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QUESTION PRESENTED

Whether the decision below correctly adheres to unanimous circuit court precedent by confirming the complete preemptive effect of the Federal Railroad Safety Act, without regard to the relief available after removal jurisdiction attaches?

RULE 29.6 STATEMENT

Canadian Pacific Railway Company is a wholly-owned subsidiary of Canadian Pacific Railway Limited; Soo Line Railroad Company is an indirect wholly-owned subsidiary of Canadian Pacific Railway Company. Canadian Pacific Limited changed its name to Fairmont Hotels & Resorts Inc. as of October 1, 2001, and since that date has no relationship to Canadian Pacific Railway Limited, Canadian Pacific Railway Company or Soo Line Railroad Company. No other publicly held corporation owns 10% or more of the shares of either Canadian Pacific Railway Company, Canadian Pacific Railway Limited, or Soo Line Railroad Company.

PARTIES TO THE PROCEEDINGS

Petitioners are Tom and Nanette Lundeen, individually and on behalf of Molly and Michael Lundeen, minors; Melissa Todd; Irene Clare Korgel; Trent and Randi Lou Westmeyer; Darla M. Just; Mary Beth Gross, individually and on behalf of Brett Gross, a minor; Mark and Sandra Nesbit; LeRoy Storby; Ray Lokoduk; JoAnn Flick; Wilfred and Geraldine Dahly; Marilyn Carlson; Gerald Wickman; Dion and Brenda Darveaux, individually and on behalf of Kendall Darveaux, a minor; Shelly Hingst; Bobby and Mary Smith; Richard Muhlbradt; Doug Weltzin; Nathan and Nichole Freeman, individually and on behalf of Ashlyn Freeman, a minor; Charlotte Goerndt; Leo Gleason; Judy Deutsch, individually and on behalf of Tyrone Deutsch, a minor; Denise Duchsherer, Leo Duchsherer, and Joshua Duchsherer; Larry and Carol Crabbe; Rebecca M. Behnkie, individually and on behalf of Nathaniel Behnkie, a minor; Charles and Sandra Swenson; Larry and Tami Schafer, individually on behalf of Jenna Schafer, a minor; John Salling, individually, and Lorenda Poissant Salling, individually and on behalf of Sebastian Poissant, a minor; Racheille Todoshchuk; Lonni Shigley; and Richard McBride and Linda McBride.

Respondents are Canadian Pacific Railway Company, Canadian Pacific Limited, Canadian Pacific Railway Limited, and Soo Line Railroad Company.

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OPINIONS BELOW

The decision of the United States Court of Appeals for the Eighth Circuit affirming removal on complete preemption grounds is reported at 447 F.3d 606 and reproduced in petitioners' appendix ("Pet. App.") at 1a-29a. The order denying rehearing en banc and rehearing by the panel is unreported, but reproduced at Pet. App. 53a.

The decision of the United States District Court for the District of Minnesota denying an initial motion to remand is reported at 342 F. Supp. 2d 826; the ultimate remand after express references to federal law were excised from the complaint is unreported, but available at 2005 WL 563111. The district court's decisions are reproduced at Pet. App. 30a-42a and Pet. App. 43a-52a, respectively.

JURISDICTION

Petitioners timely sought to invoke this Court's jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This Petition implicates the Federal Railroad Safety Act (49 U.S.C. § 20101, *et seq.*) and provisions of Title 28 affording federal question removal jurisdiction (28 U.S.C. §§ 1331 & 1441).

RESPONDENTS' STATEMENT OF THE CASE

The nation's railroads are the paradigm of interstate commerce, prompting this Court to long ago recognize that federal oversight "is practically indispensable to the operation of an efficient and economical national railway system." *S. Pac. Co. v. Arizona*, 325 U.S. 761, 771 (1945). Congress made that indispensable federal governance "exclusive" with the enactment of the Federal Railroad Safety Act ("FRSA").

The FRSA vests the Federal Railroad Administration ("FRA") with plenary authority to "prescribe regulations and issue orders for every area of railroad safety." 49 U.S.C. § 20103 (emphasis added). To safeguard against local interference Congress preempted all state laws based upon subject matters "covered" by FRA standards. 49 U.S.C. § 20106. This extraordinary preemptive force reflects both the supremacy of federal law and superiority of a unitary federal forum:

[S]afety in the nation's railroads [is not] advanced sufficiently by subjecting the national rail system to a variety of enforcement in 50 different judicial and administrative systems.

* * *

[Indeed,] the railroad industry has very few local characteristics. Rather, in terms of its operations, it has a truly interstate character calling for a uniform body of regulation and enforcement. . . . To subject a carrier to enforcement before a number of different state administrative and judicial systems in several areas of operation could well result in an undue burden on interstate commerce.

H.R. Rep. No. 91-1194 (1970), *reprinted in* 1970 U.S.C.C.A.N. 4104, 4109, 4110-11.

