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**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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**STB Docket No. FD 36408**

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**LEE ROY HAYNES – PETITION FOR DECLARATORY ORDER**

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**REPLY OF THE  
ASSOCIATION OF AMERICAN RAILROADS**

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On May 22, 2020, Lee Roy Haynes filed a petition seeking a Declaratory Order that his claims in a civil lawsuit arising under Texas law against Union Pacific are not preempted under the ICCTA, 49 U.S.C. §10501(b). The petition raises questions about the scope and application of preemption under ICCTA, a matter of substantial importance to the Association of American Railroads (AAR) and its members. Therefore, AAR files this reply.

Petitioner argues that because his state law claims are “safety-related” any preemption analysis must be limited to the preemption provision of the Federal Railroad Safety Act (FRSA). 49 U.S.C §20106. Petitioner largely relies on recent guidance provided by the Board in STB Docket FD 37399, *Jimmy Lee Waneck and Starr Swearingen Waneck, et al.—Pet. for Declaratory Order* (served May 25, 2018) (“*Waneck I*”); STB *recon. denied* FD 36167 (served October 31, 2018) (“*Waneck II*”). The Board should take this opportunity to review and reevaluate its

*Waneck* guidance. *Waneck* enunciated a paradigm for evaluating ICCTA preemption that deviated from the well-established preemption tests that the courts—and the Board itself—have crafted and applied over many years in a wide variety of circumstances. Those tests for ICCTA preemption should apply to petitioner’s claims because they properly implement the intent of Congress in enacting ICCTA, do not conflict with FRSA or any other federal laws with application to the railroad industry, and have successfully addressed the concern expressed by Congress when it enacted ICCTA that “[s]ubjecting rail carriers to regulatory requirements that vary among the States would greatly undermine the industry’s ability to provide the ‘seamless’ service that is essential to its shippers and would waken [sic] the industry’s efficiency and competitive viability.” Sen. Rep. No. 104-176, at 6 (1995).

## **I. Background**

The evolution and clearly articulated purpose of the current regulatory regime governing the railroad industry is relevant to the question before the Board.

The construction of the national railroad network during the nineteenth century created the archetypal instrumentality of interstate commerce. Motivated in part by the rapidly expanding railroad industry’s outsized role in the national economy, as well as its network characteristics, Congress determined that effective regulation of railroad economics, operations, and safety is best accomplished at the

federal level. Indeed, Congress focused on railroads as it began to exert its constitutional authority over commerce, an effort that began with enactment of the Interstate Commerce Act of 1887 (ICA), c.104, 24 Stat. 379 (1887). The ICA granted the Interstate Commerce Commission (ICC), an independent federal agency, broad authority to regulate practically every aspect of railroad operations. For nearly a century, that regulation was pervasive. *See Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 318 (1981) (“The Interstate Commerce Act is among the most pervasive and comprehensive of federal regulatory schemes.”); *R.J. Corman R.R. v. Palmore*, 999 F.2d 149, 151 (6<sup>th</sup> Cir. 1993) (“[P]erhaps no industry has a longer history of pervasive federal regulation than the railroad industry.”).

Congress also determined that railroad safety is an area calling for uniform regulation on the national level. Initially, this policy took the form of a series of statutes aimed at discrete rail safety hazards. *E.g.*, Safety Appliances Act, c. 196, 27 Stat. 531 (1893); Hours of Service Act, c. 2939, 34 Stat.1415 (1907); Boiler Inspection Act, c. 103, 36 Stat. 913 (1911).<sup>1</sup> Eventually, however, while acknowledging that these laws had “served well” and were “reasonably effective in

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<sup>1</sup> Early on, the U.S. Supreme Court also recognized the importance of uniformity in rail safety regulation. *Illinois Cent. R.R. v. Williams*, 242 U.S. 462, 467 (1917) (“To this primary purpose of protecting the life and limb of employees is added the purpose of protecting the lives of passengers and of securing the safety of property by requiring *uniform standards* as to other equipment of cars . . .”) (emphasis supplied).

