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 CO.,

Defendant-Appellee.

Appeal from the United States District Court
for the Western District of Louisiana

BRIEF OF CONSTITUTIONAL LAW SCHOLARS AS *AMICUS CURIAE* SUPPORTING APPELLANT AND ADVOCATING REVERSAL

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CERTIFICATE OF INTERESTED PERSONS

No. 08-30236

Franks Investment Company, L.L.C. v. Union Pacific Railroad Co.

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

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INTEREST OF THE AMICUS CURIAE

Amici are scholars who teach and write about federal preemption of state law.[1] This brief is an effort to bring pertinent legal scholarship to bear on the preemption issues in this case.

Our scholarly interest in preemption arises from teaching and writing on subjects touching on several related fields, including constitutional law, administrative law, and federal courts law. Stephen Gardbaum is Professor of Law at the University of California at Los Angeles, where he teaches Constitutional Law and Comparative Law. Garrick Pursley is Assistant Professor in the Emerging Scholars Program at the University of Texas School of Law, where he teaches Constitutional Law. Ernest Young is Professor of Law at Duke Law School, where he teaches Constitutional Law and Federal Courts.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

This case implicates two important issues in preemption law. First, in holding Franks' state-law claim preempted by § 10501 of the Interstate Commerce Commission Termination Act (ICCTA), the panel failed to apply the "presumption against preemption," *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947), a longstanding canon governing judicial interpretation of the preemptive scope of

[1] Pursuant to Federal Rule of Appellate Procedure 29(a), *amici* state that counsel for all parties have consented to the filing of this brief.

federal statutes that is essential to maintaining the constitutional balance between federal and state authority. The presumption unquestionably applies here: This Court, other federal and state courts, and the STB have all recognized that the ICCTA presumptively does not preempt state law in areas of traditional state authority.[2] And property rights—particularly those relating to railroad crossings—

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[2] *See New Orleans & Gulf Coast Ry. Co. v. Barrois*, 533 F.3d 321, 334 (5th Cir. 2008) (holding with respect to preemption under the ICCTA that "[t]he presumption against preemption applies with full force to this generally applicable state property law, even if applied to permit a private, at-grade railroad crossing"); *Island Park, LLC v. CSX Transp.*, --- F.3d ---, 2009 WL 585649, at *3 (2d Cir. Mar. 4, 2009) (applying the presumption to questions of ICCTA preemption). *See also Emerson v. Kans. City S. Ry. Co.*, 503 F.3d 1126, 1129 (10th Cir. 2007); *Iowa, Chi. & E. R. Corp. v. Wash. County, Iowa*, 384 F.3d 557, 561 (8th Cir. 2004); *Fla. E. Coast Ry. Co. v. City of W. Palm Beach*, 266 F.3d 1324, 1327–28 (11th Cir. 2001); *Tyrrell v. Norfolk S. Ry Co.*, 248 F.3d 517, 522 (6th Cir. 2001); *Elam v. Kan. City S. Ry. Co.*, 2009 WL 774404, at *3 (N. D. Miss. Mar. 24, 2009); *Union Pac. R. Co. v. Chi. Transit Auth.*, 2009 WL 448897, at *4 (N.D. Ill. Feb. 23, 2009); *Engelhard Corp. v. Springfield Terminal Ry. Co.*, 193 F. Supp. 2d 385, 389 (D. Mass. 2002); *Rushing v. Kan. City S. Ry. Co.*, 194 F. Supp. 2d 493, 498 (S.D. Miss. 2001); *Burlington N. Santa Fe Corp. v. Anderson*, 959 F. Supp. 1288, 1292 (D. Mont. 1997); *Home of Economy v. Burlington N. Santa Fe R.R.*, 694 N.W.2d 840, 842–43 (N.D. 2005); *Native Village of Eklutna v. Alaska R.R.*, 87 P.3d 41, 56 (Alaska 2004); *In re Vermont Ry.*, 769 A.2d 648, 652 (Vt. 2000); *Village of Ridgefield Park v. N.Y., Susquehanna*, & W. Ry. Corp., 750 A.2d 57, 61 (N.J. 2000); *Soo Line R. Co. v. City of Minneapolis*, 625 N.W.2d 834, 836–37 (Minn. Ct. App. 2001); *State ex rel. Oklahoma Corp. Comm'n v. Burlington N. & Santa Fe Ry. Co.*, 24 P.3d 368, 371 (Okla. Civ. App. 2000). *Cf. Maumee & W. R.R. Corp. and RMW Ventures, LLC—Petition for Declaratory Order*, STB Finance Docket No. 34354, 2004 WL 395835, at *2 (S.T.B. Mar. 2, 2004) (recognizing that under the ICCTA preemption provision, "state and local regulation is permissible where it does not interfere with interstate rail operations, and localities retain certain police powers to protect public health and safety"); *CSX Transp., Inc.—Petition for Declaratory Order*, STB Finance Docket No. 34662, 2005 WL 1024490, at *2–*3 (S.T.B. May 3, 2005) (recognizing that "a state's traditional authority over the

have long been recognized as falling within the core of traditional state authority. This Court should remedy the panel's error by applying the presumption to the preemption questions in this case. Proper application of the presumption leads to the conclusion that Franks' claim is not preempted.

