No. _____

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Can a federal statute that creates no cause of action for the injured party provide a basis for federal jurisdiction and removal of a state tort claim filed in state court under the doctrine of complete preemption?

2. Does the Federal Railroad Safety Act ("FRSA") authorize complete preemption of state-law tort claims over railroad accidents, thereby conferring jurisdiction on federal courts, where the FRSA contains no private right of action for persons injured by a railroad's acts or omissions?

PARTIES TO THE PROCEEDINGS BELOW

The following individuals were plaintiffs in the district court and appellees in the court of appeals, and are petitioners here: Tom and Nanette Lundeen, individually and as parents of their minor children Molly and Michael Lundeen; Melissa Todd; Irene Clore Korgel; Trent Westmeyer and Randi Lou Westmeyer; Darla M. Just; Mary Beth Gross, individually, and Mary Beth Gross on behalf of, and as parent and natural guardian of Brett Gross; Mark Nesbit and Sandra Nesbit; LeRoy Slorby; Ray Lokoduk; JoAnn Flick; Wilfred Dahly and Geraldine Dahly; Marilyn Carlson; Gerald Wickman; Dion Darveaux, individually, and Brenda Darveaux, individually, and Dion Darveaux and Brenda Darveaux on behalf of, and as parents and natural guardians of Kendall Darveaux, a minor; Shelly Hingst; Bobby Smith and Mary Smith; Richard Muhlbradt; Doug Weltzin; Nathan Freeman, individually and Nichole Freeman, individually, and Nathan Freeman and Nichole Freeman on behalf of, and as parents and natural guardians of Ashlyn Freeman, a minor; Charlotte Goerndt; Leo Gleason; Judy Deutsch, individually, and Judy Deutsch on behalf of, and as parent and natural guardian of Tyrone Deutsch, a minor; Denise Duchsherer, Leo Duchsherer, and Joshua Duchsherer; Larry Crabbe and Carol Crabbe; Rebecca M. Behnkie on behalf of, and as parent and natural guardian of Nathaniel Behnkie, a minor; Charles Swenson and Sandra Swenson; Larry Schafer, individually, and Tami Schafer, individually, and Larry Schafer and Tami Schafer on behalf of, and as parents and natural guardians of Jenna Schafer, a minor; John Salling, individually, and Lorenda Poissant Salling, individually, and Lorenda Poissant Salling on

PARTIES TO THE PROCEEDINGS BELOW – Continued

behalf of, and as parent and natural guardian of Sebastian Poissant, a minor; Rachelle Todosichuk; Lonnie Shigley; and Richard McBride and Linda McBride.

The following entities were defendants in the district court and appellants in the court of appeals, and are respondents here: Canadian Pacific Railway Company; Canadian Pacific Limited; Canadian Pacific Railway Limited; and Soo Line Railroad Company.

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The opinion of the United States Court of Appeals for the Eighth Circuit (Pet App. 1a to 29a) is reported at 447 F.3d 606. The opinions of the United States District Court for the District of Minnesota, initially denying the motion to remand (Pet. App. 30a to 42a), and then granting the motion for remand following amendment of the complaint (Pet. App. 43a to 52a), are respectively reported at 342 F. Supp. 2d 826 and 2005 WL 563111.

JURISDICTION

The decision of the United States Court of Appeals was issued on May 16, 2006. Pet. App. 20a. A timely petition for rehearing en banc was denied on July 18, 2006. Pet. App. 53a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant portions of 28 U.S.C. §§ 1331 and 1441 and of the Federal Railroad Safety Act, 49 U.S.C. §§ 20101 *et seq.*, are set forth at Pet. App. 54a to 60a.

STATEMENT

A. Introduction

For more than a century, persons injured by railroads have brought suits in state court under state-law theories of liability. These tort claims went forward based upon

failures to meet standards set under either federal law or state law. In 1970, Congress enacted the Federal Railroad Safety Act ("FRSA") "to promote safety in every area of railroad operations and reduce railroad-related accidents and incidents." 49 U.S.C. § 20101. After that enactment, plaintiffs continued to bring their state tort claims in state court, again either based upon violations of the standards set in federal law, or where federal law does not cover the issue, based upon state-law standards.

In a decision that radically upsets the settled jurisdictional and substantive framework, the court below held that, despite the absence of any cause of action at all under the FRSA, railroad track inspection claims are subject to the complete preemption doctrine and therefore must be removed to federal court. That holding, which conflicts with the decisions of this Court and those of numerous other courts of appeals, means that causes of action that historically have been brought against railroads in state courts may only be brought in federal court. Indeed, in the wake of the decision below, respondent has removed approximately 150 cases from state court to federal court, asserting that all claims against the railroad must be heard in federal court under the complete preemption doctrine. Under the Eighth Circuit's holding, victims of train derailments, like the tragic occurrence here, will be channeled to federal court only to be told that they have no remedy at all. Congress intended no such result when enacting the FRSA. Because the Eighth Circuit's decision deepens and widens the conflict among the circuits on complete preemption and is contrary to this Court's decisions, the petition should be granted and the decision below should be reversed.

