No. 06-528

IN THE

Supreme Court of the United States

TOM LUNDEEN, *et al.*,

Petitioners,

v.

CANADIAN PACIFIC RAILWAY COMPANY, *et al.*,

Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals for the Eighth Circuit

PETITIONERS' REPLY

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The petition raises two important questions of federal law that have vexed the lower courts: (1) whether one precondition for removal under the complete preemption doctrine is that the preempting federal statute must provide a federal cause of action that supplants the state-law claim under which the plaintiff sought to sue; and (2) whether federal preemption by the Federal Railroad Safety Act ("FRSA") is a mere defense, not a basis for complete preemption.

The opposition is based primarily on the proposition that the Eighth Circuit was correct, not on the absence of severe disagreements among the lower courts on the preconditions for complete preemption. Respondents also argue that the courts of appeals are in general agreement about whether there is complete preemption of state-law tort claims under the FRSA. Respondents mischaracterize the questions presented, ignore the widespread division among the lower courts on the issues presented, and recast the decision below as providing for an even broader basis for complete preemption than even the Eighth Circuit advanced.

1. Certiorari Should Be Granted to Decide Whether There Can Be Complete Preemption by a Federal Statute That Does Not Provide a Federal Cause of Action Supplanting the Removed State Claims.

Broad disagreement exists among the courts of appeals about whether a federal statute can be invoked as a basis for removal pursuant to the doctrine of complete preemption if that statute does not provide a cause of action that displaces a state-law claim that is removed to federal court. Addressing that issue in cases removed under a wide variety of federal statutes, the First, Second, Third, Fourth, Seventh, Ninth, Tenth and Eleventh Circuits have all held that provision of a federal cause of action by the federal statute is a precondition for removal, Pet. at 14-17, while the Eighth Circuit has held that the federal statute need **not** provide a federal cause of action, *id.* at 16-17, 24, and the Sixth Circuit has also allowed complete preemption

despite the absence of a federal cause of action. *Id.* at 17. The Fifth Circuit has been on both sides of the divide, amplifying the need for this Court's review. Pet. at 14 n.3, 16 n.5.

Instead of candidly acknowledging this widespread disagreement, respondents try to avoid review not by meeting the petition head on, but by mischaracterizing the first question presented. Respondents ignore the fact that the conflict at issue is about whether the federal statute must provide a **cause of action**, recasting the issue as whether plaintiffs have a **particular federal remedy**. Respondents quite correctly note that a specific federal remedy need not be available, because, for example, in *Avco Corp. v. Machinists Lodge No. 735*, 390 U.S. 557 (1968), removal was allowed even though the governing federal law, section 301 of the Labor-Management Relations Act, which provided a federal cause of action, was understood at the time as not affording a basis for injunctive relief. Similarly, in *Caterpillar v. Williams*, 482 U.S. 386 (1987), the Court affirmed the Ninth Circuit's rejection of removal on the basis of complete preemption, but rejected the Ninth Circuit's reasoning that federal law needed to provide the same remedy that the state court plaintiffs had been seeking.

These two cases illustrate the flaw in respondents' reasoning, however, and show that complete preemption depends on whether the federal statute creates a displacing cause of action that transforms the state-law claim into a federal one. In *Avco*, the employer brought its claim to enforce a collective bargaining agreement, whose enforcement had been held to arise exclusively under federal law regardless of how the employer chose to characterize the legal basis for its claim, hence the action was removable. In *Caterpillar*, by contrast, the employees had sued under alleged individual employment agreements, which are creatures of state law, and even though federal law might preempt those claims, the preemption

question was purely a matter of defense. Complete preemption thus was not available. *See also Franchise Tax Bd. v. Construction Laborers Vacation Trust*, 463 U.S. 1, 22-26 (1983) (no complete preemption where State of California had no federal cause of action under ERISA).

