of this Court dismissed the case for lack of federal question jurisdiction, holding in part that the ICCTA did not completely preempt the landowners' ability to bring that state law cause of action. *See id*. at 336. Reasoning by analogy to ordinary preemption, *see id.* at 332, the panel considered the landholders' state law cause of action within the framework of the STB's test for ICCTA preemption, under which routine crossing disputes are not expressly preempted and are impliedly preempted only to the extent they "impede rail operations." *Id*. at 333 (internal quotation omitted). Because the railroad did not prove that the statute interfered substantially with rail operations, the panel concluded that the statute was not preempted, and hence that complete preemption could not establish the predicate for federal subject matter jurisdiction. *See id.* at 334-36. The panel did not independently address the meaning of § 10501(b)'s express preemption language or otherwise question the STB's view that crossing disputes are subject only to implied preemption analyses. *See id.* at 332. The *Barrois* court's approach to these preemption issues is understandable, because the railroad apparently litigated the case purely as an as-applied challenge. *See id.* at 333 ("The Railroad raises an as-applied preemption challenge to the Louisiana state law."). Had the issue been raised, in our view (and that of the district court and panel in this case) the application of the Louisiana statute would have been expressly preempted by § 10501(b). And while this Court has not "defin[ed] the precise contours of the complete preemption doctrine under the ICCTA," *id.* at 334, that conclusion would likely have convinced the panel that the doctrine applied and provided federal question jurisdiction in that case. *See id.* at 331 (noting that "the complete preemption doctrine applies to state causes of action that 'fall squarely' under [§ 10501(b)]") (citation omitted).

[10] Congress sometimes does explicitly grant an agency authority to determine

conclusion that state law is preempted," *id.* (emphasis in original), and explained that "[t]he weight we accord the agency's explanation of state law's impact on the federal scheme depends on its thoroughness, consistency, and persuasiveness." [11] *Id.* (citing *United States v. Mead Corp.*, 533 U.S. 218, 234-35 (2001) and *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)). Because the ICCTA does not delegate to the STB interpretive authority over the scope of statutory preemption, the STB's views on that subject do not merit *Chevron* deference, and the consideration to which the Board's views are entitled under *Skidmore* is limited to their "power to persuade." *Christensen v. Harris County*, 529 U.S. 576, 587 (2000) (quotation omitted); *see also Mead*, 533 U.S. at 235 (agency's opinion only persuasive to the extent of "its writer's thoroughness, logic and expertness, its fit with prior interpretations, and any other sources of weight.").

The STB's view of ICCTA express preemption is entitled to no weight in this Court's analysis because the Board has never persuasively explained its

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the scope of a statutory preemption clause. *See Wyeth*, 129 S. Ct. at 1201 and n.9 (listing examples). For instance, 49 U.S.C. § 5125(d) gives the Secretary of Transportation authority to issue "a decision on whether" a state law "requirement" applying to the transport of hazardous waste "is preempted." The ICCTA contains no similar provision.

[11] To the extent that Franks and the STB rely on earlier case law for the proposition that the Board's interpretation of the scope of ICCTA preemption is entitled to controlling, *Chevron*-style deference, *see* Appellant Br. at 22-23; STB Br. at 13-14, *Wyeth* clarifies that the STB's view merits deference only to the extent it is persuasive.

interpretation of § 10501(b). As discussed, the STB's view of the scope of its exclusive jurisdiction is not grounded in the statutory language at all, but instead derives entirely from its adoption of the results of particular court cases, many of which predate the enactment of the ICCTA. *See CSX Transp. Inc.*, 2005 WL 1024490, at *2. Indeed, in its brief to this Court, the STB acknowledges that its view of exclusive jurisdiction merely "reaffirmed the [pre-ICCTA] primacy of state law governing railroad crossings," even though the ICCTA fundamentally altered the federal-state balance of rail regulation. *See* STB Br. at 18. Because the STB's statutory interpretation is entirely divorced from the text of the statute, it lacks the persuasiveness that could accord it weight under *Skidmore*.

Indeed, even if *Chevron* were theoretically applicable to the STB's interpretation of the scope of ICCTA express preemption, the Board's existing interpretation of § 10501(b) would not be entitled to any deference. Under *Chevron's* familiar two-step approach, a court must first consider "whether Congress has directly spoken to the precise question at issue." *Chevron USA Inc. v. NRDC*, 467 U.S. 837, 842 (1984). If the statute is unclear, the court must proceed to step two and consider whether the agency's view "is based on a permissible construction of the statute." *Id.* at 843. "If the intent of Congress is clear," however, "that is the end of the matter; for the court, as well as the agency,

must give effect to the unambiguously expressed intent of Congress." *Id.* at 842-43.