B. Background of This Case

In the early morning hours of January 18, 2002, a freight train derailed 31 of its 112 cars on track owned and maintained by respondent Soo Line Railroad Company (also known as Canadian Pacific Railway), about a half mile from the city limits of Minot, North Dakota. Twelve tank cars, containing liquefied anhydrous ammonia, ruptured or were damaged, resulting in the release of 220,000 gallons of anhydrous ammonia into the atmosphere and creating a toxic cloud that blanketed the city of Minot. One resident, John Grabinger, died from exposure to the ammonia; a multitude of others suffered serious, long-term injuries to their lungs, eyes and respiratory systems.

On June 28, 2004, petitioners Tom and Nanette Lundeen, individually and as parents of their minor children Molly and Michael Lundeen, sued respondent Soo Line, which owns, installed, inspected and maintained the track at issue, along with its parent, respondent Canadian Pacific Railway Company, and other subsidiaries, including respondents Canadian Pacific Limited, and Canadian Pacific Railway Limited (collectively, respondents are identified as "CP Rail"). The action was filed in Minnesota state court, the Hennepin County District Court, where Soo Line is incorporated and has its principal place of business.[1] Petitioners sought damages, alleging in several

[1] Similar cases were brought on behalf of 49 other plaintiffs, whose names are set forth above in the Parties to the Proceedings Below. Like the Lundeens' case, each of these cases was removed to federal district court and subsequently remanded to state court; each of the remands was appealed, and rehearing en banc sought after the court of appeals reversed. By consent of both sides, *Lundeen* was treated as the lead case and the outcome of all the other cases was dependent on *Lundeen*.

(Continued on following page)

counts that respondents' flawed maintenance policies were responsible for the accident and hence for petitioners' injuries. The complaint detailed several respects in which respondents' track was defective under well-established standards. It asserted that respondents had deliberately cut back track inspection efforts to save money. It also alleged that these failings, coupled with the excessive speed at which the train was being operated by respondents, were responsible for the accident and for petitioners' injuries.

At the time suit was filed, CP Rail was defending about 35 cases arising out of the Minot derailment in the same state court. Several of those cases had previously been removed to the United States District Court for the District of Minnesota but were remanded to Hennepin County District Court. Numerous other cases stemming from the Minot derailment were subsequently filed in Hennepin County court. The Hennepin County court established a master file as a repository for all filings relating to the derailment cases, and appointed a special master to administer pretrial proceedings.

C. Proceedings in the District Court

On July 15, 2004, respondents removed the Lundeens' action to the District of Minnesota, asserting that the district court had federal question jurisdiction under 28 U.S.C. § 1331. The notice of removal cited references in the complaint to the rules and regulations of the Federal

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See Pet App. 1a-17a, 39a-40a, 50a. Similarly, in this Court, all 53 original plaintiffs join this petition, but petitioners are identified as the Lundeens for brevity's sake.

Railroad Administration, and the Count III claim that respondents had "violated applicable state law . . . as well as United States law," to show that petitioners had brought federal claims in their state court suit. The Lundeens promptly moved to remand to state court, arguing that their references to such legal standards to show duties that had been violated under state tort law did not amount to bringing federal claims under *Merrell-Dow Pharmaceuticals v. Thompson*, 478 U.S. 804 (1986). The Lundeens also pointed to previous decisions of the federal district court, remanding other suits arising from the Minot derailment, because the court had expressly rejected the argument that preemption by the Federal Railroad Safety Act permitted removal. The Lundeens argued that respondents were raising the same, previously rejected argument. In response, respondents argued that the only basis for removal was the mention of federal standards in the state court complaint; respondents expressly disclaimed any reliance on the complete preemption doctrine as a basis for removal or for federal court jurisdiction.

The district court agreed with respondents that the passing reference in Count III of the complaint to "United States law" as having been violated, with the resultant release of ammonia, was properly construed as reflecting reliance on the federal environmental laws, and hence decided that removal was proper because the complaint arose, at least in part, under federal law. Pet. App. 35a-37a. The Lundeens then sought leave to amend their complaint to dismiss Count III and to remand the case because, once amended, the complaint would no longer include any claims arising under federal law. Respondents argued, however, that remand should be denied because, both by suing in Minnesota where respondents were

incorporated and headquartered instead of in North Dakota where the accident had occurred, and by first bringing a claim that invoked "United States law" and then dismissing that claim, petitioners had been engaged in "forum shopping" which, according to respondents, provided an appropriate basis for denial of a discretionary remand under *Carnegie-Mellon University v. Cohill*, 484 U.S. 343 (1988). The district court, however, agreed with the Lundeens that, given the elimination of Count III from the complaint, the pendency in state court of other cases arising from the same derailment, and the potential for conflict between state and federal cases, the case should be remanded. Pet. App. 46a-47a.

D. Proceedings in the Court of Appeals

Respondents appealed to the United States Court of Appeals for the Eighth Circuit, arguing that the district court had abused its discretion in allowing the complaint to be amended, and had further abused its discretion under *Carnegie-Mellon v. Cohill* and 28 U.S.C. § 1367 by remanding to state court. Respondents justified these arguments by raising the same concerns about forum shopping that they had presented to the district court. Respondents also argued that their federal preemption defense would be an important issue in the case, providing an additional reason to retain supplemental jurisdiction under 28 U.S.C. § 1367. Respondents did not contend that the case still arose under federal law following dismissal of Count III. However, following oral argument, the court sua sponte directed the parties to file supplemental briefs addressing, among other things, whether respondents' intended defense of preemption by the FRSA might provide

a basis for federal jurisdiction under a theory of complete preemption.