Having knocked down a straw man by showing that the plaintiff's desired remedy need not be available, respondents argue that no general standards exist for complete preemption. They argue, instead, that each federal statute must be examined on its own terms to decide whether the preemptive effect is clear enough, broad enough and powerful enough to support removal. Respondents thus ignore *Beneficial National Bank v. Anderson*, 539 U.S. 1 (2003), which teaches that a fundamental prerequisite to complete preemption is that Congress created an "exclusive cause of action for the claim asserted and also set forth procedures and remedies governing that cause of action." *Id.* at 8.

In effect, respondents argue that the complete preemption doctrine can be freed from its conceptual moorings in the theory that the federal cause of action supplants the state claim, and can be replaced with idiosyncratic judgments about the preemptive force of each statute. That is not, however, the mode of analysis followed by the great majority of circuits, and that clear conflict is what merits review by this Court.

Indeed, respondents are left to contend that the FRSA is so different from other preempting federal statutes that the rule of *Beneficial* need not apply. However, the FRSA is scarcely a candidate for expansion of the complete preemption doctrine. Many other federal statutes, such as the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), whose preemptive effect was at issue in *Bates v. Dow Agrosciences*, 544 U.S. 431 (2005), or the Federal Food, Drug, and Cosmetic Act of 1938 ("FDCA") and the Medical Device Amendments that were at

issue in *Medtronic, Inc. v. Lohr*, 518 U.S. 470 (1996), or the National Labor Relations Act that was at issue in *Caterpillar*, establish far more comprehensive regulatory regimes over the matters that they cover than does the FRSA. And many preemption provisions, such as the Airline Deregulation Act ("ADA") at issue in *Morales v. Trans World Airlines*, 504 U.S. 374 (1992), and the Employee Retirement Income Security Act at issue in *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41 (1987), are drafted far more broadly than the FRSA. After all, they both preempt any state law that "relates to" the preempted area, and contain far narrower savings clauses, than does the FRSA's preemption provision. But where Congress has not created an exclusive federal cause of action, state courts hear plaintiffs' state tort claims, even based on federal-law duties, and address any federal preemption defenses.

In *CSX Transport. v. Easterwood*, 507 U.S. 658, 664-665 (1993), the Court expressly distinguished the FRSA's preemption language from the broader "relates to" language in statutes such as the ADA, and found in the FRSA's preemption provisions "considerable solicitude" for the states' ability to provide a tort cause of action. This restricted view of FRSA preemption is consistent with the presumption against preemption where, as in tort litigation against railroads, states have a long tradition of protecting the health and safety of their citizens, and of providing tort remedies for injuries caused by negligence. See *Bates*, 544 U.S. at 449-50. Respondents' contention that the FRSA eliminates state tort claims and requires removal is at odds with these federalism concerns and with the plain language of the FRSA and *Easterwood*.[1]

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[1] Petitioners strenuously dispute respondents' arguments about the substantive preemptive effect of the FRSA. Section 20106

(continued...)

To sustain their defense of the holding below, respondents are compelled to call into question the many decisions of the courts of appeals that consistently hold that the ADA, ERISA, NLRA, and similar statutes do **not** provide for complete preemption, in part because they do not create federal

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[1](...continued)
preempts "State requirements," and focuses on whether states can adopt or continue in force "additional or more stringent" laws, regulations, or orders. 49 U.S.C. § 20106. Congress no more meant its creation of a rail safety regulatory program to prevent injured residents from seeking remedies for the injuries caused by railroad negligence, *Easterwood*, 507 U.S. at 664-665, than it meant to cut off all state tort remedies for dangerous chemicals, *Bates*, 544 U.S. at 446-452, defective medical devices, *Medtronic*, 518 U.S. at 486-489, or unsafe recreational boats. *Sprietsma v. Mercury Marine*, 537 U.S. 51, 62-64 (2002).