The STB's bid for deference in this case would not satisfy either prong. It would fail under the first prong because, as discussed, the statute's provisions for express preemption are clear. Under the ICCTA, "[t]he jurisdiction of the Board over . . . transportation by rail carriers [and] . . . the operation . . . of . . . facilities . . . is exclusive." 49 U.S.C. § 10501(b). This language unambiguously precludes any concurrent state regulation of rail transportation or main line rail operations.

Moreover, even if the statute were ambiguous, the STB's view could receive no deference under *Chevron*'s second prong because it is not based on a "construction of the statute" at all, much less a "permissible" one. Where, as here, an agency relies on prior judicial interpretations of a statute rather than construing the statute itself, it is not entitled to *Chevron* deference. *See Blackburn v. Reich*, 79 F.3d 1375, 1377 n.3 (4th Cir. 1996) ("Because the Secretary based his decision in the instant case on judicial precedent rather than his own interpretation of the statute, we owe no more deference than we would any lower court's analysis of the law.") (internal quotation omitted); *see also Hodgson & Sons v. FERC*, 49 F.3d 822, 826 (1st Cir. 1995) (same); 1 Richard J. Pierce, Administrative Law Treatise § 3.5, at 166 (4th ed. 2002) (same).

XIV. THE ICCTA IMPLIEDLY PREEMPTS FRANKS' STATE LAW POSSESSORY ACTION

Even if this Court finds that Franks' state law possessory claim is not expressly preempted by the ICCTA, it should find the claim impliedly preempted. Under the doctrine of conflict preemption, state law must fall where it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *English v. Gen. Elec. Co.*, 496 U.S. 72, 79 (1990) (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)). The STB and the courts of appeals agree that the ICCTA impliedly preempts state law causes of action that "would have the effect of foreclosing or unduly restricting a railroad's ability to conduct any part of its operations." *CSX Transp. Inc.* 2005 WL 1024490, at *4; *see also, e.g.*, *Barrois*, 533 F.3d at 332; *Emerson*, 503 F.3d at 1133; STB Br. at 10 and n.15 (citing cases). [12]

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[12] The STB has not always used consistent language to describe the conflict-preemption standard. For instance, it has stated that a state action is impliedly preempted if it "would have the effect of preventing or unreasonably interfering with rail transportation." *CSX Transp. Inc.*, 2005 WL 1024490, at *2; *see also Maumee & W. R.R. Corp. and RMW Ventures, LLC – Pet. for Decl. Order*, Finance Dkt. 34354, 2004 WL 395835, at *1 (STB March 2, 2004) ("state and local regulation is permissible where it does not interfere with interstate rail operations."). Each of these restatements makes clear that conflict preemption requires a showing of interference with rail operations or transportation. In its brief, the STB also suggests that state law causes of action should be impliedly preempted if they "constitute[e] regulation of the railroad's operations." STB Br. at 13. Under this standard, the ICCTA also preempts Franks' cause of action here because, as discussed above, the Supreme Court has held that the term "regulation" encompasses private civil suits directly affecting the enumerated subject matter. *See* note 3 and accompanying text, *supra*.

Rather than simply apply the STB's well-settled standard for conflict preemption to the facts of this case, Franks insists that this Court should presume that Congress intended no implied preemption because it made provision for express preemption where it thought preemption appropriate. Appellant Br. at 36-37. The most recent Supreme Court cases have repudiated that notion, holding squarely that the existence of an express preemption provision "does *not* bar the ordinary working of conflict pre-emption principles." *Sprietsma v. Mercury Marine*, 537 U.S. 51, 65 (2002) (emphasis in original) (quoting *Geier v. American Honda Corp.*, 529 U.S. 861, 869 (2000). And Franks freely acknowledges that, despite the statute's provision for express preemption, "no circuit has expressly declined to follow the STB test" for conflict preemption. Appellant Br. at 20.

If this Court applies the STB's conflict-preemption test to Franks' state law possessory action, it must credit the district court's factual findings unless "clearly erroneous." *Florida E. Coast*, 266 F.3d at 1327; *see also Franks*, 534 F.3d at 445 ("Any factual findings made for the purposes of determining ICCTA preemption . . . are reviewed only for clear error."). The district court found that, "according to trial testimony," private crossings like those at issue here affect "drainage and maintenance issues." TR 6-7. That unchallenged finding and the supporting undisputed facts of record establish that Franks' claim is impliedly preempted for its interference with Union Pacific's rail operations.