In their supplemental brief, respondents reversed ground. Even though, in the district court, they had expressly disavowed complete preemption as a ground for removal, they now argued that what makes the preemptive force of a statute "complete" for the purpose of removal jurisdiction is how "powerful" the preemption is. Supp. Br. at 2-4. Respondents also argued that the FRSA broadly preempts all of petitioners' claims. *Id.* at 5-7, 14-20. Therefore, respondents contended, the very fact that the FRSA preempts claims was itself sufficient to justify its preemptive force as being not merely defensive but "complete," and thus sufficient to provide federal jurisdiction. According to respondents, state courts tend to have too parochial a focus to be trusted with the application of the FRSA preemption defense. *Id.* at 9-10. Moreover, respondents pointed to the Eighth Circuit's previous decision in *Peters v. Union Pacific RR Co.*, 80 F.3d 257 (8th Cir. 1996), which had held that the FRSA completely preempted a locomotive engineer's state-law conversion action, contesting the railroad's refusal to return his engineer's certification.

The Lundeens argued in their supplemental brief, however, that a hallmark of complete preemption is not the "force" of the preemption, but whether Congress has created a federal cause of action it intended to be exclusive, such that any state-law claim asserted was not merely preempted but necessarily transformed into a federal one. Moreover, if, as under the FRSA, the federal statute creates only a regulatory scheme that is enforced primarily through agency rule-making without the creation of any federal cause of action, let alone an exclusive

one, preemption is necessarily only a federal defense that is to be raised in either state or federal court, depending on where the claim has been brought. That defense does not, however, provide a basis for federal jurisdiction. Because FRSA did not create a federal cause of action, the Lundeens argued, it did not create federal jurisdiction as a matter of "complete" preemption.

The court of appeals reversed. It began by stating that, even though respondents had not raised the issue of complete preemption on appeal, a question of subject matter jurisdiction could be raised at any time, including possible grounds for the presence of subject matter jurisdiction as well as grounds for questioning subject matter jurisdiction. Pet. App. 21a. The court noted that preemption is a question of congressional intent, *id.*, and that Congress' purported intention to ensure national uniformity on issues of railroad safety "evince[s] a total preemptive intent." *Id.* 23a, quoting *Peters*. The panel then reviewed the Eighth Circuit's two previous decisions on the issue of FRSA complete preemption, *Peters*, *supra*, and *Chapman v. Lab One*, 390 F.3d 620 (8th Cir. 2004), the latter of which held that common-law claims arising from deficient drug-testing of employees were not preempted by the FRSA's own drug-testing regulations. In both cases, the court noted, the decisions on whether the FRSA preempted state law, and on whether there was "complete preemption," were treated as being the same determination. Pet. App. 23a-25a. The court acknowledged that the FRSA did not create a private right of action, but found that to be of no moment in the complete preemption analysis. Pet. App. 25a n.4.

The court then turned to respondents' argument that the FRSA's track inspection regulations preempted petitioner's state-law claims based on negligent track inspections. The court reasoned that, because the regulations of the Federal Railroad Administration ("FRA") prescribe track inspection protocols, provide for federal and state inspectors to determine whether railroads have met their inspection obligations, and authorize civil administrative penalties for violations, the FRA regulations are intended to prevent negligent track inspection and leave no room for state-law causes of action. Pet. App. 28a. The panel opinion noted, in closing, that "absent en banc review we are bound by our decision in *Peters* to find complete, jurisdictional preemption." *Id.*

Petitioners sought rehearing *en banc*, arguing that each of this Court's previous complete preemption decisions had involved statutes that provided an exclusive federal cause of action, and citing cases from numerous other circuits holding that the existence of an alternate federal cause of action within the jurisdiction of the federal courts is a necessary precondition for "complete preemption." The Lundeens also noted the disarray into which the panel's opinion had thrown the numerous state court cases arising out of the Minot derailment, some of which had already proceeded to trial following the remand, because respondents had not sought a stay from the court of appeals pending their appeal of the decision to remand. The full court of appeals directed a response to the petition but denied rehearing. The only two active judges on the panel below – Judge Bye, the authoring judge, and Judge Smith – voted to rehear the case *en banc*. Pet. App. 53a.

REASONS FOR GRANTING THE WRIT

The Court Should Grant Review to Resolve Conflicts Among the Circuits and Other Lower Courts About Whether the Existence of a Federal Cause of Action Is a Necessary Condition for Establishing Federal Jurisdiction Based on Complete Preemption.

The decision below sharpens an ongoing conflict among the lower courts about the kinds of federal laws that provide a basis for complete preemption of state-law claims, thereby rendering the state claims removable to federal court. The lower courts are deeply divided on the question whether a claim of federal jurisdiction based on complete preemption can succeed when the federal statute at issue does not itself create a federal cause of action that "supplants" the preempted state court remedy. Moreover, the lower courts are divided specifically about whether the FRSA supports removal of state tort claims based on complete preemption. The Court should grant certiorari to resolve this fundamental dispute over federal destruction of state court jurisdiction.