Second, the panel adopted an overly broad construction of the ICCTA's preemptive scope. The state law at issue in this case is a generally applicable property-rights statute that neither targets nor disproportionately affects railroads. The Supreme Court's approach has been to narrowly construe the preemptive scope of federal statutes containing specific express preemption provisions, like § 10501 of the ICCTA, not to preempt this sort of generally applicable state law. Such a narrow construction is especially appropriate where, as here, Congress has delegated authority to a federal agency to take preemptive action if generally applicable state laws are found to conflict with federal policy *as applied* in a

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safety of roads and bridges at grade-separated rail/highway crossings pursuant to other statutory schemes is not preempted by [the ICCTA] so long as no unreasonable burden is imposed on a railroad").

Union Pacific's attempts to distinguish this Court's decision in *Barrois* are unpersuasive. While the issue in *Barrois* was "complete" preemption—that is, whether the preemptive force of the ICCTA is sufficient to create federal subject matter jurisdiction over claims that fall within its scope—the underlying preemption analysis is the same as when preemption is raised straightforwardly as a defensive matter. *See generally* Garrick B. Pursley, *Rationalizing Complete Preemption after* Beneficial National Bank v. Anderson*: A New Rule, a New Justification*, 54 DRAKE L. REV. 371 (2005).

particular case. The panel's expansive interpretation of the ICCTA's preemptive scope is inconsistent with the Supreme Court's approach, the structure and purpose of the ICCTA, and Congress's delegation of authority to the STB. These principles, too, suggest that Franks' state-law claim should go forward.

ARGUMENT

A. The Presumption Against Preemption Applies Here.

The Supreme Court first articulated a "presumption against preemption" in statutory construction in *Mintz v. Baldwin*, 289 U.S. 346, 350–52 (1933), and the canonical statement is found in *Rice*: courts in preemption cases must "start with the assumption that the historic police powers of the States are not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." 331 U.S. at 230. The *Rice* presumption applies equally to express and implied preemption questions.[3] This Court should correct the panel's erroneous failure to apply the presumption in this case.

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[3] *See, e.g.*, *Wyeth v. Levine*, --- U.S. ---, 129 S. Ct. 1187, 1194–95 (Mar. 4, 2009) (applying the presumption to an implied preemption claim); *Altria Group, Inc. v. Good*, --- U.S. ---, 129 S. Ct. 538, 543–44 (Dec. 15, 2008) (applying the presumption to an express preemption claim). Though some have argued that the *Rice* presumption does not apply to claims of conflict preemption, the Supreme Court and this Court have had no trouble applying the *Rice* presumption to such claims. *See, e.g.*, *Wyeth*, 129 S. Ct. at 1194 (applying the presumption to reject a claim of conflict preemption under the federal Food, Drug and Cosmetics Act's drug labeling provisions and related regulations); *Rush Prudential HMO, Inc. v. Moran*, 536 U.S. 355, 387 (2002) (applying the presumption to reject a claim that state law conferred remedies on HMO participants that were inconsistent with

1. The presumption against preemption is an essential part of judicial federalism doctrine.

The evolution of Commerce Clause jurisprudence has created a world in which nearly every aspect of life is subject to concurrent state and federal regulatory authority.[4] As a result, the most important federalism questions concern not what Congress *can do* as a matter of constitutional power, but rather what Congress *has done* and how much room it has left for state regulation. *Compare,*

ERISA); *Bldg. & Constr. Trades Council v. Associated Builders & Contractors of Mass./R. of the Metro. Dist. I., Inc.*, 507 U.S. 218, 224 (1993) (applying the presumption to a claim of preemption under the National Labor Relations Act, which contains no express preemption provision); *California v. ARC American Corp.*, 490 U.S. 93, 101–102 (1989) (applying the presumption against preemption in the course of rejecting an obstacle preemption claim under federal antitrust laws). *See also Hillsborough County, Fla. v. Automated Med. Labs., Inc.*, 471 U.S. 707, 716 (1985) ("Appellee must thus present a showing . . . of a conflict between a particular local provision and the federal scheme, that is strong enough to overcome the presumption that state and local regulation of health and safety matters can constitutionally coexist with federal regulation."). This Court has applied the presumption against preemption in nearly identical circumstances to those in this case—that is, in evaluating a claim of implied conflict preemption of Louisiana state-law property rights in a railroad crossing under the ICCTA. *See New Orleans & Gulf Coast Ry. Co. v. Barrois*, 533 F.3d 321, 334 (5th Cir. 2008) ("The presumption against preemption applies with full force to this generally applicable state property law, even if applied to permit a private, at-grade railroad crossing.").

[4] The enumerated powers doctrine limits Congress's regulatory authority to a degree, *see United States v. Lopez*, 514 U.S. 549 (1995); *United States v. Morrison*, 529 U.S. 598 (2000), but courts since the New Deal have not questioned the notion that the Commerce Power is nearly plenary and have repeatedly upheld federal statutes that reach deep into areas of traditional state regulatory authority. *See Gonzales v. Oregon*, 546 U.S. 243 (2006).

e.g., *Gonzales v. Raich*, 545 U.S. 1 (2005) (construing Congress's Commerce power broadly to allow regulation of homegrown medical marijuana), *with Gonzales v. Oregon*, 546 U.S. 243 (2006) (construing the Controlled Substances Act *not* to authorize the Attorney General to preempt Oregon's Death with Dignity Act).

