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Pomegranates and Railroads: Why POM Wonderful Suggests that the Federal Railroad Safety Act Should Never Preclude Federal Employers Liability Act Claims

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NOTE

Pomegranates and Railroads: Why *POM Wonderful* Suggests that the Federal Railroad Safety Act Should Never Preclude Federal Employers Liability Act Claims

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I. INTRODUCTION

On September 30, 2010, Scott Schendel was the engineer on a locomotive heading southbound near Two Harbors, Minnesota.[1] His shift started early that morning – he clocked in at 4:30 a.m. – and the railroad wanted to make sure Schendel's locomotive returned to Two Harbors before his mandatory twelve-hour on-duty time limit expired.[2] At 4:05 p.m., however, disaster struck: Schendel's locomotive collided with a northbound train, causing catastrophic damage.[3] Three locomotives and fourteen rail cars derailed, resulting in $8.1 million in damages to railroad property.[4]

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1. Schendel v. Duluth, No. 69DUCV132319, 2014 WL 5365131, at *1 (D. Minn. Sept. 29, 2014).

2. *Id.* Here, defendant Duluth moved for summary judgment against Schendel. *Id.* Therefore, the District Court viewed the evidence in the light most favorable to Schendel while ruling on the motion. *Id.* at *2.

3. *Id.* at *1–2.

4. *NTSB: Crew Error Caused 2010 Train Crash North of Two Harbors*, DULUTH NEWS TRIB. (Feb. 13, 2013), https://www.duluthnewstribune.com/business/transportation/2332255-ntsb-crew-error-caused-2010-train-crash-north-two-harbors [https://perma.cc/W5QL-WF9Q].

Schendel's injuries were significant and lead to an extended stay at a local hospital.[5] To redress them, he sued his employer for negligence under the Federal Employers Liability Act ("FELA"), which gives railroad employees a federal cause of action in tort for injuries caused by their employers.[6] Despite this statutory cause of action, the Sixth Judicial District Court of Minnesota found that part of Schendel's FELA claim was precluded by the Federal Railroad Safety Act ("FRSA"), which allows the Federal Railroad Administration ("FRA"), but not private individuals, to set and enforce general railroad safety standards.[7] Thus, Schendel was barred from presenting to a jury several theories of his employer's negligence.[8]

Schendel is one of dozens of railroad employees denied recovery on the theory of FRSA preclusion. Unlike other occupations, railroad employees are generally not covered under state worker's compensation statutes.[9] Instead, their sole form of recovery is an action under FELA.[10] When plaintiffs are precluded from bringing FELA claims, they lose their only method of compensation for injuries sustained as a result of their employers' negligence.[11]

As the United States Supreme Court recently emphasized, congressional intent is the touchstone of proper conflict analysis between two federal statutes, and a close examination of the history of these two statutes reveals that Congress never intended FRSA to preclude FELA claims.[12] Analyzed through the lens of congressional intent, the conflict between FELA and FRSA disappears, as several lower courts have recently recognized.[13] Yet more broadly, lower state and federal courts remain severely divided on the question of FRSA preclusion.[14] Courts should heed the Supreme Court's recent guidance to follow congressional

5. *1 Still Hospitalized After Train Crash Near Two Harbors*, TWINCITIES.COM (Oct. 4, 2010), https://www.twincities.com/2010/10/04/1-still-hospitalized-after-train-crash-near-two-harbors/ [https://perma.cc/R8UQ-M4ZN] (last updated Nov. 12, 2015).

6. *Schendel*, No. 69DUCV132319, 2014 WL 5365131, at *1–2.

7. *Id.* at *4.

8. *Id.*

9. 45 U.S.C. § 51; Lund v. San Joaquin Valley R.R., 71 P.3d 770, 776 (Ca. 2003) (noting that some permanently injured railroad workers can receive quasi-workers compensation benefits under the Railroad Retirement Act).

10. Earwood v. Norfolk S. Ry. Co., 845 F. Supp. 880, 885 (N.D. Ga. 1993) (citing Wabash R.R. Co. v. Hayes, 234 U.S. 86, 89 (1914)).

11. Myers v. Ill. Cent. R. Co., 753 N.E.2d 560, 561 (Ill. App. Ct. 2001) (citing Isbell v. Union Pac. R.R. Co., 745 N.E.2d 53, 61 (Ill. App. Ct. 2001)).

12. *See* Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1624 (2018) (quoting Morton v. Mancari, 417 U.S. 535, 551 (1974)); POM Wonderful LLC v. Coca-Cola Co., 573 U.S. 102, 111–13 (2014).

13. *See infra* note 151.

14. *Id.*

intent above all else and allow FELA plaintiffs, like Schendel, to maintain negligence claims against their employers, notwithstanding FRSA.

This Note proceeds in three parts. Part II gives a brief history of FELA and FRSA, a summary of the doctrines of preemption and preclusion, and a summary of the genesis of the FRSA preclusion argument in federal and state courts. It concludes with a detailed analysis of the federal circuit court precedent which established FRSA preclusion over FELA claims for more than a decade. Part III provides an in-depth analysis of *POM Wonderful v. Coca-Cola Co.*, which established a novel framework to resolve conflicts between two federal statutes or regulations. Part III also sets out a litany of post-*POM* cases that highlight lower courts' changed approach to analyzing FRSA's preclusive effect on FELA claims. Finally, Part IV evaluates the continued viability of FRSA preclusion in *POM*'s wake, as well as continued conflict regarding the preclusion issue in three federal circuits.

II. LEGAL BACKGROUND

A. FELA

Congress enacted FELA in 1908 to address the fact that, "throughout the 1870's, 80's, and 90's, thousands of railroad workers were being killed and tens of thousands were being maimed annually in what increasingly came to be seen as a national tragedy, if not a national scandal."[15] Congress intended FELA to reduce injuries and death resulting from accidents on interstate railroads by "shift[ing] part of the 'human overhead' of doing business from employees to their employers."[16] Generally, FELA serves as railroad employees' sole remedy to recover for injuries sustained as a result of an employer's negligence.[17]

FELA allows injured employees of any "common carrier by railroad" to recover against the railroad on a theory of negligence.[18] FELA grants concurrent jurisdiction to both state and federal courts.[19] Though FELA is a federal statute, its cause of action sounds in the theory of common-law

15. DeHahn v. CSX Transp., Inc., 925 N.E.2d 442, 446 (Ind. Ct. App. 2010) (quoting CSX Transp., Inc. v. Miller, 858 A.2d 1025, 1029 (Md. Ct. Spec. App. 2004)); 45 U.S.C. § 51; *see* Joseph M. Miller, *Federal Preemption and Preclusion: Why the Federal Railroad Safety Act Should Not Preclude the Federal Employer's Liability Act*, 51 LOY. L. REV. 947, 952 (2005).