their respective areas,” Congress nonetheless concluded that they were not sufficiently comprehensive to effectively regulate rail safety and that “broad-scale federal legislation” was necessary. H.R. REP. NO. 91-1194 (1970), *reprinted in* 1970 U.S.C.C.A.N. at 4105-06. This goal was achieved by enactment of FRSA, Pub. L. No. 91-458, 84 Stat. 971 (1970), with the purpose of “promot[ing] safety in every area of railroad operations and reduc[ing] railroad-related accidents and incidents.” 49 U.S.C. §20101. To effectuate its intent that railroad safety be governed by a single set of federal regulations, Congress granted the Secretary of Transportation plenary power to regulate railroad safety, authority which has been delegated to the Federal Railroad Administration (FRA). 49 U.S.C. §20103(a); 49 C.F.R. §1.89.

## **II. Preemption of state law has played an essential role in national transportation policy.**

Since enactment of the ICA, preemption of state law has been recognized as an essential feature of its regulatory scheme. *See, e.g., Kalo Brick & Tile* (state court suit for damages from abandonment of a rail line preempted); *City of Chicago v. Atchison, Topeka & Santa Fe Ry.*, 357 U.S. 77 (1958) (city licensing requirement for a passenger transfer operation preempted); *Texas & Pac. R.R. v. Abilene Cotton Oil Co.*, 204 U.S. 426 (1907) (state preempted from regulating agreements providing for joint use of trackage by two carriers). *See United Transp. Union v. Long Island R.R.*, 455 U.S. 678, 688 (1982) (“[T]he Federal

Government has determined that a uniform regulatory scheme is necessary to the operation of the national rail system.”).

Preemption also is an important feature of FRSA. With the purpose of assuring the national uniformity of railroad safety law, Congress expressly preempted state laws pertaining to railroad safety, permitting such laws to remain in effect only until the Secretary has “adopted a rule, regulation, order or standard covering the subject matter of such state requirement.” 45 U.S.C. §434 (now codified at 49 U.S.C. §20106(a)). Thus, federal law preempts state law “related to” railroad safety whenever the Secretary issues a regulation covering (that is, substantially subsuming) the subject matter of the state law. *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993).<sup>2</sup>

Promoting an economically sound, and efficient, railroad industry is the overarching purpose of the policy choice favoring national regulation of railroads repeatedly implemented by Congress. Ultimately, Congress determined that this policy was best effectuated by moving toward greater reliance on market forces rather than government prescription, with a further shrinking of the role of the

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<sup>2</sup> FRSA’s preemption provision was clarified in 2007. As amended, FRSA’s preemption provision retains the condition necessary for preemption to apply—the issuance by the Secretary of an order or regulation related to railroad safety—but now makes clear that preemption does not apply where a defendant “has failed to comply with the Federal standard of care established by a regulation or order issued by the Secretary of Transportation ... covering the subject matter.” 49 U.S.C. §20106(b)(1)(A). In other words, a state action premised on a violation of a federal safety standard is not preempted by FRSA.

states in regulating railroads. *See* Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895.<sup>3</sup>

This culminated in enactment of ICCTA in 1995, a statute designed to replace the then-existing regulatory regime. Pub. L. 104-88, 109 Stat. 803 (1995), codified at 49 U.S.C. §10101 *et seq.* In addition to further paring back railroad regulation, ICCTA contains a broad and comprehensive preemption provision, expanding even further exclusive federal jurisdiction over railroads at the expense of the states. S. Rep. No. 104-176, at 6 (ICCTA should not “be construed to authorize States to regulate railroads in areas where Federal regulation has been repealed by this bill.”).

Under ICCTA, the Board has exclusive jurisdiction over:

- (1) transportation by rail carriers, and the remedies provided in this part with respect to rates, classifications, rules . . . practices, routes, services and facilities of such carriers; and
- (2) the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching or side tracks, or facilities, even if the tracks are located, or intended to be located, entirely in one State.