Petitioners decry the extension of federal jurisdiction to claims "covered" by FRA regulations, but every circuit opinion addressing the jurisdictional impact of the FRSA holds the preemption effected to be "complete" so as to permit removal. *Lumdeen v. Canadian Pac. Ry. Co.*, 447 F.3d 606, 607 (8th Cir. 2006); *Peters v. Union Pac. R.R. Co.*, 80 F.3d 257, 262 (8th Cir. 1996); *Rayner v. Smirl*, 873 F.2d 60, 66 (4th Cir.), *cert. denied*, 493 U.S. 876 (1989).¹ In an attempt

¹ Complete preemption does not require that "covered" claims "must be removed," "may only be brought in federal court," or "must be heard in

to invent a schism in authority petitioners castigate the *Lumdeen* court for not mechanically following other holdings that have cabined the jurisdictional implications of substantially different statutory schemes to cases in which federal remedies are substituted for preempted state claims. Pet. at 13-23.

Nothing about the distinct approaches to preemption that discrete statutes have produced is "compelling." Sup. Ct. R. 10. The jurisdictional boundaries of the FRSA cannot be surveyed through the prisms of divergent statutory regimes. On the contrary, the result is dictated by the language of the statute, and not surprisingly the FRSA's broad terms have prompted circuit courts to unanimously recognize the statute's complete preemptive effect. Furthermore, the Court has rejected the premise for this Petition: a federal remedy is not a prerequisite to the exercise of federal question jurisdiction by way of complete preemption or otherwise. *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 317-18 (2005); *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 391 n.4 (1987).

With the circuit courts speaking as one and the federal remedy prerequisite a fiction, this case is not a worthy vehicle for illuminating the scope of federal jurisdiction; the path is already well lit.

federal in federal court." Petition ("Pet.") at 2. Rather, as with all 28 U.S.C. § 1441 removals resort to a federal forum is at a defendant's option.

BACKGROUND

I. THE ACCIDENT

On January 18, 2002, a Canadian Pacific Railway train derailed near Minot, North Dakota. Amended Complaint, ¶ VIII.² Several tank cars carrying anhydrous ammonia released their lading. *Id.* According to petitioners:

The Minot Derailment was caused by an ineffective and inadequate inspection and maintenance program by Defendant CPR. CPR's inspection and maintenance program failed to identify or replace cracked joint bars before those joint bars completely fractured.

Id. at ¶ XVII.

Petitioners seek redress for personal injuries and property damages allegedly sustained. *Id.* at ¶ XXXVIII.

II. THE ENSUING LITIGATION

This litigation ended up before the Eighth Circuit after a most circuitous jurisdictional journey. An overview of the complex proceedings below follows.

A. The first Minot derailment lawsuits.

Even before debris from the derailment could be cleared a putative class action was launched in North Dakota federal court. *See Mehrl v. Canadian Pac. Ry. Ltd.*, 227 F.R.D. 505, 507 (D.N.D. 2005). A class encompassing these petitioners was later certified. *Id.* at 515, 522.

² The pleadings determine whether the subject matter of the claims is "covered" for FRSA preemption purposes. *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 665 (1993) (assuming the complaint "states a valid cause of action"). Thus the "facts" upon which the preemption analysis must be based are drawn from the complaint, reproduced in respondents' appendix ("Resp. App.") at 1a-19a.

Approximately one year after the accident, dozens of North Dakotans shopped individual lawsuits in a forum far from Minot – the Hennepin County, Minnesota district court. *See, e.g., Allende v. Soo Line R.R. Co.*, No. 03-3093, slip op. (D. Minn. Jan. 29, 2004) (Resp. App. at 20a-54a). The claimants fled their home state because North Dakota tort reforms curb punitive damages and eliminate joint and several liability. N.D. Cent. Code § 32-03.2-02; N.D. Cent. Code § 32-03.2-11(4).³ Besides that, a jury drawn from metropolitan Minneapolis was perceived to be more sympathetic.

The state court lawsuits were promptly removed to federal court on complete preemption grounds. The federal court remanded, believing that removal jurisdiction is foreclosed by the FRSA's failure to afford a substitute federal remedy for the preempted state claims. *Allende*, slip op. at 18-20. Unfortunately, that denial of federal jurisdiction escaped appellate scrutiny. 28 U.S.C. § 1447(d).

B. The Lundeen district court proceedings.

Following *Allende*, litigation from Minot – including petitioners' cases – deluged the Minnesota court. The *Allende* precedent precluded removal of the subsequent case filings on complete preemption grounds. Petitioners, however, provided a path to the federal courthouse by pleading federal environmental claims. *Lundeen v. Canadian Pac. Ry. Co.*, 342 F. Supp. 2d 826, 829 (D. Minn. 2004). This group of cases was promptly removed.