A. The Decision Below Wrongly Applies the Complete Preemption Doctrine – In Conflict With This Court's Decisions

It is settled law that the affirmative defense of preemption does not confer federal jurisdiction. "The presence or absence of federal-question jurisdiction is governed by the 'well-pleaded complaint rule,' which provides that federal jurisdiction exists only when a federal question is presented on the face of the plaintiff's properly pleaded complaint. . . . A defense is not part of a plaintiff's properly pleaded statement of his or her claim." *Rivet v. Regions Bank*, 522 U.S. 470, 475 (1998) (citations omitted).

Indeed, no defense – preemption or otherwise – provides federal question jurisdiction. "[A] case may not be removed to federal court on the basis of a federal defense, including the defense of pre-emption, even if the defense is anticipated in the plaintiff's complaint, and even if both parties concede that the federal defense is the only question truly at issue." *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 393 (1987). *Accord Franchise Tax Bd. v. Construction Laborers Vacation Trust*, 463 U.S. 1, 12 (1983). Even the extremely broad preemption of the Employee Retirement Income Security Act ("ERISA") "without more, does not convert a state claim into an action arising under federal law." *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 64 (1987). Accordingly, the normal rule is that a federal-law defense to a state-law claim, including the defense of preemption, must be litigated in state court if the plaintiffs have brought their claims in state court, subject, of course, to review by this Court on certiorari from a final state court decision.

There are "only two circumstances" where a state claim may be removed to federal court: "when Congress expressly so provides, such as in the Price-Anderson Act [authorizing removal of tort claims arising from nuclear accidents], or when a federal statute wholly displaces the state-law cause of action through complete preemption." *Beneficial Nat'l Bank v. Anderson*, 539 U.S. 1, 8 (2003). This Court has identified only three federal statutes that wholly displace state-law claims rather than simply defeating them – section 301 of the Labor Management Relations Act ("LMRA"), *Avco Corp. v. Machinists Lodge 735*, 390 U.S. 557 (1968); the National Bank Act, 12 U.S.C.

§§ 85 and 86, *Beneficial*, *supra*; and section 502 of the ERISA, *Metropolitan Life*, *supra*.[2] The defining characteristics, the Court has made clear, are whether "the federal statutes at issue provided the exclusive cause of action for the claim asserted and also set forth procedures and remedies governing that cause of action." *Beneficial*, 539 U.S. at 8.

Thus, as applied in this Court's decisions, complete preemption is a jurisdictional doctrine. It occurs only where Congress has created an exclusive federal cause of action to enforce rights created by a federal statute. If a plaintiff brings a state-law claim that falls within the scope of the exclusive federal action, a federal court recharacterizes the claim as a federal claim, and federal question jurisdiction attaches. *Beneficial*, 539 U.S. at 9. Thus, a federal cause of action is the first prerequisite to complete preemption, and the second is whether Congress

[2] In special circumstances not applicable here, a federal court may have federal question jurisdiction over a state-law claim that depends on the construction of a federal statute that does not itself create a cause of action, where a disputed substantial question of federal law is a necessary element and removal will not upset the congressionally approved balance of federal and state judicial responsibilities. *See Grable & Sons Metal Products v. Darue Engineering & Mfg.*, 545 U.S. 308, 125 S.Ct. 2363 (2005) (holding national interest in providing a federal forum for federal tax litigation is sufficiently strong to support the exercise of federal question jurisdiction over state-law claim involving substantial issue of federal title law). Explaining and distinguishing *Merrell Dow Pharmaceuticals v. Thompson*, 478 U.S. 804 (1986), *Grable* observed that state-law tort claims involving violations of federal statutes will not fit this narrow exception. *See id.* at 2370-71. Moreover, in a *Grable*-type case, the federal interest does not displace the state-law claim and warrant a finding of complete preemption. The court of appeals directed the parties to brief the application of *Grable* to this case, but did not address that issue in its decision. Accordingly, this petition does not address it further.

charged the federal courts with exclusive jurisdiction to rule on the claims.

Both of those elements are absent here. Nowhere does the FRSA confer an exclusive federal private right of action for persons injured by railroads. The court below neither cited *Beneficial National Bank* nor identified anywhere in the FRSA where Congress intended to eliminate state-law remedies that have existed for more than a century and to replace those remedies with a federal cause of action. What the Eighth Circuit did below was to treat the affirmative defense of substantive preemption under the FRSA as giving rise to "complete preemption" of the type that confers exclusive federal jurisdiction over claims. Nothing in the FRSA or this Court's decisions countenances that result.