49 U.S.C. §10501(b). ICCTA goes on to state that “[e]xcept as otherwise provided in this part, the remedies provided under this part with respect to regulation of rail

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<sup>3</sup> For example, states are preempted from imposing discriminatory taxes on railroad property. Section 306 of the Railroad Revitalization and Regulatory Reform Act of 1976, codified at 49 U.S.C. §11501, and may not exercise any authority over railroad rates. Section 214 of the Staggers Rail Act of 1980.

transportation are exclusive and preempt the remedies provided under Federal or State law.” *Id.*<sup>4</sup> Through this provision, Congress made clear its intent to make federal regulation of the rail industry exclusive, explaining that while states retain the police powers reserved by the Constitution, federal regulation in the economic sphere

is intended to address and encompass *all* such regulation and to be completely exclusive. Any other construction would undermine the uniformity of Federal standards and risk the balkanization and subversion of the Federal scheme of minimal regulation for this intrinsically interstate form of transportation.

H.R. Rep. No. 104-311, at 96 (1995) (emphasis in the original), *reprinted in* 1995 U.S.C.C.A.N. 793, 808.

The sweeping preemption language of ICCTA has been given very broad effect by the courts. “It is difficult to imagine a broader statement of Congress’s intent to preempt state regulatory authority over railroad operations.” *CSX Transp., Inc. v. Georgia Pub. Service Comm’n*, 944 F.Supp. 1573, 1581 (N.D. Ga. 1996). The Board’s sweeping grant of exclusive jurisdiction has been interpreted to preempt a broad range of state and local laws when applied to railroads. *See, e.g., City of Auburn v. United States*, 154 F.3d 1025 (9<sup>th</sup> Cir. 1998), *cert. denied*,

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<sup>4</sup> “Transportation” is defined expansively to include any kind of “locomotive, car, vehicle, vessel, warehouse, wharf, pier, dock, yard, property, facility, instrumentality, or equipment ... related to the movement of passengers or property, or both, by rail” and any related services. 49 U.S.C. §10102(9).

527 U.S. 1022 (1999); *Soo Line R.R. v. City of Minneapolis*, 38 F. Supp. 2d 1096 (D. Minn. 1998); *Burlington N. Santa Fe Corp. v. Anderson*, 959 F. Supp. 1288 (D. Mon. 1997).

### **III. ICCTA's preemption provision plays a key role in effectuating Congress' policy on the regulation of railroads.**

Today's railroad industry is an interconnected network in which over 600 railroad companies (some very large, many small) operate over more than 135,000 miles of track in 49 states, with links to the railroad systems in Canada and Mexico. Association of American Railroads, *Railroad Facts*, 3, 48 (2019 ed.). All large and moderate-sized railroads operate across multiple state lines. In addition to moving large quantities of commodities within the United States, railroads play a significant role in international commerce, moving domestic freight to ports for shipment overseas, and often providing the domestic transportation leg for imported commodities. Virtually all railroads interchange freight and equipment with other railroads, or other transportation modes, at various locations along their lines. In sum, the railroad industry is a seamless nationwide network; not a set of adjoining but independent operations.

Given the national, and international, scope of rail operations, one of Congress' highest priorities has been to assure that any rail regulation be of a uniform character and not subject to a patchwork of state regulation. *See Friberg v. Kansas City S. Ry. Co.* 267 F.3d 439, 443 (5<sup>th</sup> Cir. 2001) ("The regulation of

railroad operations has long been a traditionally federal endeavor, to better establish uniformity in such operations and expediency in commerce.”); *City of Cayce v. Norfolk S. Ry. Co.*, 706 S.E.2d 6, 11 (S.C. 2011) (“The purpose of the ICCTA is to prevent the development of a patchwork of local and state regulations affecting the railroad industry, as the enactment of differing standards and requirements would inevitably be detrimental to the orderly functioning of the industry as a whole.”); *Cities of Auburn and Kent, WA—Pet. for Declaratory Order—Burlington N. R.R. Co.—Stampede Pass Line*, FD No. 33200, slip op. at 6 (STB served July 2, 1997) (“We believe there is [a compelling need for uniformity] in connection with the interstate rail system, which spans every state in the Continental United States.”).