The pre-*Rice* approach was that any federal regulation in a field broadly preempted state law. *See, e.g.*, *Chicago, Rock Island & Pac. Ry. Co. v. Hardwick Farmers Elevator Co.*, 226 U.S. 426, 435 (1913). That worked only as long as federal regulatory authority was narrowly confined. The *Rice* presumption was developed alongside the New Deal's expansive judicial interpretations of congressional power, *see, e.g.*, *Wickard v. Filburn*, 317 U.S. 111 (1942), and is complementary. As federal power expanded, continued application of the pre-*Rice* presumptive-field-preemption rule would have eradicated state regulatory authority in short order. The *Rice* presumption provided a way to maintain a viable role for state governments even as federal authority was extended to nearly every subject. *See generally* Stephen A. Gardbaum, *The Nature of Preemption*, 79 CORNELL L. REV. 767, 806 (1994).

The *Rice* presumption embodies the understanding that structural and political safeguards are the primary mechanisms for protecting states against federal encroachment and that the main task of judicial federalism doctrine is to

reinforce those safeguards. *See Garcia v. San Antonio Metro. Trans. Auth.*, 469 U.S. 528, 550–54 (1985); *see generally* Ernest A. Young, *The Rehnquist Court's Two Federalisms*, 83 TEX. L. REV. 1, 130–34 (2004).[5] As the Supreme Court explained in *Gregory v. Ashcroft*:

> [I]nasmuch as this court in *Garcia* has left primarily to the political process the protection of states against intrusive exercises of Congress's Commerce Clause powers, we must be absolutely certain that Congress intended such an exercise. "To give the state-displacing weight of federal law to mere congressional ambiguity would evade the very procedure for lawmaking on which *Garcia* relied to protect states' interests."

501 U.S. 452, 464 (1992) (quoting LAWRENCE TRIBE, AMERICAN CONSTITUTIONAL LAW, § 6-25, at 480 (2d ed. 1988)). Two essential safeguards in the structure of the political process are: (1) the political representation of the states in Congress, which provides opportunities for states to oppose federal encroachment on their regulatory authority, *see* Herbert Wechsler, *The Political Safeguards of*

[5] Courts have struggled in attempting to convert broad constitutional provisions into substantive limitations on congressional power. *See, e.g.*, Jenna Bednar & William N. Eskridge, Jr., *Steadying the Court's "Unsteady Path": A Theory of Judicial Enforcement of Federalism*, 68 S. Cal. L. Rev. 1447, 1450–53 (1995). And the history of this doctrinal area suggests that such limitations are not in the offing. Instead, the courts have marked off the judicial role as primarily to facilitate and enhance political and institutional checks on federal expansion. *See, e.g.*, *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938) (holding that, generally, only formal federal legislation can displace state law); *Printz v. United States*, 521 U.S. 898 (1997) (striking down congressional "commandeering" of state officers to enforce federal law in order to force Congress to bear the political and financial costs of its actions).

Federalism: The Role of the States in the Composition and Selection of the National Government, 54 COLUM. L. REV. 543 (1954); and (2) the sheer difficulty of navigating the formal Article I legislative procedure, which keeps the overall volume of preemptive federal legislation down, *see* Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 TEX. L. REV. 1321, 1330 (2001).[6]

The presumption against preemption is the most important judicial tool for reinforcing these process protections for federalism. The Supreme Court's application of the *Rice* presumption in its two most recent preemption decisions—both involving expansive federal regulatory schemes alleged to preempt traditional state remedies for torts or deceptive trade practices—reemphasizes the presumption's status as a centerpiece of judicial federalism doctrine. *See Wyeth*, 129 S. Ct. at 1194–95 (applying the presumption to the question of whether state tort claims were preempted by the federal Food, Drug and Cosmetics Act's drug

[6] Courts have implemented a variety of rules of statutory construction to reinforce these process protections for federalism. *See generally* Thomas W. Merrill, *Rescuing Federalism After* Raich*: The Case for Clear Statement Rules*, 9 LEWIS & CLARK L. REV. 823 (2005); William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules As Constitutional Lawmaking*, 45 VAND. L. REV. 593 (1992). Hence, Congress must speak clearly in order to subject state governments to generally-applicable federal laws, *Gregory*, 501 U.S. at 460–61, to impose conditions on States' receipt of federal funds, *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 296 (2006), to subject States to liability under federal statutes, *Will v. Mich. Dept. of State Police*, 491 U.S. 58, 65 (1989), or to regulate at the outer limits of its commerce power, *Jones v. United States*, 529 U.S. 848, 858 (2000).

labeling provisions and related regulations); *Altria*, 129 S. Ct. at 543–44 (applying the presumption to the question of whether generally-applicable state deceptive trade practices and fraud claims were expressly preempted by the Federal Cigarette Labeling and Advertising Act).