A. Franks' Requested Relief Would Substantially Impair Track Drainage, Maintenance, and Operational Efficiency

Unchallenged trial testimony supports the district court's finding that an injunction requiring Union Pacific to rebuild two rail crossings and leave two more in place would detrimentally affect its railroad operations. The following testimony was not disputed at trial. The entire length of the Union Pacific right of way abutting Franks' property lies in a flood plain. TT 145. Before 2007, the four private rail crossings running across the right of way and at issue here consisted of wooden boards nailed to the existing railroad ties with associated dirt approach ramps to ensure a flat surface upon which to cross the rails. TT 156-50. According to Union Pacific's Director of Track Maintenance James Moeller, "these type" of private crossings cause the majority of track maintenance problems he sees. TT 159. And given Louisiana's high water table, Mr. Moeller stated that the biggest maintenance issue associated with such crossings involves drainage. TT 157.

In particular, these sorts of simple private crossings prevent rainwater from draining off of the rail bed and instead cause it to pool in the center of the tracks. TT 157. This pooling crushes the ballast supporting the tracks, leads to an hydraulic pumping action whereby the rail ties move up and down, and causes the ties themselves to wear out much more quickly than they otherwise would. TT 157-58. In Louisiana, wet private crossings also grow muddy and quickly become

what Mr. Moeller described as a "trackman's nightmare." TT 157. In order to repair the tracks damaged by a drainage failure at a crossing, maintenance crews have to "remove the crossing, remove the approaches, [and] dig the mud out. It's very time consuming, it's very costly, and its' a very difficult task to perform." TT 157.

Moreover, when rails at a private crossing are damaged by failed drainage, maintenance crews often cannot fix them immediately. TT 160. Until these crossings are repaired, trains must proceed along the affected portion of the track at a reduced speed, under a slow order, for safety reasons. TT 160. These slow orders negatively impact railroad operations by increasing fuel costs, TT 174, and slowing down fleet-wide average speed, TT 175-76.

As this summary of the record makes clear, it was undisputed at trial that the types of private crossings at issue cause drainage problems that damage track integrity, add to a railroad's maintenance responsibilities, and increase operating costs. These findings amply demonstrate that a state law action requiring Union Pacific to rebuild two such crossings and prevent Union Pacific from closing two more is impliedly preempted because it would "unduly restrict[] [the] railroad's ability to conduct [a] part of its operations." *CSX Transp. Inc.*, 2005 WL 1024490, at *4.

B. Franks' Arguments to the Contrary Ignore the Factual Record Developed at Trial

Franks advances a hodgepodge of arguments against conflict preemption, none of which have merit. First, Franks claims that the district court's holding was insufficiently specific to justify conflict preemption, because it relied on only "generalized evidence." Appellant Br. at 40. But this Court can affirm the district court on any basis supported by the record, and Union Pacific's supporting evidence was tailored to the problems posed by the crossings at issue in this case. Union Pacific adduced specific testimony regarding the area's elevated water table. TT 157. Its witnesses testified about the ways in which the types of primitive private crossings at issue impact track maintenance in the region of Louisiana in which Franks' property is located. TT 157-59. They testified about the special challenges to rail maintenance that are caused by mud at private rail crossings in a low-lying and damp environment. TT 157. And they explained how all of these factors jointly and negatively impact operational efficiency and cost. TT 160, 175-76. These undisputed facts in combination are amply specific for this Court to conclude that the four crossings unduly burden a relevant part of Union Pacific's rail operations.

Certainly Union Pacific was not required to prove that it has already sustained substantial damage or suffered substantial costs from these particular crossings to establish the predicate for preemption. Courts have regularly

considered potentialities when analyzing as-applied ICCTA preemption. For instance, in *City of Lincoln*, the Eighth Circuit upheld the STB's ruling that a state effort to condemn part of a railroad's right of way was preempted because the use of that land might interfere with railroad operations sometime in the future. 414 F.3d at 862; *see also Fayard v. N.E. Vehicle Services, LLC*, 490 F. Supp. 2d 134, 141 (D. Mass. 2007) *rev'd on other grounds*, 533 F.3d 42 (1st Cir. 2008) (injunction seeking that railroad reduce noise emissions has "the *potential* to interfere with . . . rail operations") (emphasis added); *Rushing v. Kan. City S. Ry.* 194 F. Supp. 2d 493, 499 (2001) (preempting plaintiff's negligence and nuisance claims "*potentially* interfering with interstate rail operations") (emphasis added). Given the difficulties that Union Pacific has had historically with these types of crossings, and the specific problems it has encountered in Louisiana regions with high water tables, Union Pacific clearly demonstrated the potential for interference with its rail operations that the STB conflict-preemption test demands.