While at times this approach usurps the prerogatives of individual states (and their subdivisions), it is the manifest intent of Congress to do just that. Congress’ motivation is straightforward. Given the railroad industry’s inherent characteristics as a national network, allowing the application of a variety of state laws, potentially changing every time a state border is crossed, would create an untenable situation. The U.S. Supreme Court recognized this—even in the absence of an applicable federal rule—when it held that states could not regulate the length of trains. *Southern Pac. Co. v. State of Ariz. ex rel. Sullivan*, 325 U.S. 761, 773 (1945) (The state train length law “imposes a serious burden on [ ] interstate

commerce.... It materially impedes the movement of [the railroad's] interstate trains through that state and interposes a substantial obstruction to the national policy proclaimed by Congress, to promote adequate, economical and efficient railway transportation service.”).

Courts and the STB have properly recognized the disruptive effect state regulation can have on the interconnected national rail network, and have routinely found state laws or regulations to be preempted whenever they limit or restrict how railroads may conduct their operations. *See e.g., Texas Cent. Business Lines Corp. v. City of Midlothian*, 669 F.3d 525 (5th Cir. 2012); *Green Mountain R.R. Corp. v. Vermont*, 404 F.3d 638 (2d Cir. 2005). Traditional police powers of the states must yield whenever they interfere with or unreasonably burden rail transportation. *New York, Susquehanna & W. Ry. Corp. v. Jackson*, 500 F.3d 238, 252 (3d Cir. 2007). *See also Norfolk S. Ry. Co., v. City of Alexandria*, 608 F.3d 150, 160 (4<sup>th</sup> Cir. 2010) (striking down a local ordinance restricting the transloading of ethanol, explaining that even when local ordinances “commendably seek to enhance public safety,” if they “unreasonably burden rail carriage” they “cannot escape ICCTA preemption under the police power exception”). Similarly, in *CSX Transp., Inc.—Pet. for Declaratory Order*, FD No. 34662 (STB served May 3, 2005), a District of Columbia regulation limiting the routing of certain commodities, aimed at enhancing the security of the National Capital area, was held preempted. The

Board explained that “states are not free to impose any requirements they wish in the name of their police power. Rather, it is well settled that states cannot take an action that would have the effect of foreclosing or unduly restricting a railroad’s ability to conduct any part of its operations or otherwise unreasonably burdening interstate commerce.” Slip op. at 3.<sup>5</sup>

Furthermore, ICCTA preemption is not contingent on the Board having specifically regulated the subject of the state law. *Thomas Tubbs, et al.—Pet. for Declaratory Order*, FD No. 35792, slip op. at 4 (STB served Oct. 31, 2014), *aff’d*, *Tubbs v. Surface Transp. Bd.*, 812 F.3d 1141 (8<sup>th</sup> Cir. 2015) (ICCTA preempts state efforts “to regulate that would unreasonably interfere with railroad operations that come within the Board’s jurisdiction, without regard to whether or not the Board actively regulates the particular activity involved.”).

Courts and the Board have applied a two-pronged test when evaluating whether ICCTA preempts a state law. State laws are expressly or categorically preempted by ICCTA when they “have the effect of managing or governing rail transportation.” *Delaware v. Surface Transp. Bd.*, 859 F.3d 16, 19 (D.C. Cir. 2017) (internal quotation marks omitted). Additionally, a state law may be preempted as applied if it would “have the effect of unreasonably burdening or interfering with

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<sup>5</sup> The D.C. law was also held to be preempted by FRSA. *CSX Transp., Inc. v. Williams*, 406 F.3d 667 (D.C. Cir. 2005).

rail transportation.” *Franks Inv. Co., LLC v. Union Pac. R.R.*, 593 F.3d 404, 414 (5th Cir. 2010). However, state laws that have a remote or incidental effect on rail transportation are not preempted. *Jackson*, 500 F.3d at 252; *Florida E. Coast Ry. Co. v. City of W. Palm Beach*, 266 F.3d 1324, 1331 (11<sup>th</sup> Cir. 2001).

**IV. There is no basis for ignoring ICCTA when a state attempts to regulate the design, construction and maintenance of railroad infrastructure, regardless of whether the state regulation may be characterized as safety-related.**

Petitioner asks the Board to eschew these well-established tests and declare that because his state law claims are “safety-related” they cannot be preempted under ICCTA. Instead, he argues that any preemption analysis must be limited to application of FRSA’s preemption provision. However, the distinction between safety-related and non-safety-related state regulation is not one that has any basis in ICCTA’s language or structure. Nor is it a meaningful dichotomy. Rail safety and rail operations cannot be easily separated into neat compartments. Many aspects of railroad operations—which involve massive trains involved in complex movements in all sorts of shifting weather and environmental conditions, traversing flat terrain to steep grades, dense urban areas and sparsely populated expanses, on rights-of-way that frequently intersect public and private roadways—necessarily implicate safety; in truth, practically all efforts to regulate those operations could be characterized as safety-related.