The district court rejected petitioners' first request for remand because the federal claims expressed on the face of the complaints invoked federal question jurisdiction. *Id.* at 829-31. A second remand motion succeeded after petitioners

³ Petitioners' stratagem ultimately failed: the Minnesota state court rejected punitive damages and applied North Dakota law. *In re: the Soo Line Co. Derailment of Jan. 18, 2002 in Minot, ND*, No. MC 04-007726, slip op. at 1, 3 (Minn. Dist. Ct. Dec. 21, 2005) (Resp. App. at 55a-72a).

were allowed to purge all federal references. *Lumdeen v. Canadian Pac. Ry. Co.*, No. 04-3220, 2005 WL 563111, at *3 (D. Minn. Mar. 9, 2005) (Pet. App. at 43a-52a). Because federal jurisdiction had been initially accepted the second remand order was discretionary and, therefore, appealable. See, e.g., *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 711-12 (1996) (remands not pursuant to 28 U.S.C. § 1447 subject to appellate review); *Gaming Corp. of Am. v. Dorsey & Whitney*, 88 F.3d 536, 541-42 (8th Cir. 1996) (remand of supplemental state claims appealable).

C. The appellate proceedings.

The remand order was challenged as an affront to the forum shopping admonition in *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 357 (1988). After the briefing had closed, this Court affirmed the propriety of removal based upon underlying substantial federal questions, notwithstanding the absence of a parallel federal cause of action. *Grable*, 545 U.S. at 317-18. Shortly thereafter the Eighth Circuit decided *In re Derailment Cases*, which confirmed the pervasive implications of the FRSA in analogous derailment litigation. 416 F.3d 787, 793-94 (8th Cir. 2005). Reacting to these precedents the appellate court asked for supplemental briefing. *Lumdeen v. Canadian Pac. Ry. Co.*, No. 05-1918, slip order (8th Cir. Feb. 13, 2006) (Resp. App. at 73a).

After further consideration the court enabled the jurisdictional effect of the FRSA to be realized. That result flowed from two Eighth Circuit pronouncements regarding the FRSA's complete preemption ramifications: *Peters v. Union Pac. R.R. Co.*, 80 F.3d 257 (8th Cir. 1996) (affirming removal); and *Chapman v. Lab One*, 390 F.3d 620 (8th Cir. 2004) (reversing removal). Prior to those decisions the Fourth Circuit had similarly recognized the jurisdictional effect of the FRSA. *Rayner v. Smirl*, 873 F.2d 60 (4th Cir.), cert. denied, 493 U.S. 876 (1989).

Since the FRSA had already been understood to have complete preemptive effect, the *Lumdeen* panel merely needed to assess whether FRA regulations "covered" the subject matter of the claims as was the case in *Peters* and *Rayner*, or not as in *Chapman*. *Lumdeen*, 447 F.3d at 613-14. Using negligent inspection allegations as a template, the Eighth Circuit found petitioners' claims to be subsumed by numerous federal standards. In particular,

federal regulations establish a specific inspection protocol including how, 49 C.F.R. § 213.233(b), when, §§ 213.233(c) & .237(a)-(c), and by whom, §§ 212.203, 213.7 & .233(a), track inspections must be conducted; the regulations establish a national railroad safety program intended to promote safety in all areas of railroad operations, § 212.101(a); federal and state inspectors determine the extent to which the railroads, shippers, and manufacturers have fulfilled their obligations with respect to, among other things, inspection, § 212.101(b)(1); and railroads face civil penalties for violations, § 213 App. B. It is clear the FRA regulations are intended to prevent negligent track inspection and there is no indication the FRA meant to leave open a state law cause of action.

Id. at 614 (emphasis added). This regulatory "coverage" of track inspections rendered the litigation removable.

At the Eighth Circuit petitioners entreated for the imposition of the same complete preemption prerequisite now heralded before this Court – *i.e.*, the substitution of a federal remedy for the preempted state claims. Following this Court's guidance the appellate court rejected petitioners' pleas and allowed the FRSA's preemptive force to displace "covered" claims:

“The issue of whether complete preemption exists is separate from the issue of whether a private remedy is created under a federal statute. *Cater-*

pillar [482 U.S. at 391 n.4]. Complete preemption can sometimes lead to dismissal of all claims in a case. Although courts may be reluctant to conclude that Congress intended plaintiffs to be left without recourse, see *M. Nakas & Co., Inc. v. First National Bank of Hot Springs*, 930 F.2d 608, 612 (8th Cir. 1991), the intent of Congress is what controls. *Pilot Life Insurance Co. v. Dedeaux*, 481 U.S. 41, 45, 107 S. Ct. 1549, 95 L. Ed. 2d 39 (1987) (citations omitted)."

Id. at 613 n.4 (quoting *Gaming Corp.*, 88 F.3d at 542).

A petition for en banc reconsideration was turned away. Pet. App. 53a.

THE WRIT SHOULD BE DENIED

I. CIRCUIT COURTS AGREE ABOUT COMPLETE FRSA PREEMPTION

Complete preemption removal is firmly rooted in Supreme Court jurisprudence. The acknowledgement of complete preemption under the FRSA does not break new ground: the Fourth and Eighth Circuits have endorsed the statute's jurisdictional implications and no other circuit court has disagreed. Such unanimity is antithetical to the "compelling reasons" necessary to justify certiorari review. Sup. Ct. R. 10.