As recent cases demonstrate, preemption typically involves central state regulatory concerns—including regulation of local telephone markets, *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999), protection of state waterways from oil spills, *United States v. Locke*, 529 U.S. 89 (2000), state healthcare policy, *Rush Prudential HMO, Inc. v. Moran*, 536 U.S. 355 (2002), medical ethics, *Gonzales*, 546 U.S. 243, and States' traditional ability to provide remedies for injured citizens, *Wyeth*, 129 S. Ct. 1187; *Altria*, 129 S. Ct. 538; *Bates v. Dow Agrosciences, L.L.C.*, 544 U.S. 431 (2005). Because of their subject matter and the frequency with which they arise, the stakes for federalism in preemption cases are particularly high. As Justice Breyer observed:

> [I]n today's world, filled with legal complexity, the true test of federalist principle may lie, not in the occasional effort to trim Congress' commerce power at its edges, . . . or to protect a State's treasury from a private damages action, . . . but rather in those many statutory cases where courts interpret the mass of technical detail that is the ordinary diet of the law.

Egelhoff v. Egelhoff, 532 U.S. 141, 161 (2001) (Breyer, J., dissenting). For this reason, it is essential to view preemption cases as not just about the technical details of the federal statute at issue, but also about the broader *constitutional*

concern of maintaining balance in our federal system. The presumption against preemption is the primary judicial tool for maintaining that balance.

2. The presumption applies with particular force here because states have traditionally exercised authority over railroads and property law has long been recognized as a core area of state authority.

The Supreme Court has occasionally indicated that the presumption against preemption may apply, not in every preemption case, but rather only in cases involving federal encroachment on areas of "traditional" state authority.[7] But the Court in *Wyeth* has now made clear that the presumption against preemption applies "in *all* pre-emption cases, and *particularly* in those in which Congress has legislated in a field which the States have traditionally occupied." *Wyeth*, 129 S. Ct. at 1194 (internal quotation marks, brackets, and alterations omitted, emphasis added); *id.* at 1195 n.3 (presumption "does not rely on the absence of federal regulation"); *see also Altria*, 129 S. Ct. at 543 (quoting *Lohr*, 518 U.S. at 485) (holding that the presumption against preemption "'applies with *particular force* when Congress has legislated in a field traditionally occupied by the States'" (emphasis added)). Thus there can be no question that the presumption applies here.

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[7] *Compare, e.g.*, *Locke*, 529 U.S. at 108 ("[A]n assumption of nonpre-emption is not triggered when the State regulates in an area where there has been a history of significant federal presence."), *with Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (stating that the presumption against preemption applies in "all pre-emption cases").

Applying the presumption in all cases is the better approach. If a significant federal regulatory presence were sufficient to render the *Rice* presumption inapplicable, then there would be virtually no cases in which to apply it.[8] Today there is significant—though not exclusive—federal regulation in nearly every field.[9] Thus lawyers can characterize almost every case as falling within a traditionally federal *or* state regulatory field, depending on their purposes. It was this very difficulty in drawing sharp distinctions between areas of state and national authority that prompted the Court to abandon its restrictive reading of the Commerce Clause after 1937. In rail transportation, as in most other areas, there in fact has been significant federal *and* state regulation for some time.

Applying the presumption against preemption is particularly appropriate here because state law has played an important role in governing railroads since the earliest days of the industry. Indeed, the complex and evolving interplay of state

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[8] *Cf. Hillsborough County v. Automated Med. Labs., Inc.*, 471 U.S. 707, 719 (1985) ("Undoubtedly, every subject that merits congressional legislation is, by definition, a subject of national concern.").

[9] This includes a variety of "traditional" state fields such as family law, *see, e.g.*, Defense of Marriage Act, Pub. L. 104-199, 110 Stat. 2419 (1996); Child Abuse, Domestic Violence, Adoption and Family Services Act, Pub. L. 100-294, 102 Stat. 102 (1988), primary education, *see, e.g.*, No Child Left Behind Act, Pub. L. 107-110, 115 Stat. 1425 (2001); Elementary and Secondary Education Act, Pub. L. 89-10, 79 Stat. 27 (1965), and land use regulation, *see, e.g.*, Religious Land Use and Institutionalized Persons Act, Pub. L. 106-274, 114 Stat. 803 (2000).

and federal authority over railroads is the arena in which judicial preemption doctrine was first developed. *See* Gardbaum, *supra*, at 803–05.