Franks' second argument—that, in *Barrois*, this Court already ruled that a action like Franks' is not impliedly preempted, *see* Appellant Br. at 42—fails as well. The *Barrois* court stated that the key inquiry when considering conflict preemption is whether the statutory scheme is "capable of being applied in a manner that does not unreasonably interfere with railroad operations." 533 F.3d at 335. The Court concluded that the statute at issue could be so applied, both

because the parties seeking rail crossings were required to indemnify the railroad for any costs associated with their construction and use, and because the railroad had implicitly admitted that the crossings could be built in a way that did not interfere with rail operations. *Id.* Here, by contrast, Union Pacific has demonstrated that the specific relief Franks seeks threatens to interfere with railroad operations and cannot be granted without a substantial likelihood of interference. Franks requests the entry of an injunction requiring Union Pacific to rebuild two specific crossings and preventing the railroad from closing two more already in place. Trial testimony has demonstrated that the types of primitive crossing at issue routinely interfere with rail operations. Therefore, a judicial remedy mandating that these crossings remain in place necessarily risks interference with Union Pacific's rail operations.

C. If Necessary, the District Court Should Determine in the First Instance Whether Franks Possesses a Deed-Based Right to Use the Rail Crossings

Franks' final argument is that its possessory action cannot constitute interference with rail operations because, more than 85 years ago, Union Pacific's predecessor in interest allegedly gave Franks' predecessor in interest the right to use three of the four crossings and accepted responsibility for "furnish[ing] proper drainage." Appellant Br. at 37-38. That argument has no merit, but even if this

Court accepts it in theory, it would at most warrant a remand, not reversal of the judgment.

The Fourth Circuit has held that a valid contract between a rail carrier and another party may reflect "the carrier's own determination" that the subject of the agreement would not interfere with rail transportation. *See PCS Phosphate Co., Inc. v. Norfolk S. Corp.*, 559 F.3d 212, 221 (2009). Franks relies on that holding, arguing that conditions in a deed granting Union Pacific's predecessor in interest the railroad right of way show that Union Pacific has agreed to provide these crossings, and that the crossings therefore pose no undue interference to its operations. Appellant Br. at 38.

Yet the Fourth Circuit in *PCS Phosphate* emphasized that it was *not* holding "that a voluntary agreement could never constitute an 'unreasonable interference' with rail transportation," but instead just that "the facts of th[at] case indicat[ed] than any interference [wa]s not unreasonable." 559 F.3d at 222. Here, the claim that a single provision in a deed signed in 1923 by predecessors in interest to both Franks and Union Pacific constitutes an admission by Union Pacific that these rail crossings do not presently interfere with rail transportation is far fetched. Union Pacific amply demonstrated such interference at trial, and an 85 year-old deed cannot alter that reality.

Even if Franks' deed-based argument had merit in theory, it should not matter in practice and at most justifies a remand for further proceedings. If this Court agrees with the district court and panel that Franks' possessory action is expressly preempted by ICCTA § 10501(b), the predecessor deed is completely irrelevant. If on the other hand it proves necessary for this Court to address implied preemption, and if this Court believes that the deed could mitigate the finding of substantial interference with rail operations that is a predicate to implied preemption, this Court should remand to the trial court to determine the deed's applicability, validity, and enforceability in the first instance. Having decided the case based on express preemption, the district court never had the opportunity to address those issues; indeed, evidence as to whether Franks has an entitlement to *ownership* of the crossings was not before the court at all in this possessory action. *See* TT 351 (Counsel for Franks: "Do we have to establish ownership of the right of servitude in this case? We don't. That's later. That's a petitory action.").

CONCLUSION

The judgment of the panel of this Court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32(A)

Pursuant to FED. R. APP. P. 32(a)(7)(C), the undersigned certifies this brief complies with the type-volume limitations of FED. R. APP. P. 32(a)(7)(B).

1. This brief complies with the type-volume limitation of FED. R. APP. P. 32(a)(7)(B) because this brief contains 13070 words, excluding the parts of the brief exempted by FED. R. APP. P. 32 (a)(7)(B)(iii).

2. This brief complies with the typeface requirement of FED. R. APP. P. 32(a)(5) and the type-style requirements of FED. R. APP. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface in Microsoft Word 2003 using 14 point Times New Roman font in the text and footnotes.

Executed May 6, 2009

CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that on this the 6th day of May, 2009, 2 true and correct paper copies and an electronic copy of the En Banc Brief of Appellees, were served on the following:

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Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.