A. Complete preemption removal is well established.

Complete preemption arises when "the pre-emptive force of a statute is so 'extraordinary' that it 'converts an ordinary state common-law complaint into one stating a federal claim for purposes of the well-pleaded complaint rule.'" *Caterpillar*, 482 U.S. at 393 (quoting *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 65 (1987)). The doctrine is an exception

to the general bar against removal on account of a federal defense. *Id.*

The seminal precedent, *Avco Corp. v. Aero Lodge No. 735, Int'l Ass'n of Machinists & Aerospace Workers*, delineates the controlling analysis. 390 U.S. 557 (1968). The *Avco* union removed a strike injunction lawsuit, arguing that § 301 of the Labor Management Relations Act ("LMRA") overwhelmed the state law claim. *Id.* at 558-59. This Court agreed:

An action arising under § 301 is controlled by federal substantive law even though it is brought in a state court. . . . It is thus clear that the claim under this collective bargaining agreement is one arising under the "laws of the United States" within the meaning of the removal statute.

Id. at 560 (citing 28 U.S.C. § 1441(b)).

Notably, the practical recourse available after removal was not a federal lawsuit; rather, the union was only accountable through a contractual dispute resolution process. The lack of judicial relief after removal was, nonetheless, irrelevant: "[t]he necessary ground of decision [in *Avco*] was that the preemptive force of § 301 is so powerful as to displace entirely any state cause of action [within its scope]." *Franchise Tax Bd. v. Constr. Laborers Vacation Trust*, 463 U.S. 1, 23 (1983) (emphasis added). *Accord Metropolitan Life*, 481 U.S. at 64. Hence, the breadth of a federal statute's preemptive "power" – not the availability of federal redress – is the touchstone of complete preemption, as *Caterpillar* and *Grable* later confirmed. See *infra* at 18-23.

B. The FRSA makes railroad regulatory oversight nationally uniform.

The preemptive effect of the FRSA is no less than the statute considered in *Avco*. Congress federalized regulation of the nation's rail transportation system regulation as follows:

Laws, regulations, and orders related to railroad safety and laws, regulations, and orders related to railroad security shall be nationally uniform to the extent practicable. A State may adopt or continue in force a law, regulation, or order related to railroad safety or security until the Secretary of Transportation (with respect to railroad safety matters), or the Secretary of Homeland Security (with respect to railroad security matters), prescribes a regulation or issues an order covering the subject matter of the State requirement. A State may adopt or continue in force an additional or more stringent law, regulation, or order related to railroad safety or security when the law, regulation, or order:

- (1) is necessary to eliminate or reduce an essentially local safety or security hazard;
- (2) is not incompatible with a law, regulation, or order of the United States Government; and
- (3) does not unreasonably burden interstate commerce.

49 U.S.C. § 20106 (emphasis added). *Accord* 49 C.F.R. § 213.2.

Pursuant to this explicit mandate state law is displaced whenever "regulations issued by the Secretary cover the subject matter of the . . . allegations." *Easterwood*, 507 U.S. at 665 (emphasis added). *See also CSX Transp., Inc. v. Williams*, 406 F.3d 667, 672 (D.C. Cir. 2005) ("The FRSA preemption provision . . . authorizes the court only to determine whether the regulation covers the subject matter . . .")

(emphasis in original). The statute's express displacement of state law could not be clearer or more powerful.

The genesis for FRSA preemption was the threat to interstate commerce posed by local oversight:

[T]he railroad industry has very few local characteristics. Rather, in terms of its operations, it has a truly interstate character calling for a uniform body of regulation and enforcement. . . . To subject a carrier to enforcement before a number of different state administrative and judicial systems in several areas of operation could well result in an undue burden on interstate commerce.

H.R. Rep. No. 91-1194 (1970), *reprinted in* 1970 U.S.C.C.A.N. 4104, 4110-11 (emphasis added). Congress concluded that federal oversight would promote the safe operation of the nation's rail transportation system, a legislative judgment entitled to judicial obeisance.⁴

Giving effect to this purpose, the statute vests federal authorities with "exclusive" administration of railroad safety regulations. 49 U.S.C. § 20111(a). To protect against the parochial tendencies of state regulators, courts and juries, governmental authorities are singularly charged with FRA enforcement, and the forum for that enforcement is expressly federal. 49 U.S.C. § 20112 (authorizing federal court recourse by the United States Attorney General); 49 U.S.C. § 20113(a) & (b) (authorizing limited federal court action by a participating "State authority" if federal authorities fail to

⁴ Significantly, the complete preemptive effect of railroad legislation is not newly recognized. The Railway Labor Act and Interstate Commerce Act have both been held to completely preempt state claims. *Deford v. Soo Line R.R. Co.*, 867 F.2d 1080, 1084-85 (8th Cir.) ("We believe that the fundamental question is whether the RLA or the ICA so pervasively occupy the field of railroad governance that a competing state law claim necessarily invokes federal law."), *cert. denied*, 492 U.S. 927 (1989).

act). The statute contemplates litigation no place other than in federal court and subject exclusively to federal law.