Respondents mischaracterize *Norfolk S. Ry. v. Shanklin*, 529 U.S. 344 (2000), to argue that this Court forbade state tort claims based on violations of the FRSA. In *Shanklin*, however, the railroad was undisputedly "fully compliant with federal standards," and the plaintiff argued that the railroad should be liable based upon more stringent standards than those approved by the federal and state governments. *Id.* at 350. Rejecting this argument, the Court held that the federally approved standard was preemptive. *Id.* at 359. Respondents omit critical language from their *Shanklin* quote and take the sentence out of context. Nothing in *Shanklin* indicates that state tort claims cannot be based upon FRSA violations. *See also* 49 U.S.C. § 20903 (setting evidentiary standards for parties who bring a "civil action for damages").

But as much as respondents would like to avoid it, the question presented is whether, as respondents contend, Congress meant to take the litigation of that preemption defense entirely out of the hands of the state courts by allowing defendants to choose federal court despite the absence of any federal cause of action that could have been filed in federal court in the first place.

causes of action that would supplant the state-law claim that is argued to be preempted. Petition at 13-16. Respondents effectively discard the well-established rule that a federal defense, even the defense of preemption, is not a basis for federal jurisdiction by removal or otherwise. *Franchise Tax Bd.*, 463 U.S. at 12.[2]

Respondents also urge that state courts should not hear tort claims potentially implicating FRSA standards because of the goal of uniformity in railroad regulation. As an initial matter, the primary and express goal of the FRSA is safety. *See* 49 U.S.C. § 20101. Allowing state tort claims to proceed in state courts furthers that express congressional goal. In fact, this Court rejected respondents' argument under a federal safety act with similar purposes, the Federal Boat Safety Act. *See Sprietsma v. Mercury Marine*, 537 U.S. 51, 70 (2002).

Departing from the Eighth Circuit's own reasoning, respondents also argue that *Grable & Sons Metal Prods. v. Darue Eng'g & Mfg. Co.,* 545 U.S. 308 (2005), eliminated the need for an alternative federal cause of action. Although the court below asked for briefing on *Grable* at the same time that it sought briefing on complete preemption, it did not mention *Grable* in finding complete preemption. Nor did this Court, as respondents urge, expand the doctrine of complete preemption

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[2]In arguing that "the complete preemptive effect of railroad legislation" has long been recognized, Opp. at 11 n.4, respondents cite the Eighth Circuit's decision in *Deford v. Soo Line R.R. Co.*, 867 F.2d 1080 (1989), applying the doctrine of complete preemption to the Railway Labor Act ("RLA"). However, as shown in the Petition, at 16-17 & nn. 5 and 6, most circuits that have addressed the question flatly reject complete preemption by the RLA, precisely because that statute does not create an alternate cause of action. Respondents blithely ignore that line of authority.

in *Grable* based on the breadth of substantive preemption and "comprehensive regulation." Opp. at 22. Indeed, the mere comprehensiveness of a scheme of federal regulation does not establish even ordinary preemption, *Hillsborough County, Florida v. Automated Med. Lab.*, 471 U.S. 707, 716 (1985), much less complete preemption. Instead, the Court confined *Grable* to a "slim category" of cases that will not upset the balance of federalism in the courts and in which a federal issue is a necessary element of the plaintiff's claim for relief and, indeed, the only contested issue in the case. *Empire Healthchoice Assurance v. McVeigh*, — U.S. —, 126 S. Ct. 2121 (2006). Under respondents' theory of complete preemption, which involves fact-specific judgments about substantive preemption, the availability of federal removal jurisdiction will remain far from clear, and judicial resources will be diverted to wrangling over removal issues before the merits of the claims and defenses can even be reached.

Finally, respondents quote a brief excerpt from the Solicitor General's Brief in Opposition to the petition for a writ of certiorari in *Davis v. UAW*, No. 05-107, as supporting their opposition to review in this case. Opp. at 20-21, *quoting* SG Opp. at 19. But the Solicitor General's opposition to review in *Davis* was not based on the position that the existence of an alternate federal cause of action should never be considered, but only that this limit to the doctrine of complete preemption "should not be addressed in the abstract," in a case where that limitation had been neither raised nor addressed below. SG Opp. at 16-17. Moreover, *Davis* concerns a statute with respect to which **no** court of appeals has ever expressly considered the issue of complete preemption, and hence there was no conflict among the circuits. *Id.* at 16. These case-specific reasons for denying review in *Davis* do not apply here. The doctrinal limitation of complete preemption to those federal statutes that

create a cause of action was presented and expressly decided below, and has been addressed by several lower courts in disagreement with the Eighth Circuit. The FRSA does not create any cause of action that might be substituted for the state-law tort claims that were removed in this case. Accordingly, the Solicitor General's concerns about review in *Davis* simply do not apply here.