B. The Eighth Circuit's Approach Conflicts With the Decisions of Other Circuits.

In seeking to identify the essential characteristics that confine complete preemption claims to a narrow class of cases, a deep split has developed among the courts of appeals that has now been widened by the Eighth Circuit in this case. A clear majority of circuits has rejected the notion accepted below that a regulatory scheme alone is sufficient for the invocation of the complete preemption doctrine. Those courts have assessed the removal of claims pursuant to preemption defenses under a large variety of federal statutes and held that a federal statute cannot effectuate the "complete preemption" that allows removal of state-law claims if Congress did not create a federal cause of action that substitutes for the state cause of action that the plaintiff would otherwise have. For example, the

Fourth Circuit rejected complete preemption under sections 7 and 8 of the National Labor Relations Act, explaining "the sine qua non of complete preemption is a preexisting *federal* cause of action that can be brought in the district courts." *Lontz v. Tharp*, 413 F.3d 435, 442 (4th Cir. 2005). The Seventh Circuit similarly explained this precondition of a federal cause of action in *Rogers v. Tyson Foods, Inc.*, 308 F.3d 785, 789 (7th Cir. 2002). The court stated, "Logically, complete preemption would not be appropriate if a federal remedy did not exist in the alternative. . . . Preemption is what wipes out state law, but the foundation for removal is the creation of federal law to replace state law." *Id.* at 789 (internal quotes and cites omitted). A distinct majority of circuits agree with the analysis in *Lontz* and *Rogers*.[3] In these cases, unlike the approach taken below, the absence of a federal cause of

[3] *E.g.*, *Felix v. Lucent Technologies*, 387 F.3d 1146, 1158 (10th Cir. 2004) (ERISA); *Opera Plaza Residential Parcel Homeowners Ass'n v. Hoang*, 376 F.3d 831, 839 (9th Cir. 2004) (Telecommunications Act of 1996); *Briarpatch Ltd. v. Phoenix Pictures*, 373 F.3d 296, 304-305 (2d Cir. 2004) (Copyright Act); *Wayne v. DHL Worldwide Express*, 294 F.3d 1179, 1184 (9th Cir. 2002) (Airline Deregulation Act); *Johnson v. Baylor University*, 214 F.3d 630, 631-634 (5th Cir. 2000) (Pilot Records Sharing Act); *American Policyholders Ins. Co. v. Nyacol Products*, 989 F.2d 1256, 1263 (1st Cir. 1993) (CERCLA); *Railway Labor Execs Ass'n v. Pittburgh & Lake Erie RR Co.*, 858 F.2d 936, 942 (3d Cir. 1988) (Railway Labor Act); *Williams v. Midwest Express Airlines*, 315 F. Supp. 2d 975, 979 (E.D. Wis. 2004) (Airline Deregulation Act); *Burton v. Southwood Door Co.*, 305 F. Supp. 2d 629, 637-638 (S.D. Miss. 2003) (Federal Omnibus Transportation Employee Testing Act). *See also Hudson Ins. Co. v. American Elec. Corp.*, 957 F.2d 826, 830 (11th Cir. 1992) (in federal court action for declaratory judgment that insurance policy did not provide CERCLA coverage, court rejected argument that suit to compel coverage would be completely preempted by CERCLA because CERCLA does not create cause of action for insurance coverage).

action was critical to the court's determination that the complete preemption doctrine did not apply.

The view of the great majority of circuits is exemplified by their cases – and, indeed, decisions from this Court – involving preemption under ERISA. Courts routinely hold that, because "a vital feature for complete preemption is the existence of a federal cause of action that replaces the state cause of action," complete preemption extends only to claims for relief that could have been brought under ERISA section 502, *King v. Marriott Int'l*, 337 F.3d 421, 425 (4th Cir. 2003), and where the state plaintiff would have had standing to file under section 502.[4] However, when ERISA's preemptive force comes only from conflict with ERISA's policies, this Court has long held that there is no replacement of state-law claims by section 502, and that the preemption is only conflict preemption that does not support removal. *Franchise Tax Bd.*, 463 U.S. at 25-27.

As the Ninth and Tenth Circuits have held, the fact that the federal statute may give regulatory authority to a federal agency, which in turn has the authority to institute a civil action in district court, does not mean that complete preemption applies, even if the regulatory scheme is established as the exclusive means of enforcement in the area. *Opera Plaza v. Hoang, supra*, 376 F.3d at 838-839; *Schmeling v. NORDAM*, 97 F.3d 1336, 1342-1344 (10th Cir. 1996). Otherwise, every case of claimed "field preemption" could support removal of the allegedly preempted

[4] *Pascack Valley Hospital v. Local 464A UFCW Welfare Reimb. Plan*, 388 F.3d 393, 400 (3d Cir. 2004); *Felix v. Lucent Technologies*, 387 F.3d 1146, 1158 (10th Cir. 2004).

state claims to federal court. But complete preemption is not "a crude measure of the breadth of the preemption (in the ordinary sense) of a state law by a federal law, but rather . . . a description of the specific situation in which a federal law not only preempts a state law to some degree but also substitutes a federal cause of action for the state cause of action, thereby manifesting Congress's intent to permit removal." *Schmeling*, 97 F.3d at 1342, *quoted in Lucent Technologies*, *supra*, 387 F.3d at 1156-1157. Such decisions comport with the theoretical basis for the doctrine of complete preemption – that Congress has created a cause of action that actually displaces the state cause of action and "converts" it into a federal cause of action within the district court's original jurisdiction. *Aetna Health v. Davila*, 542 U.S. 200, 209 (2004).