Courts and the Board will be entering difficult judicial terrain if, as a prerequisite of undertaking a preemption analysis, they are to be tasked with divining the motives of state lawmakers and discerning whether a particular state regulation was based on safety, something else, or some combination. The test for ICCTA preemption cannot be whether a court or the Board can characterize a state regulatory effort as “safety-related,” but rather—per the statute—whether the state-law-based claim or regulation impacts transportation by rail carriers.

Here, petitioner alleges tortious conduct by a railroad, for which he seeks a remedy under a “safety-related” state law, much as did the plaintiff in *Waneck*. In *Waneck I*, relying largely on the Sixth Circuit’s opinion in *Tyrrell v. Norfolk S. Ry. Co.*, 248 F.3d 517 (6th Cir. 2001), the Board asserted that the petitioner’s claims arising from a grade crossing accident “are rail safety-related claims,” but offered no basis for making the determination that a state law claim is safety-related. Slip op. at 3. Confirming the guidance offered in *Waneck I*, again relying on *Tyrrell*, in *Waneck II* the Board offered no further clarification on that threshold question, beyond the implication that tort claims seeking compensatory damages for an injury are safety-related. But it is not clear why alleging a tort-based claim should eliminate the need for an ICCTA preemption analysis. There is no basis in the statute to conclude that ICCTA permits a state to regulate the design, construction

and maintenance of a railroad’s infrastructure as long as it does so through a safety-related regulation.

The Board should re-examine its reliance on *Tyrrell* because the outcome that case suggests simply cannot be squared with Board and court precedent, nor with the policy goals of ICCTA. Beyond stating that the FRA is vested “with primary authority over national rail safety policy”—a proposition not in dispute—the *Tyrrell* court offered no principled way to distinguish between safety-related and non-safety-related state laws. Far more relevant than the respective primary missions of FRA and the Board, is whether the impact of the state law in question on railroad transportation is of the nature that ICCTA was enacted to prevent.<sup>6</sup>

Courts are well-versed in sorting out the types of tort claims that are preempted by ICCTA and those that are not, without resorting to an artificial and arbitrary distinction between those claims that are safety-related and those which are something else. Indeed, courts have undertaken that task with regularity. For example, in *Jones Creek Investors, LLC v. Columbia County*, 98 F. Supp. 3d 1279 (S.D. Ga. 2015), the plaintiffs brought state tort claims alleging that the railroad caused damage to their property and business. Applying a traditional ICCTA

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<sup>6</sup> That is the approach the Sixth Circuit took more recently in *CSX Transp., Inc. v. City of Seabee*, 924 F.3d 276 (6th Cir. 2019), when it evaluated an ordinance that required a railroad to obtain the approval of local authorities before undertaking maintenance or construction of a crossing. Focusing on the impact of the ordinance, the Court held that it directly contravened the purpose of ICCTA because it had the effect of restricting the railroad’s ability to maintain its infrastructure.

preemption analysis, the court explained that “[a]ny state tort claims against [the railroad] for damages resulting from this construction to its infrastructure effectively govern [the railroad’s] ability to keep its rail lines in safe, working order.” Therefore, plaintiff’s claims stemming from the construction and design of its culverts were preempted by ICCTA. *Id.* at 1294.

Similarly, the court in *Griffioen v. Cedar Rapids & Iowa City Ry. Co.*, 914 N.W.2d 273, 287 (Iowa 2018) explained that in determining whether state tort claims are preempted under ICCTA “[t]he test focuses on whether the legal requirement at issue relates to rail transportation, as opposed to something else with only incidental effects on rail transportation. Thus, laws, ordinances, and common-law damage actions challenging ... how [railroads] constructed [their] lines are generally preempted.” *See also Waubay Lake Farmers Ass’n v. BNSF Ry. Co.*, 2014 U.S. Dist. LEXIS 120160 (D.S.D. 2014); *Pere Marquette Hotel v. United States*, 2010 U.S. Dist. LEXIS 36413 (E.D. La. 2010).