16. Consol. Rail Corp. v. Gottshall, 512 U.S. 532, 542 (1994).

17. Earwood v. Norfolk S. Ry. Co., 845 F. Supp. 880, 885 (N.D. Ga. 1993) (citing Wabash R.R. Co. v. Hayes, 234 U.S. 86 (1914)).

18. 45 U.S.C. § 51.

19. 45 U.S.C. § 56.

negligence.[20] Therefore, plaintiffs "must offer evidence proving the common law elements of negligence, including duty, breach, foreseeability, and causation."[21] The scope of the railroads' liability extends to the negligence "of any of the officers, agents, or employees of such carrier" or negligence resulting from "defect or insufficiency… in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment."[22]

In light of FELA's "humanitarian" purposes, courts have construed FELA liberally.[23] As such, courts apply a relaxed standard of causation to FELA claims,[24] requiring only proof that "employer negligence played *any part, even the slightest*, in producing the injury or death for which damages are sought."[25] In other words, FELA uses a pure comparative fault standard to measure negligence.[26] Additionally, subsequent amendments to the 1908 act abolished common-law tort defenses such as assumption of risk, the fellow-servant rule, and contributory negligence.[27] Furthermore, FELA claims arising out of violations of other, related statutes (such as the Federal Safety Appliance Act and Locomotive Inspection Act) hold the railroad strictly liable for injuries, such that an employee's contributory negligence cannot be used to diminish their recovery.[28] Subsequent amendments also prohibited FELA claims from

20. *Id.*; Norfolk S. Ry. Co. v. Sorrell, 549 U.S. 158, 165–66 (2007) (first citing Chesapeake & Ohio R. Co. v. Stapleton, 279 U.S. 587, 590 (1929); and then citing Urie v. Thompson, 337 U.S. 163, 182 (1949)).

21. DeHahn v. CSX Transp., Inc., 925 N.E.2d 442, 446–47 (Ind. Ct. App. 2010) (citing Williams v. Nat'l R.R. Passenger Corp., 161 F.3d 1059, 1062 (7th Cir. 1998)).

22. 45 U.S.C. § 51.

23. Consol. Rail Corp. v. Gottshall, 512 U.S. 532, 542–43 (1994).

24. *Id.* at 543 (citing Rogers v. Mo. Pacific R. Co., 352 U.S. 500, 506 (1957)).

25. Rogers v. Mo. Pac. R. Co., 352 U.S. 500, 506 (1957) (emphasis added); *see* CSX Transp., Inc. v. McBride, 564 U.S. 685, 700 (2011) (quoting Coray v. S. Pac. Co., 335 U.S. 520, 524 (1949) ("Under FELA, injury 'is proximately caused' by the railroad's negligence if that negligence 'played any part … in … causing the injury.").

26. Under a pure comparative fault standard, a plaintiff may recover damages may recover damages even if they are 99% responsible for the total negligence in a given case. 3 ALFRED W. GANS ET AL., AMERICAN LAW OF TORTS § 13:8 (Mar. 2021 update); *see also* 45 U.S.C. § 53 ("[T]he fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee"); Norfolk S. Ry. Co v. Sorrell, 549 U.S. 158, 171 (2007) (holding that same standard of causation applies to railroad negligence as to plaintiff contributory negligence).

27. *Consol. Rail Corp.*, 512 U.S. at 542–43; 45 U.S.C. §§ 51, 53–55. The general tenor of these defenses was that a railroad employee, by nature of his contract of employment, assumed the risk of injuries resulting from his negligence or the negligence of his fellow employees. *See* GANS ET AL., *supra* note 26, at § 13:8.

28. *See, e.g.*, Wright v. Ark. & Mo. R.R. Co., 574 F.3d 612, 620 (8th Cir. 2009) (Locomotive Inspection Act); Grogg v. Mo. Pac. R.R. Co., 841 F.2d 210, 212 (8th Cir.

being waived by contract.[29] Similarly, FELA claims are generally not arbitrable.[30]

In sum, Congress intended FELA to have a broad scope in order to redress an increasing number of injuries sustained by railroad workers as the railroad industry expanded.[31] Courts have consistently construed FELA liberally in light of this remedial goal to allow railroad workers to bring causes of action under a pure comparative fault standard, thus maximizing the chances of recovery for injured employees.[32] Courts have further held that FELA should not be cut down by judicial inference or implication, citing Congress's remedial purposes.[33] As one court aptly put it, "In the wake of this juggernaut of language, consistently iterated and reiterated over the course of seven and one-half decades, it is not hard to figure out who wins the ties and who gets the benefits of the close calls" in FELA cases.[34]

B. The Federal Railroad Safety Act

The FRSA was enacted in 1970 to enhance railroad safety and reduce rail-related accidents.[35] Concerned with a steady increase in the number of said accidents over a decade-long period and increased scrutiny from

1988) (Federal Safety Appliance Act). In order to reap the benefits of a FELA strict liability claim arising out of LIA or FSAA, the locomotive or railcar at question must be "in use." *See, e.g.*, Brady v. Terminial R. Ass'n of St. Louis, 303 U.S. 10, 12–13 (1938). The "in use" question has garnered significant debate over the past thirty years and could be decided by the United States Supreme Court relatively soon. *See* Ledure v. Union Pac. R.R. Co., 209 L. Ed. 2d 747 (May 17, 2021) (SCOTUS calling for views of the solicitor general on the "in use" question). For a detailed summary of the conflict and an argument for why "in use" should be interpreted broadly within the LIA and FSAA, see Petition for Writ of Certiorari, Ledure v. Union Pac. R.R. Co. (No. 20-807), 2020 WL 7356624 (U.S. Dec. 10, 2020).

29. *Consol. Rail Corp.*, 512 U.S. at 542–43; 45 U.S.C. §§ 51, 53–55.

30. Some injuries compensable under the FELA are also compensable under the Railway Labor Act's arbitration scheme. Atchison, Topeka and Santa Fe Ry. Co. v. Buell, 480 U.S. 557, 564–67 (1987). The Supreme Court has held the fact that a claimant's injury is compensable under the RLA's arbitration scheme does not preclude a claimant from bringing an FELA claim. *Id.* ("The fact that an injury otherwise compensable under the FELA was caused by conduct that may have been subject to arbitration under the RLA does not deprive an employee of his opportunity to bring an FELA action for damages").

31. Atchison, Topeka & Santa Fe Ry. Co. v. Buell, 480 U.S. 557, 561–62 (1987).

32. Norfolk & Western Ry. Co. v. Ayers, 538 U.S. 135, 145 (2003); *Consol. Rail Corp.*, 512 U.S. at 543.

33. Madden v. Anton Antonov & AV Transportation, Inc., 156 F. Supp. 3d 1011, 1021–22 (D. Neb. 2015) (citing Urie v. Thompson, 337 U.S. 163, 189 (1949); *Atchison, Topeka & Santa Fe Ry. Co.*, 480 U.S. at 562.