Before federal entry into the regulatory field, states were the acknowledged primary regulators of railroads. Thus, even under the now abandoned pre-*Rice* automatic field preemption rule, the Supreme Court recognized that until Congress displaced it by statute, states had authority to regulate, for example, rail safety, *see Nashville, Chattanooga & St. Louis Ry. v. Alabama*, 128 U.S. 96, 99–100 (1888) ("Until [federal] legislation is had, it is clearly within the competency of the States to provide against accidents on trains whilst within their limits), the condition of animals transported by rail, *see Missouri, Kansas & Texas Ry. v. Haber*, 169 U.S. 613 (1898) (holding that a Kansas statutory claim against a railroad for transporting diseased cattle was a legitimate exercise of the states' "reserved power to provide for the safety of all persons and property within its limits"), the manner of heating passenger cars, *see N.Y., New Haven & Hartford R.R. Co. v. New York*, 165 U.S. 628 (1897) (holding that a New York statute forbidding use of internal furnaces for heating was within the "authority of the states to establish such reasonable regulations as were appropriate for the protection of the health, the lives, and the safety of their people), and the licensing of railroad engineers, *see Smith v. Alabama*, 124 U.S. 465 (1888) (holding that an Alabama licensing statute was "within the scope of the admitted power reserved to the states to regulate the

relative rights and duties of persons being and acting within its territorial jurisdiction . . . to secure for the public safety of persons and property").

In short, even as Congress began to extend federal rail regulation with the enactment of the Interstate Commerce Act in 1887, 24 Stat. 379 (1887), state governments remained the primary regulators of railroads. State authority only gave way when Congress affirmatively legislated on a particular subject. It is important to keep in mind that the nature of federal railroad regulation from its inception was to carve out niches of federal exclusivity from a backdrop of general state regulatory power.[10] Aside from retained authority defined by gaps in federal regulatory coverage, states also retained important regulatory authority over railroads as a result of express congressional will. So, for example, the pre-ICCTA federal statutory scheme implemented a policy of "cooperat[ing] with each State and the officials of each State on transportation matters," 49 U.S.C.

[10] *See* Gardbaum, *supra*, at 803–05 (discussing early interaction of federal and state railroad regulation); Carter H. Strickland, Jr., *Revitalizing the Presumption Against Preemption to Prevent Regulatory Gaps: Railroad Deregulation and Waste Transfer Stations*, 34 ECOLOGY L.Q. 1147, 1163–65 (2007) (describing the history of state involvement in rail regulation); Maureen E. Eldredge, Comment: *Who's Driving the Train? Railroad Regulation and Local Control*, 75 U. COLO. L. REV. 549, 556–60 (2004) (same). *See also Fla. E. Coast*, 266 F.3d at 1333–38 (discussing the development and purposes of federal statutory law governing railroads).

§ 10101(a)(1)(E) (1988),[11] emphasized that "[e]xcept as otherwise provided in this subtitle, the remedies provided under this subtitle are in addition to remedies existing under another law or at common law," 49 U.S.C. § 10103 (1988), preserved state regulatory authority over the intrastate activities of railroads, *see* 49 U.S.C. § 10501(b)–(d) (1988), and recognized exclusive state authority over "the construction, acquisition, 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 . . . ," 49 U.S.C. § 10907(b)(1) (1988).

Similarly, Congress's first substantial effort to deregulate interstate rail transportation—the 1980 Staggers Rail Act, Pub. L. 96-448, 94 Stat. 1895—maintained a role for state law by allowing for continuing state "jurisdiction over intrastate transportation provided by a rail carrier providing transportation subject to the jurisdiction of the" ICC as long as the state submitted its "standards and procedures" for railroad regulation to the ICC for approval. *See* 49 U.S.C. § 11501(b) (1988); *see also* H.R. Rep. No. 104-311, 104th Cong., 1st Sess. at 95 (1995), *reprinted in* 1995 U.S.C.C.A.N. 793, 807 (describing the Staggers Act's "system of optional certification of State regulatory agencies to administer

[11] *See also* 49 U.S.C. § 10101(a)(9) (1988) ("In regulating the railroad industry, it is the policy of the United States Government . . . to cooperate with the States on transportation matters to assure that intrastate regulatory jurisdiction is exercised in accordance with the standards established in this subtitle . . . .").

economic regulation of railroads using Federal standards"). Everyone agrees that Congress's next deregulatory move—the ICCTA—completely federalized the *economic* regulation of railroads. *See* Appellant's En Banc Brief (hereinafter "App. Br.") at 16-18; H.R. Rep. 104-311, *supra*, at 94 (emphasizing the need for a uniform "Federal scheme of *economic* regulation and deregulation" of railroads (emphasis added)). But the ICCTA, too, recognizes a continuing role for state law—not state economic regulation, to be sure, but other kinds of state laws potentially applicable to railroads. *See* App. Br. at 17-18; H.R. Rep. 104-311, *supra*, at 95–96 (stressing that generally applicable state laws "remain fully applicable" under the ICCTA "because they do not generally collide with the [Federal] scheme of economic regulation" of railroads).

First, the ICCTA provides for exclusive federal jurisdiction only over a subset of rail-related matters: "transportation by rail carriers," "remedies . . . with respect to rates, classifications, rules (including car service, interchange, and other operating rules), practices, routes, services, and facilities of such carriers," and "the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are located, or intended to be located, entirely in one state." 49 U.S.C. § 10501(b). Second, the ICCTA provides that only the "*remedies* provided under this part with respect to rail transportation" actually preempt state law. *Id.* (emphasis added).