C. Federal court is open for completely preempted FRSA claims.

The Fourth and Eighth Circuits are in synch: the FRSA is “so powerful” as to enable removal. *Rayner* was the first to recognize the statute’s complete preemptive effect. In that wrongful discharge action the employee sought to clude the National Railroad Adjustment Board by suing in state court. *Rayner*, 873 F.2d at 62-63. The case was removed and remand denied. *Id.* at 63.

In affirming the jurisdictional ramifications of the FRSA the unanimous panel heeded Congress’s judgment that “railroad safety is better served by uniform federal action rather than ‘by subjecting the national rail system to a variety of enforcement in 50 different judicial and administrative systems.’” *Id.* at 65 (quoting H.R. Rep. No. 91-1194, reprinted in 1970 U.S.C.A.N. 4104, 4109).⁵

The court reasoned:

Congress’ desire for national uniformity in railroad safety practices clearly is implicated by Rayner’s common law claims. In one sense, of course, all the trier of fact need do in a wrongful discharge action is determine the reason for the discharge. In another sense, however, Rayner’s claim of wrongful discharge for “whistleblowing” is inextricably

⁵ *Rayner* addressed the previous codification of preemption at 45 U.S.C. § 434; the renumbering of the preemption provision to 49 U.S.C. § 20106 was implemented “without substantive change.” H.R. Rep. No. 103-180, (1993), reprinted in 1994 U.S.C.A.N. 818, 818. The lack of substantive change was recognized by this Court when the § 20106 iteration of FRSA preemption was given identical treatment in *Norfolk S. Ry. Co. v. Shanklin*, 529 U.S. 344 (2000) as the previous preemption provision — § 434 — considered in *Easterwood*.

tied to the question of precisely what railroad safety practices he was blowing the whistle on. To the extent that the justifiable nature of the whistleblowing enters the calculus in wrongful discharge actions, railroad safety laws might be subject to an unpredictable medley of jury determinations, which Congress, in its quest for national uniformity under [the FRSA], sought to avoid. *Id.* at 66.

Because “[c]ongressional intent in the FRSA is clear,” the applicable whistleblower regulation completely preempted parallel common law claims. *Id.* at 63-66.⁶ That Fourth Circuit holding follows exactly the statutory directive.

Peters was the next circuit court precedent to allow the FRSA’s preemptive reach to be realized. 80 F.3d at 260-62. The *Peters* plaintiff contested the railroad’s refusal to return his engineer certificate by suing for conversion. After removal the preemptive realm of the FRSA was enforced in furtherance of the statutory intent to shut state courts out of railroad regulatory enforcement. *Id.* at 261 n.2 (“The FRSA’s legislative history also emphasizes that railroad safety is better served by uniform federal action rather than by subjecting the national rail system to a variety of enforcement in 50 different judicial and administrative systems.”) (quotation omitted). As in *Rayner*, complete preemption was deemed to reign whenever the subject matter of a state law claim is “covered” by FRA regulations. *Id.* at 261.

The appellate court found the certification process to be subsumed by numerous FRA promulgations, in particular 49

⁶ Although the Fourth Circuit reflected upon the “comprehensive remedial scheme for aggrieved railroad employees” provided by the relevant regulations, the appellate court engaged in that exercise only “to confirm its preemptive scope.” *Id.* at 65. The words of the statute, not the provision of an administrative remedy, were dispositive.

C.F.R. §§ 240.401-411. *Id.* at 261-62. Such “coverage” completely preempted plaintiff’s tort claim and afforded federal jurisdiction. *Id.* at 262.⁷ Removal was, therefore, affirmed.

In the wake of *Rayner* and *Peters*, the *Lundeen* court readily acknowledged the FRSA’s jurisdictional implications. 447 F.3d at 612-13. In doing so the Eighth Circuit dismissed the contention that a federal remedy must be provided before complete preemption will lie. *Id.* at 613 n.4. Rather, complete preemption prevails upon the finding that the subject matter is “covered” by FRA regulations. *Id.* at 613-14.⁸

In all, three circuit court decisions have assessed FRSA complete preemption, and each has sustained removal. The only ostensibly contrary authority petitioners could muster is *Smallwood v. Ill. Cent. R.R. Co.*, 385 F.3d 568 (5th Cir. 2004), *cert. denied*, 544 U.S. 992 (2005), and even then the case is mentioned only in passing. *Smallwood* arises from a car/train accident removed on diversity grounds despite the joinder of a non-diverse co-defendant. *Id.* at 571-72. The district court concluded that diversity jurisdiction attached because the joinder was fraudulent.