34. CSX Transp., Inc. v. Miller, 858 A.2d 1025, 1038 (Md. Ct. Spec. App. 2004).

35. 49 U.S.C. § 20101.

media outlets, Congress held hearings on the need for a uniform regulatory framework for track, roadbed, and equipment safety.[36] Congress's initial inquiries into the overhaul of then-current railroad safety regulations were met with stark opposition from railroad management, labor unions, and state regulatory authorities.[37] The Secretary of Transportation – in an effort to curb criticism from these powerful and politically influential actors – appointed a Rail Safety Task Force in 1969, which concluded that track, roadbed, and equipment defects were equally as responsible for train accidents as was human error.[38] Additionally, the Task Force concluded existing federal and state regulations did not provide adequate safety standards.[39] The Task Force recommended that "broad federal regulatory authority over all areas of railroad safety be enacted";[40] Congress agreed.[41]

FRSA empowers the Secretary of Transportation to "prescribe regulations and issue orders for every area of railroad safety."[42] In turn, the Secretary acts through the FRA to promulgate regulations regarding railroad safety.[43] The FRA was established by the Department of

36. *The Federal Railroad Administration–Lobbyist Participation in Drafting*, 21 CATH. U. L. REV. 747, 748–49 (1972) ("There is no information in the FRA's files during this period relative to the causes of the accident increase or on the introduction of rail safety legislation. The interviewers asked spokesmen for the FRA whether there was activity that was not reflected in the files. The responses varied. Some stated vaguely that 'there were on-going discussions on the methods of improving rail safety.' Specifics, however, could not be given. Others stated frankly that the FRA did not have the muscle to initiate the type of broad-based safety bill that was necessary to adequately attack the problem."); H.R. REP. NO. 91-1194 at 4108 (1970).

37. *The Federal Railroad Administration–Lobbyist Participation in Drafting*, *supra* note 36, at 750–52.

38. The task force's membership consisted of DOT representatives, FRA representatives, and several members of respected lobbying groups. *Id.* at 753. "[The establishment of the task force] recognized the necessity for the Department [of Transportation] to establish its neutrality. The three groups—labor, management, and state regulatory authorities—had too much influence, both in DOT and Congress, for any one side to trust the matter to an early and open committee hearing." *Id.*; H.R. REP. NO. 91-1194 at 4108.

39. *Id.*

40. *Id.*

41. The House and Senate agreed to the Conference Report on the bill (S.1933) on Sept. 28, 1970. *The Federal Railroad Administration–Lobbyist Participation in Drafting*, 21 CATH. U. L. REV. 747, 765 (1972). On Oct. 7, President Nixon signed the bill into law. *Id.*

42. 49 U.S.C. § 20103(a).

43. 49 U.S.C. §§ 103, 20103(a).

Transportation Act of 1966.[44] The FRA has, and continues to employ, an informal rulemaking framework to draft these regulations.[45]

Violating FRA regulations can result in a civil penalty, an injunction, or other appropriate action recommended by the Secretary.[46] Additionally, the Secretary can order compliance with a violated railroad safety regulation or prohibit an individual from performing safety-sensitive functions.[47] At the request of the Secretary, the Attorney General of the United States may bring an action in a United States District Court to use the above mechanisms of enforcement.[48]

As with other regulatory agencies, the FRA has experienced intense scrutiny due to concerns regarding industry influence.[49] While the history of the railroad industry and the Interstate Commerce Commission ("ICC")[50] suggest industry influence is inevitable, new literature suggests that the railroad industry's power to obtain desired outcomes by shaping the FRA's rule-making process is far from conclusive.[51] Yet, concerns of

44. *About FRA*, FED. RAILROAD ADMIN., https://railroads.dot.gov/about-fra/about-fra (last updated Oct. 7, 2019). The FRA is one of ten regulatory agencies within the Department of Transportation concerned with intermodal transport. *Id.*

45. *Rulemaking Process*, U.S. DEPT. OF TRANSP., https://www.transportation.gov/regulations/rulemaking-process (last updated Apr. 5, 2021). First, the FRA issues a notice of proposed rulemaking ("NPRM") to publicize the proposed regulation. *Id.* After the NPRM is published in the Federal Register and public docket, the FRA is required to allow a period for public comment (usually 60 days). *Id.* After the public comment period closes, the FRA reviews the comments received and decides whether to proceed with the proposed regulation or not. *Id.* If the FRA decides to proceed, the finalized version of the regulation is published in the Federal Register or personally served to those affected by the regulation. *Id.* Additionally, a final version of the regulation (along with copies of any finalized documents relating to the regulation) will be published in the public docket. *Id.* Generally, a finalized regulation "cannot be made effective in less than 30 days after publication." *Id.* The Office of the Federal Register will add the finalized regulation to the Code of Federal Regulations ("CFR") on a rolling basis "to reflect the additions, changes, or rescissions" made by the regulation. *Id.*

46. 49 U.S.C. § 20111(a).

47. 49 U.S.C. § 20111(b)–(c).

48. 49 U.S.C. § 20112(a).

49. *See* Hannah J. Wiseman, *Negotiated Rulemaking and New Risks: A Rail Safety Case Study*, 7 WAKE FOREST J. L. & POL'Y 207, 215–17 (2017).

50. *See* Samuel P. Huntington, *The Marasmus of the ICC: The Commission, the Railroads, and the Public Interest*, 61 YALE L.J. 467, 473–505 (1952) (arguing that the ICC's reliance on the railroad industry to maintain viability and expand its power in the post-World War I era led to a number of concessions to the rail industry in the areas of rates and fares, monopoly and antitrust allegations, rail-motor competition, and rail-water competition).

51. *See* Gabriel Scheffler, *Failure to Capture: Why Business Does Not Control the Rulemaking Process*, 79 MD. L. REV. 700, 760–66 (2020) (analyzing the formulation of the Tank Car Rule and the railroad industry's ability to achieve desired policy goals in regard to the rule).

inadequate resources and input from the railroad industry in the FRA's rule-making process continue to fuel accusations that the agency has been captured by the railroads and their supportive special interest groups.[52]

FRSA contains an express preemption provision that provides in pertinent part: "A state may adopt or continue in force a law, regulation, or order related to railroad safety or security until the Secretary of Transportation (with respect to railroad safety matters) . . . prescribes a regulation or issues an order covering the subject matter of the State requirement."[53] This provision enables the Secretary of Transportation (and their servient regulatory agencies) to assume the responsibility of creating uniform railroad safety regulations. Once the Secretary of Transportation enacts a regulation that "covers" an area of railroad safety, any corresponding state law or regulation is displaced.[54]

To better understand the impact of FRSA's express preemption provision and federal courts' application of the provision to *preclude* FELA claims, an explanation of the distinctions between preemption and preclusion is merited.