Once again, federal regulatory authority over railroads has been carved out of the backdrop of general state regulation. The federal carve-out has broadened over the years, but even federalizing all *economic* regulation of railroads under the ICCTA does not preempt the entire field—states retain their traditional authority to regulate in ways that affect railroads, so long as they do not enter into the particularized federal regulatory field marked off by the ICCTA.[12] The evolution of rail regulation, including the ICCTA, confirms the basis for the Supreme Court's pre-ICCTA holding that the presumption against preemption applies in the area of railroad regulation—it truly is an area of "traditional" state authority. *See CSX Transp. Inc. v. Easterwood*, 507 U.S. 658, 663–64 (1993).

Moreover, state laws governing the ownership of private property, like the Louisiana statute underpinning Franks' claim here, fall at the core of traditional state authority.[13] The Supreme Court has emphasized the "basic axiom that

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[12] In our federal system, field preemption is rare. *See, e.g.*, *Hillsborough County*, 471 U.S. at 715–19. The more common situation is for the two sovereigns—federal and state—to exercise concurrent regulatory authority over a given area in a "cooperative federalism" arrangement. *See, e.g.*, Philip J. Weiser, *Federal Common Law, Cooperative Federalism, and the Enforcement of the Telecom Act*, 76 N.Y.U. L. REV. 1692, 1696–98 (2001).

[13] *See Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159, 174 (2001) (noting "the States' traditional and primary power over land and water use"); *In re Davis*, 170 F.3d 475, 481 (5th Cir. 1999) ("Deference to our federalism counsels a presumption that areas of law traditionally reserved to the states, like police powers *or property law*, are not to be disturbed absent the 'clear and manifest purpose of Congress.'" (emphasis added)).

'[p]roperty interests . . . are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law." *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1001 (1984) (quoting *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 161 (1980) (internal quotation omitted)). Importantly, unlike most state law, state-law property rights are singled out for special constitutional protection in the Fifth Amendment's Takings Clause. U.S. CONST., Amdt. V.[14] And the Federal Circuit has squarely rejected the proposition that "general federal legislation providing for the governance of interstate railroads, enacted over the years of the Twentieth Century, somehow redefined state-created property rights and destroyed them . . . ." *Preseault v. United States*, 100 F.3d 1525, 1530 (Fed. Cir. 1996); *see also id.* at 1538–39 (rejecting the United States' argument, "invoking the broad concept that

[14] As the Supreme Court has recognized, the Takings Clause has special impact on the analysis of alleged federal preemption of state property rights. *See, e.g.*, *Ruckelshaus*, 467 U.S. 1003–04, 1012 ("If Congress can 'pre-empt' state property law in the manner advocated by EPA, then the Takings Clause has lost all vitality. [A] sovereign, 'by *ipse dixit*, may not transform private property into public property without compensation. . . . This is the very kind of thing that the Taking Clause of the Fifth Amendment was meant to prevent.'") (quoting *Beckwith*, 449 U.S. at 164). While federal law may preempt the use or application of property rights for a time, to the extent that such preemption amounts to a compensable taking, the property rights that form the basis for the claim remain creatures of state law. *See Preseault v. Interstate Commerce Comm'n*, 494 U.S. 1, 22–23 (1990) (O'Connor, J., concurring) ("Although the [ICC's] actions may pre-empt the operation and effect of certain state laws, those actions do not displace state law as the traditional source of real property interests."). In a sense, then, state property rights can never be wholly "preempted."

'background principles define property rights, . . . that there is nothing to preclude the use of federal law as well as state law in selecting the relevant 'background principles.'").

Indeed, the Supreme Court has specifically held state laws governing railroad crossings are "peculiarly within the police power of the states." *Lehigh Valley R. Co. v. Board of Public Utilities Comm'rs*, 278 U.S. 24, 35 (1928).[15] Before the ICCTA, the Department of Transportation, charged with administering federal regulations relating to the safety of railroads and rail crossings, recognized that "'[j]urisdiction over railroad-highway crossings resides almost exclusively in the States.'" *CSX Transp.*, 507 U.S. at 670 (quoting U.S. Dept. of Transp., Fed. Hwy. Admin., Traffic Control Devices Handbook, § 8A-6 (1983) ("Grade Crossing Responsibility")). The STB has reaffirmed the primacy of state law governing railroad crossings even after enactment of the ICCTA, noting that railroad "crossing cases are typically resolved in state courts." *Maumee & W. R.R. Corp. and RMW Ventures, LLC—Pet. for Declaratory Order*, STB Finance Docket No. 34354, 2004 WL 395835, at *2 (S.T.B. Mar. 2, 2004); *see* App. Br. at 20–21.

[15] *See also Erie R.R. v. Bd. of Pub. Util. Comm'rs*, 254 U.S. 394, 409 (1921) (responding to the railroad's attempt to deny "the power of the State to throw the burden of [crossing improvements] upon the railroad" by recognizing the traditional state authority to require railroads "at their own expense, not only to abolish existing grade crossings, but also to build and maintain suitable bridges or viaducts to carry highways . . . over their tracks or to carry their tracks over such highways").

This Court has embraced the STB's view. *New Orleans & Gulf Coast Ry. Co. v. Barrois*, 533 F.3d 321, 332–33 (5th Cir. 2008).

For these reasons, the presumption against preemption not only applies here—it applies with particular force because the Louisiana property statute forming the basis of Franks' claim is at the heart of the states' traditional authority to administer property rights.