Addressing only the propriety of joinder, an en banc Fifth Circuit sent the case back to state court. *Id.* at 576. The Opinion did not address, much less apply, complete preemption. *Id.* at 575-76 (“The railroad could not remove on the

⁷ Like in *Rayner* the Eighth Circuit noted in dicta that some of the “covering” regulations contemplated an administrative resolution of certification disputes. *Id.* at 261. These rules “serve[d] to confirm [the FRSA’s] preemptive scope,” not to establish the threshold for complete preemption. *Id.*

⁸ Between *Peters* and *Lundeen* the Eighth Circuit acknowledged complete FRSA preemption in *Chapman*, but concluded that the claims in question were not “covered.” 390 F.3d at 629. Without “coverage,” preemption could not prevail.

basis of federal question jurisdiction because the only federal question appeared as a defense.”). Thus there is no conflict to resolve; the improper joinder decision in *Smallwood* is not discordant with the *Rayner/Peters/Lundeen* harmony.⁹

D. Non-FRSA precedents do not repel the statute’s jurisdictional force.

Petitioners contrive a circuit split by referencing the application of different statutes in obviously distinguishable cases. Pet. at 12-17. This ruse fails in its premise because the preemptive effects of distinct statutes cannot corral the FRSA’s jurisdictional ramifications. See, e.g., *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 446 (2005) (“[C]ourts [have] too quickly concluded that failure-to-warn claims were pre-empted under [the Federal Insecticide, Fungicide, and Rodenticide Act], as they were [under the Public Health Cigarette Smoking Act], without paying attention to the rather obvious textual differences between the two pre-emption clauses.”).

For example, petitioners take the FRSA analysis in *Lundeen* to task with *Beneficial Nat’l Bank v. Anderson*, which applied the National Bank Act (“NBA”). 539 U.S. 1 (2003). Importantly, the NBA does not expressly preempt state law; instead, its limits on interest rates and contemplation of claims are deemed to displace conflicting state law actions. *Id.* at 9-11. In assessing the NBA’s complete preemptive

⁹ The petitioners also pronounce the FRSA to be “a particularly unsuitable candidate for complete preemption [because of] the fine lines and particularized factual determinations that often divide the preempted tort claim from the non-preempted claim.” Pet. at 20. But the operative “coverage” analysis is driven by the pleadings, not by “particularized factual determinations.” *Easterwood*, 507 U.S. at 665 (“The sole issue here is preemption, which depends on whether the regulations issued by the Secretary cover the subject matter of the two allegations, each of which we may assume states a valid cause of action.”) (emphasis added).

effect the Court considered federal cause of action availability, but because NBA preemption must be implied the federal relief merely reflected Congress's preemptive intent in the absence of a complete or clear preemptive mandate. See *also infra* at 18-23. By no means did the Court announce a new prerequisite to complete preemption applicable to all federal schemes.

The FRSA is substantially different. Congress displaced all "covered" state law claims with 49 U.S.C. § 20106. Consequently, the analysis does not depend upon additional evidence to divine preemptive intent. Regardless, all evidence points to an unmistakable congressional purpose to preclude railroad oversight interference by state authorities, including the courts. See, e.g., H.R. Rep. No. 91-1194 (1970), reprinted in 1970 U.S.C.A.N. 4104, 4110-11 ("To subject a carrier to enforcement before a number of different state administrative and judicial systems in several areas of operation could well result in an undue burden on interstate commerce."). The express language and clear legislative history obviate the need to discern congressional intent from the nature of relief available after removal, contrary to the statute at issue in *Beneficial Nat'l Bank*.

Petitioners also embrace authorities like *Rogers v. Tyson Foods, Inc.*, 308 F.3d 785 (7th Cir. 2002). But *Rogers* addresses the Poultry Products Inspection Act ("PPIA"), which is far more limited than the FRSA. Among other differences, the PPIA circumscribes preemption to state laws that seek to enforce standards "in addition to, or different than" the established federal standards. 21 U.S.C. § 467e. In other words, PPIA preemption is not invoked so long as charges of negligence are consistent with the standard of care imposed by the applicable federal regulation.

In contrast, the FRSA preempts all state claims regardless of whether they are different from or in addition to FRA mandates. See, e.g., *Shanklin*, 529 U.S. at 358 (if regulatory

"coverage" exists, "[i]t is this displacement of state law concerning the [subject matter], and not . . . adherence to the federal standard . . . that preempts state tort actions") (emphasis added). This wholesale preemption of all "covered" claims is far more expansive than the PPIA's "not in addition to or different than" preclusion of state law. Consequently, the extent of the FRSA's preemptive effect cannot be measured by inapposite authorities like *Rogers*.

Again, the discrete statutory language controls when preemption is express. As a result, the terms of more constrained preemptive provisions cannot define § 20106's impact on this litigation. Obvious textual distinctions prevent analyses applicable to dissimilar legislation from being projected onto the FRSA in order to contrive the supposed conflict upon which this Petition is based.

E. Certiorari review is not justified.

The Court has long recognized the doctrine of complete preemption, and *Lumdeen* brings the total of appellate precedents that have enforced the FRSA's complete preemptive effect to three. There is no jurisprudential need for the Court to weigh in on this most recent application of well-established authority. Sup. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law.")