C. Federal Preemption and Preclusion

Federal preemption and preclusion are related doctrines that allow claims to be barred in certain situations.[55] Preemption is the principle that a federal law can supersede or supplant any inconsistent state law or regulation.[56] The doctrine of federal preemption is rooted in the Supremacy Clause of the U.S. Constitution, which mandates that federal law remain "the supreme law of the land."[57] The Supreme Court has

52. THOMAS MCGARITY ET AL., CENTER FOR PROGRESSIVE REFORM, CENTER FOR PROGRESSIVE REFORM WHITE PAPER #910: THE TRUTH ABOUT TORTS: REGULATORY PREEMPTION AT THE FEDERAL RAILROAD ADMINISTRATION 9–15 (2009) http://208.112.41.213/articles/RailroadPreemption910.pdf [https://perma.cc/2DDM-3GAC] (arguing that evidence of FRA inspections only covering 2% of railroads' operations each year and investigating only 13% of serious crossing collisions, combined with the exodus of high-level FRA officials from the agency to companies they once regulated is evidence of agency capture).

53. 49 U.S.C. § 20106(a)(2).

54. *Id.*

55. *See Res Judicata*, BLACK'S LAW DICTIONARY (11th ed. 2019); *Preemption (5)*, BLACK'S LAW DICTIONARY (11th ed. 2011).

56. *Preemption (5)*, BLACK'S LAW DICTIONARY (11th ed. 2019).

57. Thomas H. Sosnowski, *Narrowing the Field: The Case Against Implied Field Preemption of State Product Liability Law*, 88 N.Y.U. L. REV. 2286, 2294 (2013) (quoting U.S. CONST. art. VI, § 1, cl. 1); *see also* CSX. Transp., Inc. v. Easterwood, 507 U.S. 658, 663 (1993) (citing U.S. Const. Art. VI, cl.2; Maryland v. Louisiana, 451 U.S. 725, 746 (1981)) ("Where a state statute conflicts with, or frustrates, federal law, the former must give way"), *superseded on other grounds by statute*, Implementing the Recommendations of the 9/11 Commission Act of 2007, Pub. L. No. 110-52, 121

constructed two maxims to guide lower courts in any preemption analysis: (1) Congressional intent and (2) the "presumption against preemption."[58] These maxims direct any court conducting a preemption analysis to determine the congressional intent behind the federal statute at issue and defer to state law in fields the states have traditionally occupied, "unless the 'clear and manifest purpose of Congress' requires it."[59]

There are generally two types of preemption: express and implied.[60] Applying the concept of express preemption is relatively undemanding. If a federal statute or federal agency regulation includes a provision explicitly displacing state law, a court determines whether the state law at issue falls within the scope of the provision.[61] If there is no express preemption provision, or the state law at issue is determined to fall outside the scope of the provision, courts will turn to the concept of implied preemption.[62] Implied preemption is further subdivided into implied "conflict" preemption and implied "field" preemption.[63] If a court determines that any form of preemption applies in a dispute, the claimant is barred from asserting the state-law claim.[64]

Preclusion, in the context of statutory conflict analysis, is the principle that, where two statutes conflict with one another and neither can be given its full effect, one statute must override the other and thus bar claims brought under the overridden statute.[65] The doctrine of preclusion applies to any two state statutes or any two federal statutes.[66] Therefore – unlike preemption – issues of preclusion do not upset the state-federal balance.[67] Nevertheless, preemption principles are instructive to

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Stat. 266, *as recognized in* Rhinehart v. CSX Transp., Inc., No. 10-CV-86(LJV)(LGF), 2017 WL 3500018 (Aug. 16, 2017).

58. Sosnowski, *supra* note 57, at 2296–97.

59. Wyeth v. Levine, 555 U.S. 555, 565 (2009) (quoting Medtronic, Inc. v. Lohr, 518 U.S. 470, 485 (1996)).

60. Sosnowski, *supra* note 57, at 2288.

61. *Id.* at 2294–95. In order to determine the scope of an express preemption provision, courts employ "conventional tools of statutory interpretation." *Id.* at 2295.

62. *Id.*

63. *Id.* While not salient to the current analysis, implied conflict preemption can occur when either it is *impossible* for a party to comply with the federal law and state law at issue simultaneously, or where the state law "stands as an *obstacle* to the accomplishment and execution of the full purposes and objectives of Congress." *Id*. at 2295. Implied field preemption occurs when a court "defines a field in which all state law claims are invalidated, rather than conduct a conflict analysis." *Id.* at 2296.

64. *See id.* at 2294.

65. *See* Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1624 (2018); POM Wonderful, L.L.C. v. Coca-Cola Co., 679 F.3d 1170, 1175 (9th Cir. 2012), *rev'd*, POM Wonderful L.L.C. v. Coca-Cola Co., 573 U.S. 102, 121 (2014); WILLIAM M. ESKRIDGE, JR. ET AL, LEGISLATION AND STATUTORY INTERPRETATION 281–82 (2d ed. 2006).

66. *See, e.g.*, ESKRIDGE, JR. ET AL, *supra* note 65, at 282–83.

67. *POM Wonderful*, 573 U.S. at 111.

preclusion cases "insofar as they are designed to assess the interaction of laws that bear on the same subject."[68]

In dealing with federal statutory conflicts, the Supreme Court has expressed that it "must strive to give effect to both" statutes in question.[69] Additionally, a party arguing that two statutes are incapable of being harmonized bears the burden of showing "a clearly expressed congressional intention" that one should override the other.[70]

Furthermore, the Supreme Court applies canons of construction to resolve conflicts between federal statutes.[71] One of these canons is the "presumption against repeals by implication," which rests on the theory that "Congress will specifically address pre-existing law when it wishes to suspend operations in a later statute."[72] Another canon the Court applies is the "primacy of the last enacted statute."[73] This canon rests on the theory that subsequent amendments to one statute can change interpretation of other statutes not formally or recently amended.[74] Finally, a third canon commonly invoked in federal statutory conflict is the rule that "the specific statute controls the general."[75] This canon rests on the theory that, when resolving a conflict between two statutes, courts should give priority to the statute that deals more specifically with the issue at hand because it denotes Congress' deliberation and specific intent on said issue.[76]

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68. *Id.* at 111–12.

69. Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1624 (2018) (quoting Morton v. Mancari, 417 U.S. 535, 551 (1974)) (internal quotations omitted).

70. *Id.* (quoting Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer, 515 U.S. 528, 533 (1995)).