In *Guild v. Kansas City S. Ry. Co.*, 541 Fed. Appx. 362 (5th Cir. 2013), the court assessed the impact on railroad operations of the plaintiff’s various state law claims. The court held that the plaintiff’s effort to compel the railroad to replace a switch connected to a spur track on plaintiff’s property was expressly preempted by ICCTA because construction of switching tracks is within the Board’s exclusive jurisdiction. *Id.* at 367. On the other hand, the plaintiff’s negligence claim seeking

compensation for damages caused by the railroad's use of plaintiff's spur track was not preempted by ICCTA because the railroad could not show that awarding damages would affect its decisions regarding car weight on its main lines. *Id.* at 368.

Applying ICCTA's preemption provision will not necessarily mean that a state tort claim will be preempted. It simply will permit the court hearing the claim to evaluate whether it would have the effect of managing or governing rail transportation, or if the application of the state law in question unreasonably burdens interstate commerce. *Compare Rushing v. Kansas City S. Ry. Co.*, 194 F. Supp. 2d 493, 500-01 (S.D. Miss. 2001) (plaintiff's attempt to "use state common law to regulate the manner in which the Defendant conducts operations at its switch yard" is preempted by ICCTA) *with Emerson v. Kansas City S. Ry. Co.*, 503 F.3d 1126 (10th Cir. 2007) (plaintiff's state tort claims alleging that the railroad's disposal of old ties into a waste water ditch and failure to properly maintain the ditch led to flooding of plaintiff's property were not expressly preempted by ICCTA because they did not implicate railroad transportation).

The notion that some state efforts to regulate a railroad's design, construction and maintenance of its infrastructure are safety-related, and therefore subject to preemption under FRSA, if at all, while other state efforts to regulate a railroad's design, construction and maintenance of its infrastructure are not safety-

related, and therefore subject to ICCTA preemption, makes little sense in light of ICCTA's policy of protecting railroads from piecemeal regulatory interference from individual states. Regardless of the purported aim of a particular state regulation, the impact of regulating the design and construction of a railroad's infrastructure would be the same. Moreover, there is no basis for determining that claims seeking substantial monetary damages for losses resulting from severe flooding, allegedly caused by a railroad's negligent construction of its infrastructure, is not safety-related, and therefore appropriately evaluated under ICCTA, while claims seeking damages for a personal injury, also allegedly caused by a railroad's negligent construction of its infrastructure, is safety-related—and subject only to FRSA preemption—if, in fact, that is the distinction on which the Board's *Waneck* guidance is premised.

Precedent does not support a distinction between tort suits seeking damages for property loss and those seeking damages for personal injury. In *Elam v. Kansas City S. Ry. Co.*, 635 F.3d 796 (5th Cir. 2011), the plaintiff brought a personal injury action alleging the railroad was negligent per se because it violated the state blocked-crossing statute. The plaintiffs argued that this claim was not preempted by ICCTA because it involved “safety issues.” The Court rejected that argument, explaining that “[r]egardless of why the [plaintiffs] brought their negligence per se claim, the effect of the claim is to economically regulate [the railroad's] switching

operations.” *Id.* at 807. At the same time, the court suggested that the plaintiffs’ other negligence claims, such as failure to warn, might survive ICCTA preemption, again focusing on the regulatory impact on railroad transportation. *Id.* at 814. *See also Ezell v. Kansas City S. Ry. Co.*, 866 F.3d 294 (5th Cir. 2017) (same).

Surely this case presents no conceptual difference from *CSX Transp., Inc. – Petition for Declaratory Order* and *City of Alexandria*. In each of those cases, the state laws at issue, both of which sought to restrict the movement of hazardous materials, certainly could have been characterized as safety-related. *City of Alexandria*, 608 F.3d at 160 (the local ordinances “commendably seek to enhance public safety”). In both of those cases the Board and Fourth Circuit, respectively, held that ICCTA preempted the state laws because even though safety-related, they clearly impacted transportation by rail. Here too, notwithstanding that petitioner’s state law claim is related to safety, it attempts to regulate the design and construction of the railroad’s tracks and right-of-way near a grade crossing, an area that falls well within the Board’s regulatory authority.