B. Supreme Court Preemption Doctrine Shows That the Panel Construed the ICCTA's Preemptive Scope Too Broadly.

Applying the presumption against preemption, this Court held in *Barrois* that the ICCTA does not expressly preempt all state law claims having to do with railroad crossings. 533 F.3d at 332–33.[16] Everyone now appears to concede this. App. Br. at 28. Explaining that result requires detailed analysis of both the ICCTA's express preemption provision and Franks' state-law claim, which we leave to the Appellant's Brief. We are concerned to emphasize two points related to Union Pacific's implied preemption argument. First, implied preemption is a separate and analytically subsequent issue that can only properly be resolved *after*

[16] This is consistent with the STB's conclusion that state laws relating to railroad crossings do not amount to state "regulation with respect to rail transportation" within the meaning of the ICCTA. *See* App. Br. at 20; *Barrois*, 533 F.3d at 333 (citing STB decisions). An agency's interpretation of the substantive terms of the statute it administers—even when that interpretation effects the preemptive scope of the statute—is entitled to deference. *See Wyeth*, 129 S. Ct. at 1201.

the scope of express preemption is determined, and in the light of the presumption against preemption. Second, courts should hesitate to find that generally applicable state laws are preempted merely because they touch on matters that are also subject to federal regulation. This hesitation is particularly appropriate where, as here, (1) the federal statute contains an express preemption provision that does not cover the generally applicable state law at issue, and (2) a federal agency has authority to take preemptive action if a particular application of general state law conflicts with the federal scheme.

1. Express preemption should be carefully distinguished from implied preemption.

As the Supreme Court has repeatedly emphasized, the basic inquiry in all preemption cases, including implied (or, as they are sometimes called, "conflict") preemption cases, is to determine what Congress intended. *See, e.g., Wyeth*, 129 S. Ct. at 1194 (explaining that a "cornerstone" of preemption jurisprudence—alongside the presumption against preemption—is that "the purpose of Congress is the ultimate touchstone in every preemption case.").[17] And where Congress has specifically addressed preemption in a provision like § 10501 of the ICCTA, that provision is "'the most reliable indicium of congressional intent with respect to state authority.'" *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 517 (1992)

[17] *See generally* Garrick B. Pursley, *The Structure of Preemption Decisions*, 85 NEB. L. REV. 912, 938–40 (2007).

(quoting *Malone v. White Motor Corp.*, 435 U.S. 497, 505 (1978)); *see also CSX Transp.*, 507 U.S. at 664 ("If the statute contains an express pre-emption 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.").

Because every kind of preemption turns on Congress's preemptive intent and express statutory language is the best evidence of that intent, the entire preemption inquiry must begin with construction of the express preemption clause if there is one. Once the scope of express preemption is determined, the *Rice* presumption and general principles of statutory construction suggest that state laws beyond the scope of the express preemption provision are not displaced. *See Cipollone*, 505 U.S. at 517 ("Such reasoning is a variant of the familiar principle of *expression unius est exclusio alterius*: Congress' enactment of a provision defining the pre-emptive reach of a statute implies that matters beyond that reach are not pre-empted."). Of course, construing the express preemption clause does not always "immediately end the inquiry," *Altria*, 129 S. Ct. at 543; state law can still be preempted if it conflicts with federal law either directly or by undermining congressional purpose. *See CSX Transp.*, 507 U.S. at 663. The point here is that as the best evidence of Congress's intent regarding the scope and substance of state law it intended to displace, the presence of an express preemption clause should

raise a presumption against additional implied preemption beyond the scope of that clause.

The *Rice* presumption is also useful in dealing with the central problem in assessing implied preemption claims: identifying the relevant congressional purpose. In enacting laws, Congress frequently has multiple purposes that will trade off with each other to some extent. Here, for example, Congress wanted both to regulate the conduct of participants in the market for interstate rail transportation and to encourage competition in that market. In situations like this, opponents of state law can *always* claim that Congress struck a balance between these purposes so that any state involvement—such as providing a cause of action to enforce property rights in rail crossings—will disrupt the federal scheme. But that argument proves too much. In assessing conflict preemption claims, courts must carefully examine the regulatory scheme to determine whether Congress really intended a specific balance among competing purposes or, instead, intended to permit state variation within a reasonable range consistent with the primary purpose of the federal scheme. The *Rice* presumption is a helpful default here, as it suggests that federal legislation should rarely be construed to represent a fixed balance among competing purposes to the exclusion of state variation. *See, e.g.*, *Gade v. Nat'l Solid Waste Mgrs. Ass'n*, 505 U.S. 88, 111 (1992) (Kennedy, J., concurring in the judgment) ("A free wheeling judicial inquiry into whether a state

statute is in tension with federal objectives would undercut the principle that it is Congress rather than the courts that pre-empts state law."). There simply is no evidence here that Congress intended generally to displace state laws applicable to rail crossings or that it viewed possible variation in such laws as somehow inconsistent with the primary purposes of the ICCTA. *See* App. Br. at 12–18, 28–30.