71. *See* ESKRIDGE, JR. ET AL, *supra* note 65, at 281.

72. *Epic Systems*, 138 S. Ct. at 1624 (quoting United States v. Fausto, 484 U.S. 439, 452 (1988)).

73. ESKRIDGE, JR. ET AL, *supra* note 65, at 282.

74. *Id.* at 282–83; *see* Smith v. Robinson, 468 U.S. 992, 1024 (1984) (Brennan, J., with Marshall, J. and Stevens, J., dissenting) ("[C]onflicting statutes should be interpreted so as to give effect to each but to allow a later enacted, more specific statute to amend an earlier, more general statute only to the extent of the repugnancy between the two statutes."), *superseded by statute*, Handicapped Children's Protection Act of 1986, Pub. L. No. 99-372, 100 Stat. 796; *see, e.g.*, Sorenson v. Sec'y of Treasury, 475 U.S. 851, 863–65 (1986) (giving deference to the 1981 Omnibus Budget Reconciliation Act intercepting of "overpayments" that would be credited to low-income families under the 1975 Earned Income Credit Program).

75. ESKRIDGE, JR. ET AL, *supra* note 65, at 283–84.

76. *Id.*; *see* Morton v. Mancari, 417 U.S. 535, 550–51 (1974) ("Where there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment.").

D. Easterwood*: The Beginning of the FRSA Preemption/Preclusion Analysis*

FRSA's express preemption provision, which displaced corresponding *state* law claims that were covered by FRSA regulations, provided the foundation for early decisions holding that FELA claims could be precluded by the same regulations.[77] The catalyst for the preclusion argument – although FELA was not implicated in the case – was *CSX Transp., Inc. v. Easterwood*.[78] In *Easterwood*, the United States Supreme Court applied FRSA's express preemption provision to block a state-law wrongful death claim brought in a diversity action.[79] The plaintiff argued that defendant CSX Transportation was, among other things, negligent for operating a train at an excessive speed.[80] In turn, CSX argued that the plaintiff's claims were pre-empted by 49 C.F.R. § 213.9, a regulation promulgated under FRSA concerning maximum allowable train speeds on different classes of track.[81] The Court held that the state tort action was pre-empted because 49 C.F.R. § 213.9, "cover[ed] the subject matter of train speed with respect to track conditions, including the conditions posed by grade crossings."[82]

The Supreme Court's holding in *Easterwood* did not address whether FRSA's express preemption clause could preclude a cause of action under a *federal* statute, such as FELA.[83] That question was instead left for lower courts to decipher. Less than seven months after *Easterwood*, the U.S. District Court for the Northern District of Georgia became one of the first lower courts to analyze whether regulations promulgated under FRSA precluded FELA claims.[84] In *Earwood v. Norfolk S. Ry. Co*, James Earwood, a conductor for Norfolk Southern Railway Company, brought a

77. 49 U.S.C. § 20106(a)(2).

78. 507 U.S. 658 (1993), *superseded on other grounds by statute*, Implementing the Recommendations of the 9/11 Commission Act of 2007, Pub. L. No. 110-52, 121 Stat. 266, *as recognized in* Rhinehart v. CSX Transp., Inc., No. 10-CV-86(LJV)(LGF), 2017 WL 3500018 (Aug. 16, 2017).

79. *Id.* at 661, 676.

80. *Id.* at 661.

81. *Id.* at 665, 673.

82. *Id.* at 675; *see id.* at 664–65 ("To prevail on the claim that the regulations have pre-emptive effect, petitioner must establish more than that they "touch upon" or "relate to" that subject matter… for "covering" is a more restrictive term which indicates that preemption will lie only if the federal regulations substantially subsume the subject matter of the relevant state law… The term "covering" is in turn employed within a provision that displays considerable solicitude for state law in that its express preemption clause is both prefaced and succeeded by express saving clauses." (citations omitted)).

83. *Id.*

84. Earwood v. Norfolk S. Ry. Co., 845 F. Supp. 880, 885 (N.D. Ga. 1993).

FELA claim for unsafe work conditions as a result of a crossing collision.[85] In response, Norfolk Southern argued that Earwood's claim, as far as it concerned excessive speed, should have been precluded based on congressional intent expressed in FRSA's preemption provision and the Supreme Court's holding in *Easterwood* .[86] The court held that Earwood's FELA claim was not precluded by regulations promulgated under FRSA.[87] In finding the claim was not precluded, the Court correctly determined that *Easterwood* did not address FRSA's alleged preclusive effect on FELA claims.[88] Furthermore, the Court determined that since FRSA and FELA did not purport to cover the same areas, there was no "intolerable conflict" between the statutes.[89] Thus, Earwood's FELA claim was not precluded by the applicable regulation.[90]

While Norfolk Southern was unsuccessful in arguing FRSA regulations could preclude FELA claims, two other United States District Courts held otherwise. In *Thirkill v. J.B. Hunt. Transp., Inc.*, the U.S. District Court for the Northern District of Alabama held that a FRSA regulation regarding excessive speed precluded plaintiff's FELA claim insofar as the claim had to do with excessive speed.[91] There, just as in *Earwood*, the plaintiff asserted a FELA claim for injuries sustained as the result of a crossing collision.[92] Defendant Norfolk Southern, who was also the defendant in *Earwood*, once again argued that the then-relevant FRSA regulation and the Supreme Court's holding in *Easterwood* precluded the plaintiff's FELA claim.[93] The U.S. District Court for the Northern District of Alabama was persuaded by Norfolk Southern's argument and held that FRSA's preemption provision precluded the plaintiff's FELA claim on the grounds of national uniformity.[94] The court reasoned – without explanation – that Congress's goal of national uniformity for applicable

85. *Id.* at 883. In addition to the FELA claim, James Earwood also brought common law negligence claims against the driver of the tanker truck that caused the collision as well as the driver's employer. *Id.* Additionally, the driver and company cross-claimed against Norfolk Southern on claims of inadequate warning and excessive train speed. *Id.* Furthermore, Earwood's wife brought a loss of consortium claim against the driver and the driver's company. *Id.*

86. *Id.* at 883, 887, 889–90.

87. *Id.* at 885.

88. *Id.*

89. *Id.* (citing Atchison, Topeka & Santa Fe Ry. Co. v. Buell, 480 U.S. 557, 566-67 (1987)) ("Absent an intolerable or irreconcilable conflict between two statutes, a court need not decide whether one controls over the other or whether the later one impliedly repeals the earlier one.").

90. *Id.*

91. 950 F. Supp. 1105, 1107 (N.D. Ala. 1996).

92. *Id.* at 1106.

93. *Id.* at 1106–07.