If the effect of a state law is to restrict railroad transportation, even while purporting to promote safety, it should not matter whether a state seeks to regulate through positive law or a common law negligence lawsuit. There is no conceptual difference between a state legislature or administrative agency seeking to impose design or construction standards on a railroad crossing and a jury hearing a state

negligence lawsuit awarding damages after finding that the design and construction of the same crossing is unsafe. While the jury cannot mandate that the railroad redesign or reconstruct the crossing, it can impose a significant damage award based on its finding that the crossing was unsafe, and going forward the railroad proceeds at its peril if it fails to heed the jury's finding and take some remedial action. Indeed, tort awards are intended to create a strong behavior-modifying incentive. "The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy." *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 247 (1959); *Kurns v. R.R. Friction Prod. Corp.*, 565 U.S. 625, 637 (2012); *Law v. General Motors Corp.*, 114 F.3d 908, 911 (9th Cir. 1997) ("Imposing tort liability on railroad equipment manufacturers would ... forc[e] them to conform to design and construction standards imposed by the states.").<sup>7</sup>

**V. ICCTA and FRSA can both be applied to state law claims characterized as safety-related in a way that harmonizes the statutes.**

Harmonizing FRSA and ICCTA, which is what the Board is obligated to do in the event of a perceived conflict, means that one statute does not operate in isolation of the other. Both FRSA and ICCTA can, and must, be given their

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<sup>7</sup> See also *Geier v. American Honda Motor Co., Inc.*, 529 U.S. 861, 881 (2000) (recognizing the regulatory impact of tort suits); *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 521 (1992) (same).

intended effect when evaluating whether a state law may be enforced or applied against a railroad. *See Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 533 (1995) (“When two statutes are capable of coexistence ... it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective.”).

FRSA preempts state law when the Secretary of Transportation has issued a regulation or order covering the subject of that state law. 49 U.S.C. §20106.

Through delegation of authority to the FRA, the Secretary has issued numerous railroad safety regulations. Those regulations govern railroad conduct and establish a standard of care for railroads. For example, FRA has set train speed limits based on the class of track. State law negligence claims that a train was traveling at an excessive speed must be judged against that standard, and are preempted as long as the railroad complied with that standard.

Applying the well-established tests for ICCTA preemption to state laws that have a safety connection does not negate FRSA or diminish its scope. Nor does it absolve railroads from their obligation to comply with FRA regulations.<sup>8</sup> Congress made it clear that even where ICCTA preempts state requirements, federal laws of general applicability (e.g., antitrust laws) remain in force for railroads despite the

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<sup>8</sup> Neither AAR nor Union Pacific argue that FRA regulations are rendered inapplicable by ICCTA.

Board’s exclusive jurisdiction over rail transportation. H. Conf. Rep. No. 104-422, *reprinted in* 1995 U.S.C.C.A.N. 852. That rule can easily be applied when addressing state laws arguably coming within the scope of the preemption provisions of both ICCTA and FRSA.

Properly harmonizing FRSA and ICCTA best accomplishes the goals of both statutes. Under FRSA, Congress authorized the Secretary of Transportation to establish uniform safety regulations governing the railroad industry because it believed that that was the most effective way to promote railroad safety. Those federal safety rules, which are established through a rulemaking process that takes into account the views of all stakeholders, set a standard of care for railroads. At the same time, applying ICCTA to state law claims, without regard to their “safety-relatedness,” will not disturb the congressionally-mandated safety regime established by FRSA and other federal railroad safety laws. But evaluating those state laws under ICCTA’s broad preemption provisions is the only way to effectuate Congress’ other, equally important, policy of leaving the regulation of railroad transportation exclusively at the federal level in order to avoid the disruptive impact of piecemeal application of state rules.

Respectfully submitted,



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Dated July 8, 2020

## CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of July, 2020, a copy of the foregoing  
Reply of the Association of American Railroad to the Haynes Petition for  
Declaratory Order was served by email on the following counsel of record:

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