2. Generally applicable state laws are presumptively not preempted by statutes like the ICCTA.

The fact that the state law at issue here is one of general applicability provides another reason to reject preemption—especially implied preemption. Even constitutional protection for individual rights does not automatically exempt the exercise of those rights from generally applicable laws. *See, e.g.*, *Employment Division v. Smith*, 494 U.S. 872, 878–87 (1990) (holding that the First Amendment right to free exercise of religion did not exempt religious use of peyote from generally applicable narcotics laws that were not targeted at religious users).[18] So too, state procedural law is not preempted when state courts hear claims of federal right unless the state procedures discriminate against or unduly burden federal

[18] *See also Illinois v. Telemarketing Assocs.*, 538 U.S. 600, 610 (2003) (upholding enforcement of generally-applicable state antifraud laws against political fundraisers); *Arcara v. Cloud Books, Inc.*, 478 U.S. 697 (1986) (upholding a generally applicable state anti-prostitution law even though it required closing a book store selling constitutionally-protected literature).

rights. *Johnson v. Frankell*, 520 U.S. 911, 918–19 (1997); *Felder v. Casey*, 487 U.S. 131, 141–42 (1988). The default rule, then, is that state laws of general applicability are not displaced simply for intersecting with an area of federal law. Principles of conflict preemption invalidate such generally applicable state laws only when they target or directly interfere with federal law. *See, e.g.*, *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (striking down compulsory school attendance laws as applied to Amish parents refusing to send their children to school on religious grounds).

The ICCTA saves generally applicable state laws by limiting preemption to "remedies . . . with respect to regulation of rail transportation." 49 U.S.C. § 10501(b). The principles discussed above support reading this provision to prohibit states from second-guessing federal judgments about how railroads should be regulated, as reflected in the statute and STB regulations. But the provision should not be read as the panel read it here—that is, as evidence of a broad congressional intent to displace general state law requirements that might bear some relation to railroads as applied in a particular case. As long as the state law is not targeted at regulating railroads, it is not of the kind that one can reasonably conclude Congress intended to preempt.

Congress may intend for federal law to provide the only operative rules of a particular kind—for example, prescribing permissible rates for interstate rail

transportation—but it is difficult for Congress to anticipate the full range of generally applicable state laws that may in particular applications interfere with such federal-law requirements. Moreover, holding that federal legislation broadly conflicts with and thus preempts all such general state law requirements would introduce significant uncertainty into state regulatory efforts, forcing state actors to try to anticipate a nearly infinite range of possible exemptions where general state laws apply to the same factual situations as the federal law rules. Accordingly, courts should be particularly reluctant to find generally applicable state law preempted absent a clear indication congressional intent.

Importantly, the Supreme Court also has recognized that it need not construe the preemptive effect of federal statutes so broadly where Congress has delegated authority to a federal agency to take preemptive action in the event of a conflict with the letter or the goals of the federal scheme. *See Hillsborough County, Fla. v. Automated Med. Labs., Inc.*, 471 U.S. 707, 721 (1985). Here, Congress provided that the STB's remedies have preemptive force, 49 U.S.C. § 10501(b), and the STB regularly determines whether particular applications of state law conflict with the ICCTA regulatory scheme. In particular, it has determined that crossing-related claims are not typically preempted. App. Br. at 20–21.

In sum, absent clear evidence of congressional intent to the contrary, courts ordinarily should construe federal statutes like the ICCTA not to preempt generally

applicable state laws. Thus, insofar as the panel decided that *all* claims related to railroad crossings that arise out of generally applicable state property laws conflict with the ICCTA, the foregoing arguments show that the Court should reach a different result. Instead, "interference with rail transportation must always be *demonstrated*." *Island Park*, 2009 WL 585649 at *6 (emphasis added). Because Union Pacific has not made that demonstration, *see* App. Br. at 36–44, this Court should reverse.

CONCLUSION

In this case, proper application of preemption doctrine and constitutional federalism principles require that Franks' state law claim go forward.

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CERTIFICATE OF SERVICE

I certify that on April 14, 2009, I served two copies of this Brief of Constitutional Law Scholars as *Amicus Curiae* Supporting Appellant and Advocating Reversal in paper form, and one copy on an electronic computer-readable compact disc in Portable Document Format, by Federal Express, on counsel for Appellant and Appellee as follows:

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In addition, on April 14, 2009, I sent this Brief of Constitutional Law Scholars as *Amicus Curiae* Supporting Appellant and Advocating Reversal in paper and electronic form to the Clerk of the Fifth Circuit by Federal Express.

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CERTIFICATE OF COMPLIANCE

Pursuant to FED. R. APP. P. 29(c)(5), I certify that this brief complies with the type-volume limitations of FED. R. APP. P. 32(a)(7)(B) and 5TH CIR. R. 32.2 because it consists of 6,891 words, excluding the parts of the brief exempted by FED. R. APP. P. 32(a)(7)(B)(iii) and 5TH CIR. R. 32.2. This brief also complies with FED. R. APP. P. 32(a)(5)-(6) and 5TH CIR. R. 32.1 because it has been prepared in Word 2003 in proportionally spaced typeface, using Times New Roman font in 14-point size for text and footnotes.

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