94. *Id.* at 1107.

safety regulations, as expressed by FRSA's preemption provision, applied to railroad employees as well as non-railroad employees.[95]

Less than a year after *Thirkill*, the U.S. District Court for the Eastern District of Kentucky also held that the FRSA excessive speed regulation precluded the plaintiff's FELA claim based on national uniformity grounds in *Rice v. Cincinnati, New Orleans & Pacific Ry. Co.*[96] The *Rice* court emphasized that allowing a plaintiff to argue unsafe speed under FELA, but not under state law – as per *Easterwood* – would upset Congress's goal of national railroad safety uniformity as expressed in FRSA's preemption provision.[97] Therefore, the plaintiff's FELA claim was precluded by FRSA "provided that the speed [was] in keeping with the FRSA regulation."[98] *Earwood*, *Thirkill*, and *Rice* were the first cases to deal with the issue of FELA preclusion based on FRSA's preemption provision. Their initial logical deductions about congressional intent and national uniformity were key to what would follow – three circuit court opinions that would solidify the preclusion argument for over a decade.

E. Waymire, Lane, and Nickels*: FRSA's Preemption Provision Precludes Claims under FELA*

In 2000, the U.S. Court of Appeals for the Seventh Circuit became the first circuit to weigh in on the FRSA/FELA preclusion debate. In *Waymire v. Norfolk & Western Ry. Co*,[99] that court held that a plaintiff's FELA claims alleging excessive speed and inadequate warning devices were precluded by the applicable FRSA regulations. The Seventh Circuit thus accepted the logic of *Thirkill* and *Rice* and extended the logic of *Easterwood*.[100] In *Waymire*, the plaintiff was a conductor involved in a crossing collision in Muncie, Indiana.[101] Waymire claimed he suffered from post-traumatic stress disorder as a result of the collision and sued defendant Norfolk & Western for allowing the locomotive to travel at an unsafe speed and for failing to install adequate warning devices at the crossing where the collision occurred.[102] The railroad moved for summary judgment, arguing that its compliance with the applicable FRSA regulations regarding speed and warning devices precluded Waymire's

95. *Id.*

96. Rice v. Cincinnati, New Orleans & Pac. Ry. Co., 955 F. Supp. 739, 741 (E.D. Ky. 1997).

97. *Id.*

98. *Id.*

99. 218 F.3d 773, 776–77 (7th Cir. 2000).

100. *See id.*

101. *Id.* at 774.

102. *Id.*

FELA claims.[103] In holding that Waymire's excessive speed claim was precluded, the Seventh Circuit reasoned that the FRSA regulations in question "covered" the conduct alleged in Waymire's FELA claim.[104] The court also applied this logic to Waymire's inadequate warning devices claim, reasoning that "[t]o allow a plaintiff to argue adequacy of warning claims under FELA but not under state law would undermine the railroad safety uniformity intended by Congress" and expressed in FRSA's preemption provision.[105] Therefore, Waymire's FELA claim was precluded.[106]

Less than a year after *Waymire*, the U.S. Court of Appeals for the Fifth Circuit also extended the logic of *Easterwood* to preclude a FELA claim alleging negligence for excessive speed in *Lane v. R.A. Sims, Jr., Inc*.[107] As in *Waymire*, *Thirkill*, and *Rice*, the plaintiff in *Lane* brought a FELA action for injuries he sustained in a crossing collision.[108] As in *Waymire*, the defendant railroad moved for summary judgment, arguing the applicable FRSA regulation for excessive speed precluded Lane's claim.[109] On review, the Fifth Circuit affirmed the entry of summary judgment on Lane's FELA claim, holding it was precluded by FRSA and its applicable regulations.[110] In reaching that result, the Fifth Circuit endorsed *Waymire*'s national uniformity argument, reasoning that treating state law claims and FELA claims differently would result in FRSA regulations becoming meaningless, since a railroad could "at one time be in compliance with federal railroad safety standards in respect to certain classes of plaintiffs yet be found negligent under the FELA with respect to other classes of plaintiffs for the very same conduct."[111] The Fifth Circuit also attacked *Earwood*'s conclusion that the FRSA regulations were not directed at railroad employee safety, reasoning that FRSA's purpose provision explicitly stated that its purpose is "to promote safety in *every area of railroad operations* and reduce railroad-related accidents and incidents."[112]

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103. *Id.* at 775.

104. *Id.* at 775–76. The court also compared the conduct of the locomotive in *Easterwood* with the conduct of Waymire's locomotive. *Id.* The Court found that both locomotives were operating within the 60 miles per hour speed limit prescribed by the applicable FRSA regulation. *Id.* at 776.

105. *Id.* at 777; *see* 49 U.S.C. § 20106 ("Laws, regulations, and orders related to railroad safety and laws, regulations, and orders related to railroad security *shall be nationally uniform to the extent practicable*") (emphasis added).

106. *Waymire*, 218 F.3d at 777.

107. Lane v. R.A. Sims, Jr., Inc., 241 F.3d 439, 443–44 (5th Cir. 2001).

108. *Id.* at 441.

109. *Id.*

110. *Id.* at 443–44.

111. *Id.* (quoting *Waymire*, 65 F. Supp. 2d at 955 (quotations omitted)).

112. *Id.* at 444 (emphasis added); 49 U.S.C. § 20101.

In 2009, the U.S. Court of Appeals for the Sixth Circuit joined the Fifth and Seventh Circuits.[113] Unlike the plaintiffs in *Waymire* and *Lane*, the plaintiffs in *Nickels v. Grand Trunk Western R.R., Inc.* sued their respective railroads for injuries sustained from walking on "oversized track ballast" for an extended period of time.[114] To determine whether preclusion was merited, the Sixth Circuit asked "(1) whether a FELA claim is precluded if the same claim would be preempted by the FRSA if brought as a state-law negligence action; and (2) if so, whether the subject of these plaintiffs' claims [was] covered by a FRSA regulation."[115] The *Nickels* court joined *Waymire* and *Lane* in holding that, to satisfy the FRSA's goal of "national uniformity" expressed in its preemption provision, FELA actions are precluded if the same claim would be pre-empted if brought as a state-law action.[116] Additionally, the *Nickels* court held that the plaintiffs' FELA claims for injuries caused by unsafe walkways due to ballast size were precluded by 49 C.F.R. § 213.103, which "covered" the topic of ballast size.[117] Therefore, the plaintiffs' FELA claims were precluded by the applicable FRSA regulation covering ballast.[118]

In the aftermath of *Waymire*, *Lane*, and *Nickels*, many courts applied those decisions' principles to determine whether FELA claims were precluded by applicable regulations promulgated under FRSA.[119] Two

113. Nickels v. Grand Trunk Western R.R., Inc., 560 F.3d 426, 432 (6th Cir. 2009).

114. *Id.* at 428. Track ballast consists of "stone or other material placed underneath and around railroad tracks to provide the structural support, drainage, and erosion protection necessary for safe rail travel." *Id.*

115. *Id.* at 429–30.