No circuit court has ever rejected, much less distinguished, *Rayner*, *Peters*, or *Lumdeen*, and those decisions are firmly rooted in the FRSA's purposes. Accepting review on the basis of divergent non-FRSA authorities would be disruptive: the mere possibility that claims might experience a different outcome under an inapplicable and substantively different preemptive scheme would become the rationalization for certiorari review. The issue that drives the analysis is the displacement of state law effected by the FRSA, not the result that might be produced by some other statute's preemption provision. Until

there is a true FRSA conflict among the circuits the Court has no reason to squander certiorari review on *Lumdeen's* application of complete preemption. Sup. Ct. R. 10.

II. FEDERAL REMEDY AVAILABILITY IS NOT DISPOSITIVE

Certiorari review would not be warranted even if the conflict conjured up by petitioners was more than a chimera. The Court has taught that post-removal relief controls neither the complete preemption calculus nor any other federal question determination. This FRSA litigation is not an appropriate vehicle for the Court to impose an absolute condition upon the invocation of federal jurisdiction, especially when the Court has already spoken to the contrary.

A. A substitute federal remedy is not the jurisdictional *sine qua non*.

Petitioners want federal remedy availability to be the passport for removal. That result would re-write *Avco*, in which the Court blessed removal of a labor dispute despite federal law preclusion of the relief sought. 390 U.S. at 560-61. From that very beginning the opportunity to secure satisfactory redress after removal has not been a predicate to federal jurisdiction: "The nature of the relief available after jurisdiction attaches is, of course, different from the question whether there is jurisdiction to adjudicate the controversy." *Id.* at 561.

Avco reiterated this critical distinction to emphasize the removability of precluded state claims even though the displacing federal statute affords no satisfactory remedy: "[T]he breadth or narrowness of the relief which may be granted under federal law in § 301 cases is a distinct question from whether the court has jurisdiction over the parties and the subject matter." *Id.* In the Court's view, "[a]ny error in granting or designing relief 'does not go to the jurisdiction of

the court.'" *Id.* (quoting *Swift & Co. v. United States*, 276 U.S. 311, 331 (1928)) (citation omitted).

The federal jurisdiction / federal relief distinction was amplified in *Caterpillar*, which arose out of a contract action venued in state court. 482 U.S. at 390. The complaint sought redress under California law, but the defendant removed to federal court because the individual employment arrangements had been merged into collective bargaining agreements. *Id.* The district court retained jurisdiction and dismissed for failure to state an LMRA claim. *Id.*

The Ninth Circuit reversed for reasons that mirror petitioners' argument to this Court:

A state law cause of action has been "completely preempted" when federal law both displaces and supplants the state law – that is, when federal law provides both a superseding remedy replacing the state law cause of action and preempts that state law cause of action. . . . These are two distinct inquiries, both of which must be satisfied to permit removal of an action to federal court.

Williams v. Caterpillar Tractor Co., 786 F.2d 928, 932 (9th Cir. 1986) (emphasis in original). The rationale was explained as follows:

Although this argument [that a federal remedy is not necessary for removing completely preempted claims] is persuasive, and not directly contradicted by the Supreme Court's decision in *Franchise Tax Board*, we decline to follow it. It has long been the law in this circuit that removal jurisdiction lies only when federal law supplants, as well as displaces, state law. The existence of a substitute federal remedy, in addition to preemption, is required by our precedent.

Id. at 932 n.2.

This Court flatly rejected the suggestion that “a case may not be removed to federal court on the ground that it is completely pre-empted unless the federal cause of action relied upon provides the plaintiff with a remedy.” *Caterpillar*, 482 U.S. at 391 n.4. Conditioning removal jurisdiction upon the provision of a federal remedy was “squarely contradicted by [this Court’s] decision in *Avco*.” *Id.* *Avco* was read to have

held that a § 301 claim was properly removed to federal court although, at the time, the relief sought by the plaintiff could be obtained only in state court. We reasoned as follows: ‘The nature of the relief available after jurisdiction attaches is, of course, different from the question whether there is jurisdiction to adjudicate the controversy.... [T]he breadth or narrowness of the relief which may be granted under federal law in § 301 cases is a distinct question from whether the court has jurisdiction over the parties and the subject matter.’ . . . Thus, although we affirm the Court of Appeals’ judgment, we reject its reasoning insofar as it is inconsistent with *Avco*.

Id. (quoting *Avco*, 390 U.S. at 561).¹⁰

Avco and *Caterpillar* belie the argument that complete preemption is conditioned upon a substitute remedy being at hand. Like the Eighth Circuit, the Solicitor General wholeheartedly supports that conclusion:

¹⁰ Petitioners urge the adoption of authorities like *Schmeling v. NORDAM*, 97 F.3d 1336 (10th Cir. 1996) to promote a federal remedy removal prerequisite. But that court’s open hostility to *Caterpillar* exposes the jurisprudential flaws upon which *Schmeling* and its brethren are based. *Id.* at 1341 (*Caterpillar* “strayed from the narrow path”); *id.* (“*Caterpillar* neglected the emphasis in the previous cases . . .”); *id.* at 1343 (“Rightly or wrongly, the Supreme Court read the ‘superseding remedy’ language as contrary to *Avco*’s holding that the nature of the relief available is irrelevant to the jurisdictional question.”) (emphasis added).