The Eighth Circuit wrongly treats jurisdictional complete preemption as the consequence of a preemption defense, without regard to whether the preempting statute also creates a cause of action. That is not merely a question of incorrect "application," *cf.* Opp. 17; it is the statement of the wrong rule, which most other courts of appeals expressly reject. The Court should grant review to ensure uniformity among the lower courts on that issue.

2. Certiorari Should Be Granted to Decide Whether the Preemption Defense Under the FRSA, 49 U.S.C. § 20106, Creates Federal Removal Jurisdiction Pursuant to the Doctrine of Complete Preemption.

Respondents seek to avoid review on the specific issue of removal jurisdiction under the FRSA based on a highly selective reading of the applicable lower court decisions. In fact, as the petition showed, there is widespread disagreement in the lower courts about this question presented as well.

Respondents downplay the *en banc* Fifth Circuit's rejection of removal in *Smallwood v. Illinois Cent. R. Co.*, 385 F.3d 568 (2004), cited in the Petition at 18, on the ground that the court did not expressly address the issue of complete preemption. But that court did decide – in square conflict with the Eighth Circuit's decision here – that the defense of preemption by the FRSA does not create a basis for federal jurisdiction. That the federal question jurisdiction was not the main basis put forward by the railroad defendant for removal

does not make the conflict any less genuine. In order to present a veneer of lower court unanimity, respondents also ignore the Seventh Circuit's rejection of removal based on complete preemption in *Adkins v. Illinois Cent. R. Co.*, 326 F.3d 828 (2003), cited in the Petition at 19. As this Court noted, FRSA's preemption provision, 49 U.S.C. § 20106, applies to "any regulation 'adopted' by the Secretary" of Transportation relating to railroad safety. *Easterwood*, 507 U.S. at 643 n.4. Because the Locomotive Inspection Act at issue in *Adkins* is a railroad safety statute, *Adkins* conflicts with the ruling below.

And respondents ignore the several district court decisions refusing to allow removal based on FRSA preemption because the FRSA does not create an alternate federal cause of action. Pet. at 18-19. Although district court decisions do not ordinarily provide a ground for certiorari as compelling as court of appeals decisions, they do here, because remand decisions for lack of jurisdiction are not reviewable and effectively state the final rule in their jurisdictions. 28 U.S.C. § 1447(d). Thus, these cases further demonstrate a split in the lower courts.

Moreover, respondents' image of lower court unanimity is overstated. One of the two decisions that they cite as agreeing with the ruling below is from the Eighth Circuit itself. The other decision, *Rayner v. Smirl*, 873 F.2d 60 (4th Cir. 1989), comes from a circuit that has subsequently adopted the "creates a private right of action" requirement for the doctrine of complete preemption. *Lontz v. Tharp,* 413 F.3d 435, 442 (4th Cir. 2005). More fundamentally, *Rayner* involved a provision of the FRSA, the retaliatory discharge protection for whistle-blowing railroad employees, that **does** create a private right of action under federal law, 873 F.2d at 65-66, and hence *Rayner* is consistent with the position of the vast majority of circuits on the need for a cause of action in a statute alleged to provide for complete preemption. In sum, although the Eighth

Circuit's decisions on complete preemption are consistent with each other, they are at variance with the treatment of complete preemption in other lower courts, both with specific reference to the FRSA and as a general rule governing removal based on other allegedly preempting statutes. This Court should grant certiorari to resolve that conflict.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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