116. *Id.*

117. *Id.* at 431–33.

118. *Id.* at 432.

119. *See* Harrison v. BNSF Ry. Co., 508 S.W.3d 331, 338–39 (Tex. App. 2014) (holding for preclusion based on FRSA ballast regulation); Givens v. Union Pac. R.R. Co., 28 F. Supp. 3d 854, 859 (E.D. Ark. 2014) (holding for preclusion based on applicable FRSA safety equipment regulation); Brenner v. Consol. Rail Corp., 806 F. Supp. 2d 786, 795–796 (E.D. Pa. 2011) (holding for preclusion in part based on FRSA ballast regulation); Crabbe v. Consol. Rail Corp., No. 06-12622, 2007 WL 3227584, at *6 (E.D. Mich. Nov. 1, 2007) (holding for preclusion based on FRSA ballast regulation); Norris v. Cent. of Ga. R.R. Co., 635 S.E.2d 179 (Ga. Ct. App. 2006) (holding for preclusion based on FRSA ballast regulation); Dickerson v. Staten Trucking, Inc, 428 F. Supp. 2d 909, 913 (E.D. Ark. 2006) (holding for preclusion based on applicable FRSA safety equipment regulation); *but see* Booth v. CSX Transp., Inc, 334 S.W.3d 897, 900–901 (Ky. Ct. App. 2011) (holding against preclusion based on FRSA ballast regulation); CSX Transp., Inc. v. Pitts, 61 A.3d 767, 776 (Md. Ct. Spec. App. 2013) (holding no preclusion because FRSA ballast regulation did not cover ballast on walkways, only ballast used for track support); Tufariello v. Long Island R. Co., 458 F.3d 80, 86 (2d. Cir. 2006) (holding no preclusion because no applicable FRSA regulation covered hearing protection

other federal circuit courts, the Second and the Eighth, were also presented with the issue of preclusion in the post–*Waymire* era.[120] In *Cowden v. BNSF Ry. Co.*, the Eighth Circuit disagreed with *Waymire*, *Lane*, and *Nickels* in dicta but declined to create a circuit split.[121] In *Tufariello v. Long Island R. Co.*, the Second Circuit punted the issue, holding that the FRSA regulation at issue did not cover the theory of the plaintiff's FELA claim.[122] Thus, while the Second and Eighth Circuits disagreed with the logic of their sister circuits, the *Waymire*, *Lane*, and *Nickels* precedent resulted in a steady trend of state and federal courts ruling for preclusion when the applicable FRSA regulation covered the theory of the FELA claim at issue.[123] However, this trend was reversed after the United States Supreme Court's decision in *POM Wonderful LLC v. Coca Cola Co.* expanded on past Supreme Court precedent and espoused a new framework to reconcile federal statutory conflicts.[124]

III. RECENT DEVELOPMENTS

While the *Waymire*, *Lane*, and *Nickels* precedent has not been explicitly overruled by subsequent circuit court decisions or a United States Supreme Court decision, a new framework for analyzing statutory conflict has emerged and reshaped the preclusion argument dramatically.[125] The United States Supreme Court's decision in *POM Wonderful LLC v. Coca-Cola Co.*, although not directly related to the FRSA/FELA preclusion debate, shifted the analysis of that legal question by pronouncing key factors to consider when two federal statutes conflict with one another .[126]

A. POM Wonderful v. Coca-Cola Co.*: Articulating the Federal Statutory Conflict Analysis Framework*

In *POM*, a pomegranate juice manufacturer brought an action against competitor Coca-Cola for false and misleading product descriptions under the Lanham Act.[127] POM argued that the misleading

claims); Grimes v. Norfolk Southern Ry. Co., 116 F. Supp. 2d 995, 1003 (N.D. Ind. 2000) (declining to extend *Waymire* to conclude that any FELA claim remotely covered by an applicable FRSA regulation is precluded).

120. *See* Cowden v. BNSF Ry. Co., 690 F.3d 884, 891 (8th Cir. 2012); *Tufariello*, 458 F.3d at 86.

121. *Cowden*, 690 F.3d at 891.

122. *Tufariello*, 458 F.3d at 86.

123. *See supra* note 119 and accompanying text.

124. 573 U.S. 102 (2014).

125. *See supra* Section II.E.

126. 573 U.S. 102 (2014).

127. *Id.* at 105–06.

labeling of Coca-Cola's Minute Maid pomegranate-blueberry juice blend resulted in a loss of sales for POM and amounted to unfair competition.[128] The U.S. Court of Appeals for the Ninth Circuit held that POM's Lanham Act claim was precluded by a second federal statute, the Federal Food, Drug, and Cosmetic Act ("FDCA"), which specifically forbids misbranding food by means of misleading labeling but relegates enforcement to the Food and Drug Administration.[129] The Supreme Court granted certiorari and reversed, holding that POM's Lanham Act claim was not precluded by the FDCA.[130] In holding that the FDCA did not preclude claims under the Lanham Act, the Court noted that (1) "[t]here [was] no statutory text or established interpretive principle" to support preclusion; (2) "nothing in the text, history, or structure of [either statute] show[ed] a congressional [] design to forbid" Lanham Act suits; and (3) the FDCA and Lanham Act complemented each other in the regulation of food and beverage labels.[131]

As part of its analysis to determine whether the FDCA precluded POM's Lanham Act claim, the Court first turned to the text of each statute.[132] The Supreme Court found that "neither the Lanham Act nor the FDCA, in express terms, forbids or limits Lanham Act claims challenging labels that are regulated by the FDCA."[133] The Court reasoned that the absence of any preclusion provision within the statutes was significant because the Lanham Act and the FDCA had co-existed for seventy years, and if Congress had concluded the two statutes where in conflict, it likely would have enacted a provision to address the conflict within that period.[134] The Court further reasoned the absence of such a provision was "powerful evidence that Congress did not intend FDA oversight to be the exclusive means of proper food and beverage labeling."[135]

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128. *Id.*

129. POM Wonderful LLC v. Coca-Cola Co., 679 F.3d 1170, 1179 (9th Cir. 2012), *overruled by* POM Wonderful LLC v. Coca-Cola Co., 573 U.S. 102 (2014).

130. *POM*, 573 U.S. at 120–21.

131. *Id.* at 106. It is important to note that the Court discussed POM and Coca-Cola's arguments for what canons of interpretation should control in resolving the dispute. *Id.* at 112. POM argued for an "irreconcilable conflict" canon, arguing that the conflicting statutes must be given their full effect unless the statutes were in irreconcilable conflict with one another. *Id.* at 112 (citing Carcieri v. Salazar, 555 U.S. 379, 395 (2009)). In response, Coca-Cola argued for an *ejusdem generis* canon to be applied, asserting that the Court should reconcile conflict by letting the more specific law (FDCA) control the more general law (the Lanham Act). *Id.* at 112 (citing United States v. Fausto, 484 U.S. 439, 453 (1988)).