Avco demonstrates that a plaintiff’s ostensible state-law claim may come within the scope of a federal cause of action and be completely preempted, even if the cause of action does not provide the plaintiff with a remedy. *Caterpillar*, 482 U.S. at 391 n.4. *Avco* thus supports an argument that a plaintiff’s claims may fall within the scope of a federal cause of action and be completely preempted, even if the plaintiff is unable to state a valid claim under the cause of action, provided that the plaintiff’s claim is within the field regulated by the cause of action.

Brief for the United States as Amicus Curiae, *Davis v. Int’l Union, United Automobile, Aerospace & Agriculture Implementation Workers of America*, at 19 (U.S. May 2006) (No. 05-107) (Resp. App. at 74a-100a) (emphasis added) (internal citation omitted).

The Solicitor General’s reasoning shows the way: “[W]hen the limits on the federal cause of action are an integral part of the federal scheme, it would seem counterintuitive to find a claim to be not completely preempted precisely because it seeks relief antithetical to the pervasively federal regime.” *Id.* For the same reason this case cannot become the means for diminishing the FRSA’s preemptive effect exactly because the statute’s preempting force is, in fact, “complete.” The enactment’s pervasive scope allows for no state law governance of railroads; that congressional judgment must be respected.

B. *Grable* lays the federal remedy prerequisite contentions to rest.

Avco’s recognition that federal jurisdiction is not dependent upon federal remedy availability was endorsed by *Grable*, which arose out of a quiet title action calling an IRS property seizure into question. 545 U.S. at 310-11. Although the claim was a creature of state law, removal jurisdiction was invoked based upon the inherent federal question. *Id.*

This Court affirmed jurisdiction because substantial federal issues were implicated even though no federal remedy was provided. *Id.* at 314-15. *Grable* eschewed the suggestion that an alternative federal remedy alone affords federal forum access. *Id.* at 317-18 (discussing *Merrell Dow Pharms., Inc. v. Thompson*, 478 U.S. 804 (1986)). Instead, the Court reminded that *Merrell Dow* had “disclaimed the adoption of any bright-line rule” and “treat[ed] the absence of a federal private right of action as evidence relevant to, but not dispositive of, the sensitive judgment about congressional intent that § 1331 requires.” *Id.* at 317 (emphasis added). The “primary importance” of federal remedy unavailability in *Merrell Dow* only “emerged when the Court treated the combination of no federal cause of action and no preemption of state remedies for misbranding as an important clue to Congress’s conception of the scope of jurisdiction to be exercised under § 1331.” *Id.* at 318 (emphasis added). In contrast, § 20106 expressly preempts state law of all stripes as soon as regulatory “coverage” is extended.

Grable’s treatment of general § 1331 jurisdiction follows the specific complete preemption doctrine applied in *Avco*, *Caterpillar*, and the decision below. Those precedents reject a federal remedy as talismanic of federal jurisdiction. Unlike in *Merrell Dow* and cases like *Beneficial Nat’l Bank*, the absence of a parallel remedy in the FRSA adds nothing to the comprehensive preemption that Congress necessarily effected by displacing all “covered” state claims. The statute’s unambiguous language obviates the need to search for clues about congressional intent as might be required when legislation is less explicit, like with the NBA.

C. Settled precedent challenges do not warrant certiorari review.

The scope of preemption expressed by the FRSA could not be more broad. All that is necessary is regulatory “coverage.” To the extent circumstantial evidence about legislative intent

is apposite, the jurisdictional mandate is evident without regard to a parallel remedial scheme:

[S]afety in the nation’s railroads [is not] advanced sufficiently by subjecting the national rail system to a variety of enforcement in 50 different judicial and administrative systems.

* * *

[Indeed,] the railroad industry has very few local characteristics. Rather, in terms of its operations, it has a truly interstate character calling for a uniform body of regulation and enforcement. . . . To subject a carrier to enforcement before a number of different state administrative and judicial systems in several areas of operation could well result in an undue burden on interstate commerce.

H.R. Rep. No. 91-1194 (1970), reprinted in 1970 U.S.C.C.A.N. 4104, 4109, 4110-11.

In the words of the Solicitor General, to hamstring the preemptive effect of the FRSA precisely because petitioners seek “relief antithetical to the pervasively federal regime” would be perverse. The Eighth Circuit’s refusal to graft a federal remedy prerequisite onto the removal jurisdiction afforded by FRSA complete preemption complies with this Court’s admonishments in *Avco*, as born out in both *Caterpillar* and *Grable*. As such, the Eighth Circuit did not come close to departing “from the accepted and usual course of judicial proceedings.” Sup. Ct. R. 10. The Court does not need to make jurisdictional pronouncements that would simply reaffirm existing law.

CONCLUSION

Because there is no circuit conflict regarding the FRSA's jurisdictional effect, and because the Court has already rejected the imposition of a federal remedy prerequisite upon complete preemption and all other federal question jurisdiction, the Petition should be denied.

Respectfully submitted,

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APPENDIX