A minority of lower court decisions agrees with the Eighth Circuit that complete preemption may exist even in the absence of a federal cause of action. Those courts **have** found complete preemption by a federal statute that did not create a private right of action over which district courts would have had original jurisdiction. For example, in a different case, the Eighth Circuit held that the Railway Labor Act effectuates complete preemption of some state claims that are arguably based on an interpretation of a collective bargaining agreement ("CBA") in the railway or airline industries, even though the statute does not create a federal cause of action.[5] Many other circuits,

[5] *Gore v. TWA*, 210 F.3d 944, 949-950 (8th Cir. 2000); *Deford v. Soo Line*, 867 F.2d 1080, 1086 (8th Cir. 1989). *See also, e.g., Anderson v. American Airlines*, 2 F.3d 590, 595 (5th Cir. 1993) (dictum that RLA can effectuate complete preemption, but removal reversed because particular state-law claims at issue did not require interpretation of CBA).

however, hold in conflict with the Eighth Circuit that the RLA does not provide a basis for complete preemption of state-law claims, reasoning that, unlike the LMRA, the RLA does not create a federal cause of action to enforce contracts.[6]

Similarly, the Sixth Circuit has upheld complete preemption in a case presenting claims that a labor union engaged in age discrimination in violation of state law by enforcing a rule that persons over the age of sixty-five could not run for union office, and that union officials defamed the plaintiff official when he tried to run in violation of that union rule. *Davis v. UAW*, 392 F.3d 834, 838-840 (6th Cir. 2004), *cert. pending*, No. 05-107. There, the court held that provisions of the Labor Management Reporting and Disclosure Act giving the Labor Department exclusive jurisdiction over union elections authorized complete preemption.

This disagreement among the lower courts about whether complete preemption can be found when a federal statute does not create a federal cause of action is both steadily growing and firmly entrenched, as shown by the Eighth Circuit's refusal to grant en banc review in the face of a petition that showed how generally isolated its position has become. Because this conflict involves fundamental principles of federal jurisdiction and of the relation between federal and state courts, it warrants prompt resolution by this Court.

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[6] *E.g.*, *Geddes v. American Airlines*, 321 F.3d 1349, 1354-1355 (11th Cir. 2003); *Railway Labor Execs Ass'n v. Pittburgh & Lake Erie RR Co.*, 858 F.2d 936, 942 (3d Cir. 1988); *Price v. PSA*, 829 F.2d 871, 876 (9th Cir. 1987).

C. The Decision Below Also Presents A Square Conflict Over Whether the FRSA Provides for Complete Preemption of State Tort Claims.

This case presents a particularly apt vehicle for resolving the conflict because there is also a split among the lower courts about the specific question whether there is complete preemption under the FRSA when state tort actions are brought over railroad accidents.

1. In most circuits, state court lawsuits presenting tort claims allegedly preempted by the FRSA have been held removable or not based solely on whether there was diversity of citizenship or some other basis for federal subject matter jurisdiction, without any suggestion that the FRSA preemption defense could provide a basis for removal.[7] The *en banc* Fifth Circuit, in the course of reversing a district court's refusal to remand a diversity case based on a ruling of improper joinder, squarely stated, albeit without extended discussion, that FRSA preemption is a federal defense and hence not a basis for removal. *Smallwood v. Illinois Cent. R. Co.*, 385 F.3d 568, 575-576 (5th Cir. 2004) (*en banc*). Several district courts have joined *Smallwood*, expressly rejecting arguments of complete preemption under the FRSA, which would allow

[7] *Strozyk v. Norfolk Southern Corp.*, 358 F.3d 268, 270 (3d Cir. 2004); *Macfarlane v. Canadian Pacific Ry. Co.*, 278 F.3d 54, 56 (2d Cir. 2002); *Rushing v. Kansas City Southern Ry. Co.*, 185 F.3d 496, 502 (5th Cir. 1999); *Ingram v. CSX Transp.*, 146 F.3d 858, 860-863 (11th Cir. 1998). None of these decisions expressly addressed the issue of complete preemption. However, as the court below held, subject matter jurisdiction must be considered sua sponte, and hence any ruling requiring remand for lack of diversity implicitly holds that FRSA preemption is a defense rather than an independent basis for removal.

removal of state tort claims.[8] And the Seventh Circuit, addressing the analogous issue of preemption under the Locomotive Inspection Act ("LIA"), has held that the railroad's claim of complete preemption founders on the fact that nothing in the LIA indicates that Congress intended to create a federal forum for the plaintiff's claims. *Adkins v. Illinois Cent. R. Co.*, 326 F.3d 828, 835 (7th Cir. 2003). In sum, the Eighth Circuit's FRSA holding is in conflict with a growing number of lower courts about whether the FRSA preemption defense provides federal question jurisdiction based on the principle of complete preemption. This case is, therefore, an excellent vehicle for deciding whether the absence of a federal cause of action is fatal to a claim of complete preemption.[9]

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[8] *Sullivan v. BNSF Ry. Co.*, ___ F. Supp. 2d ___, 2006 WL 2390330 (D. Ariz. Aug. 17, 2006); *Kelley v. Norfolk & Southern Ry. Co.*, 80 F. Supp. 2d 587, 590-592 (S.D. W.Va. 1999); *Duncan v. Kansas City Southern R. Co.*, 1998 WL 35069621 (W.D. La. April 7, 1998). *See also Civil City of South Bend, Ind. v. Consolidated Rail Corp.*, 880 F. Supp. 595, 598-599 (N.D. Ind. 1995) (no federal question jurisdiction of city's declaratory judgment action seeking to establish that its ordinances are not preempted by the FRSA).

[9] The one case outside the Eighth Circuit that was cited by the court below in support of its determination of complete preemption was *Rayner v. Smirl*, 873 F.2d 60, 65 (4th Cir. 1989), which held that the FRSA's whistleblower protections caused complete preemption of the state whistleblower claims of a railroad employee. Notably, however, FRSA **does** create a specific federal remedy for individual employees, and the Fourth Circuit specifically relied on that federal remedy in finding complete preemption. *See id.* at 63-67 (examining 45 U.S.C. § 441 and holding Congress intended it to be the exclusive remedy for the plaintiff). The Fourth Circuit's decision in *Lontz v. Tharp*, *supra*, shows that the Fourth Circuit is firmly of the view that the existence of a federal cause of action is one of the preconditions for complete preemption.

2. Even apart from the fact that the FRSA does not provide a federal cause of action that could supplant the state cause of action, there is another reason why FRSA preemption would make a particularly unsuitable candidate for complete preemption – the fine lines and particularized factual determinations that often divide the preempted tort claim from the non-preempted claim. The FRSA is unlike section 301 of the Labor-Management Relations Act or section 502 of ERISA, under which there is complete preemption where a plaintiff with a federal cause of action under those provisions seeks to enforce a collective bargaining agreement or benefit plan. The existence vel non of FRSA substantive preemption may depend on the case-specific factual determination of whether there was an individual hazard that imposed a duty to slow or to stop the train,[10] or whether the problem was that vegetation at a crossing blocked a sign (preempted) or blocked the motorist's view of oncoming trains (not preempted),[11] or whether there is federal funding for a particular crossing, a fact that is not always clear at the outset of a case and may even not be finally determined until trial.[12] Indeed, the facts about whether federal funds

[10] *CSX Transp. v. Easterwood*, 507 U.S. 658, 674 n.15 (1993); *Alcorn v. Union Pacific RR Co.*, 50 S.W.2d 226, 241-242 (Mo. 2001) (citing illustrative cases).

[11] *Shanklin v. Norfolk Southern Ry. Co.*, 369 F.3d 978, 986-988 (6th Cir. 2004); *Clark v. Illinois Cent. R. Co.*, 794 So.2d 191, 195-196 (Miss. 2001).

[12] *E.g.*, *Anderson v. Wisconsin Cent. Transp. Co.*, 327 F. Supp. 2d 969, 973-974 (E.D. Wis. 2004), *Richardson v. Norfolk Southern Ry. Co.*, 923 So.2d 1002, 1008 (Miss. 2006); *Ball v. Burns & McDonnell*, 883 P.2d 756, 762 (Kan. 1994).

were devoted to the one crossing or device that is at issue in the case is often peculiarly within the knowledge of the railroad, and hence subject to manipulation depending on exactly what claims are made by the plaintiff and which claims prove to be the crucial ones in the litigation. *E.g., Hester v. CSX Transp.*, 61 F.3d 382, 384, 386 (5th Cir. 1995) (railroad took inconsistent positions about whether federal funds were actually used to upgrade the subject crossing). *See also Hart v. Bayer Corp.*, 199 F.3d 239, 244-246 (5th Cir. 2000) (fact that FIFRA contains an anti-preemption provision [as does the FRSA] and that many state claims are not preempted by FIFRA militates against finding complete preemption).

If not only the existence of substantive preemption, but the very forum in which the case is to be litigated, depends on the resolution of such factual questions, a case could be tried in one forum, only to have to be sent to the other forum after the trial or even the appeal resolves one of these factual issues.

Equally dangerous to the orderly resolution of cases through certainty about the proper forum is the fact that, thirteen years after *Easterwood* – the Court's first foray into FRSA preemption – there remain major areas of disagreement among the lower courts about whether particular tort claims are preempted by the FRSA or by its implementing regulations. Lower courts disagree about the application of the term "essentially local safety or security hazard," 49 U.S.C. § 20106(1), such as whether the steepness of a grade or sharpness of a curve,[13] the

[13] *Compare Mononghela Connecting R. Co v. Pennsylvania PUC*, 404 A.2d 1376, 1379 (Pa. 1979) (not preempted) *with Union Pac. R. Co. v. California PUC*, 346 F.3d 851 (9th Cir. 2003) (preempted).

presence of multiple or congested tracks,[14] the urban nature of the tracks or crossing,[15] the malfunctioning of the warning signals,[16] fire danger conditions,[17] or obstructed or poor drainage,[18] render the hazard "essentially local." And yet, according to the Eighth Circuit, the determination of each of these legal questions, at the trial level or on appeal, will determine not only the viability of the claim but also the propriety of the forum.

The Eighth Circuit's "preemption equals jurisdiction" analysis thus creates a practical problem as to the substantive preemption analysis. For example, in the *Lundeen* decision, it resulted in a broad ruling that all track inspections claims are preempted, ignoring the particularized analysis required by this Court in *Easterwood* and the

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[14] *Compare Lavigne v. CSX Tranp.*, 2002 WL 1424808 (Mich. App. 2002), at *10-*12 (not preempted) *with Bakhuyzen v. National Rail Passenger Corp.*, 20 F. Supp. 2d 1113, 1117 (W.D. Mich. 1996) (preempted).

[15] *Compare Stevenson v. Union Pac. R. Co.*, 110 F. Supp. 2d 1086, 1091 (E.D. Ark. 2000), *aff'd in part*, 354 F.3d 739 (8th Cir. 2004) (could avoid preemption if state had regulation on point), and *In re Speed Limit for Union Pac. RR Through City of Shakopee*, 610 N.W.2d 677, 683-684 (Minn. App. 2000) (not preempted) *with Santini v. Conrail*, 505 N.E.2d 832, 835-838 (Ind. App. 1987) (preempted).

[16] *Compare Stone v. CSX Transp.*, 37 F. Supp. 2d 789, 794-797 (S.D. W. Va. 1999) (not preempted) *with Smith v. Norfolk and Western Ry. Co.*, 776 F. Supp. 1335, 1341 (N.D. Ind. 1991).

[17] *Compare State v. Chicago, M. St. P. & P.R. Co.*, 484 P.2d 1146, 1149 (Wash. 1971) (not preempted) *with Conrail v. City of Bayonne*, 724 F. Supp. 320, 330-331 (D.N.J. 1989) (preempted).

[18] *Compare State ex rel. Utilities Com'n v. Seaboard Coast Line R. Co.*, 303 S.E.2d 549, 555 (N.C. 1983) (not preempted) *with Black v. Baltimore and O. R. Co.*, 398 N.E.2d 1361, 1363 (Ind. App. 1980) (preempted).

FRA's decision not to create federal standards as to the inspection of track made of continuous welded rail. *See CSX Transp., Inc. v. Easterwood*, 507 U.S. 658 (1993); 49 C.F.R. § 213.119. Moreover, the analysis assumes that only federal courts are capable of making judgments about whether the FRSA preempts claims. This Court has long held, however, that state courts are fully capable of rendering judgments regarding the substantive preemption of state-law claims. *See, e.g., Kircher v. Putnam Funds Trust*, 126 S.Ct. 2145, 2157 (2006) (noting that state courts are equally competent bodies as federal courts, subject to review by the Supreme Court).

D. There Is Widespread Disarray in the Law of Complete Preemption.

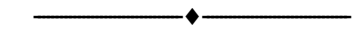
Beyond these more specific problems with the holding below is the general disarray in the law of complete preemption. Commentators have noted the confusing state of the law in this area, *e.g.*, Green, *Complete Preemption – Removing the Mystery from Removal*, 86 Calif. L. Rev. 363, 383 (1998), and a study by the Federal Judicial Code Revision Project of the American Law Institute noted the substantial divisions among the lower federal courts about complete preemption, which have given narrower or broader readings to this Court's opinions in the area:

> The failure of the federal courts to develop a coherent doctrine of removal on grounds of complete preemption threatens basic notions of the limited jurisdiction of the federal courts. While this problem falls short of apocalyptic proportions, it injects an unwholesome degree of unpredictability into the law the district courts must

> apply to determine the removability of pre-empted state law claims.
>
> American Law Institute, *Federal Judicial Code Revision Project: Tentative Draft No. 3* (1999), at 279.

The ALI singled out the Eighth Circuit as being especially profligate in finding complete preemption. *Id.* at 295-298. *See also Jones v. Bankboston, N.A.*, 115 F. Supp. 2d 1350, 1356 (S.D. Ala. 2000) (decrying "the Eighth Circuit's lenient test for complete preemption"). Indeed, in *Husmann v. Trans World Airlines*, 169 F.3d 1151, 1152-1153 (8th Cir. 1999), the Eighth Circuit held that the Warsaw Convention effects complete preemption of state-law personal-injury claims filed over accidents occurring during international travel, citing several decisions from other circuits that merely held that the Convention preempts state tort claims brought in federal court, without any further discussion of the propriety of removal. In effect, with its decisions in *Husmann, Deford v. Soo Line*, 867 F.2d 1080, 1086 (8th Cir. 1989), and the decision below, the Eighth Circuit has abolished the distinction between substantive preemption and complete preemption.

Where complete preemption applies, it has the extraordinary effect of turning a state-law case into a federal lawsuit. Without strict limits on the doctrine, there have been, and will continue to be, an "ever-increasing number of cases and contexts" in which complete preemption is invoked. 14B Wright, Miller & Cooper: *Federal Practice & Procedure* § 3722.1, at 508 (1998). There should be no uncertainty regarding the conditions under which that may properly happen, but the square and ongoing conflict among the lower courts described above shows that there is. This Court should resolve that conflict.



CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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