132. *POM*, 573 U.S. at 106–07.

133. *Id.* at 113.

134. *Id.*

135. *Id.* at 114 (quoting Wyeth v. Levine, 555 U.S. 555, 575 (2009) (quotations omitted)).

Next, the Court analyzed the express preemption provision added to the FDCA in 1990.[136] The Court reasoned that the express inclusion of state laws and the noticeable absence of federal laws within the provision's text suggested that the FDCA was not meant "to preclude requirements arising from other sources."[137]

Afterwards, the Court turned to the structures of the Lanham Act and the FDCA.[138] The Court noted that enforcement of the FDCA was committed to the United States Food and Drug Administration ("FDA"), while the Lanham Act mainly authorizes a cause of action for private parties to protect their interests.[139] The Court suggested that holding against preclusion and allowing Lanham Act claims would "[take] advantage of synergies among multiple methods of regulation…each with its own mechanisms to enhance the protection of competitors and consumers."[140] The Court further suggested that holding for preclusion would ignore congressional intent, noting that it was "unlikely that Congress intended the FDCA's protection of health and safety to result in less policing of misleading food and beverage labels than in competitive markets for other products."[141]

Then, the Court addressed Coca-Cola's argument that the FDCA's delegation of enforcement authority to the FDA in regulating labels showed Congress's desire "to achieve national uniformity in labeling."[142] The Court found Coca-Cola's argument unpersuasive, reasoning that POM was seeking to enforce a claim under the Lanham Act rather than the FDCA.[143] Additionally, the Court reasoned that the FDCA's promulgation of authority under the FDA did not indicate an intent to bar enforcement of similar violations under different federal statutes.[144] The Court further disclaimed Coca-Cola's national uniformity argument by asserting that preemption only applied to disputes regarding the state law claims and that Coca-Cola's argument in effect asked the Court "to ignore the words 'State or political subdivision of a State' in the statute."[145]

Finally, the Court turned to the Government's argument that the Lanham Act claim was precluded to the extent the FDCA or FDA regulations specifically require or authorize the challenged aspect of [the]

136. *Id.*; *see* 21 U.S.C. § 343–1.

137. *POM*, 573 U.S. at 114 (citing Sester v. United States, 566 U.S. 231 (2014)) (applying principle of *expressio unius est exclusio alterius*).

138. *Id.* at 115.

139. *Id.*

140. *Id.* at 115–16.

141. *Id.* at 116.

142. *Id.* at 116–17.

143. *Id.*

144. *Id.*

145. *Id.*

label."[146] The Court rejected this argument in part because the FDCA does "not purport to displace the remedy [under the Lanham Act] or even implement the statute that is its source."[147] While the Court agreed that a regulation under the FDCA could bar another legal remedy, the Court concluded that no FDCA regulation had barred private actors from bringing Lanham Act claims.[148] Thus, the Court found that the FDCA did not preclude POM's Lanham Act claim.[149]

In sum, *POM* announced a number of factors lower courts should take into consideration when undertaking a federal statutory conflict analysis: (1) the express inclusion or absence of a *preclusion* provision in either statute; (2) whether a "preemption" provision in either statute expressly mentioned state-law claims and omitted federal law claims; (3) whether the "text, history, or structure" of either statute show a congressional intent to preclude claims under different federal statutes; and (4) whether the statutes can complement one another by "[taking] advantage of synergies among multiple methods of regulation."[150]

B. Application of POM *to the FRSA/FELA Conflict*

While the United States Supreme Court's holding in *POM Wonderful* had nothing to do with railroads and injured railroad employees, many state and federal courts deemed the Court's preclusion analysis persuasive in resolving the FRSA/FELA conflict.[151] A few of the more significant

146. *Id.* at 118–19. The Government submitted an amicus brief on behalf of neither party, yet still argued for partial preclusion of the Lanham Act (likely in an effort to preserve the staying power of the applicable FDA and FDCA regulations). *See* Brief for the United States as Amicus Curiae Supporting Neither Party, *POM Wonderful v. Coca-Cola Co.*, 573 U.S. 102 (2014) (No. 12-761), 2014 WL 827980. It is important to note that unlike the FRSA/FELA conflict, compliance with the FDCA in *POM* did not lead to a violation of the Lanham Act (thus handcuffing Coca-Cola with inconsistent obligations). While the district court and Ninth Circuit argued that the conduct in question was permitted by the FDCA, the Supreme Court thought otherwise. *POM*, 573 U.S. at 110–11. The Court implied that while some of Coca-Cola's label complied with FDCA regulations, this did not prevent Coca-Cola from being subject to the more nuanced restrictions actionable under the Lanham Act. *Id.* at 115.

147. *POM*, 573 U.S. at 120.

148. *Id.* at 120–21.

149. *Id.* at 121.

150. *Id.* at 113–17.

151. *See* Storey v. Union Pac. R.R. Co., No. 18-CV-02675-MSK-MEH, 2020 WL 4805766, at *2 (D. Colo. Aug. 18, 2020) ("Indeed, in more recent years, the minority view that the FRSA does *not* preempt FELA claims has begun to emerge more forcefully, whereas the majority rule appears to have lost some traction") (citing Guinn v. Norfolk S. Ry. Co., 441 F. Supp. 3d 1319, 1333–34 (N.D. Ga. 2020); Dawson v. BNSF Rwy. Co., 2020 WL 288847, at *11-12 (Kan. COA Jan. 21, 2020); James v. Soo Line R.R., 2018 WL 279743, at *9 (D. Mn. Jan. 3, 2018)); Webb v. Union Pac.

cases in the post–*POM* era resolving the conflict in favor of or against preclusion are outlined below.

Less than a year after *POM*, the U.S. District Court for the District of Nebraska held that FRSA and its applicable regulations did not preclude FELA claims in any instance.[152] In holding against preclusion, the court in *Madden v. Anton Antonov & AV Transportation, Inc* heavily referenced *POM* to conclude that applicable FRSA regulations never preclude FELA claims.[153]

Using *POM*, the *Madden* court noted that FRSA's preemption provision, "by its plain terms," only applied to conflicting state–law requirements and that any other reading would force the court to "ignore the word 'State' in the statute."[154] Additionally, the court concluded that the national uniformity argument used to justify preclusion was

R.R. Co., No. 2:19-CV-04075-MDH, 2020 WL 4589713, at *6 (W.D. Mo. Aug. 10, 2020) (denying motion for summary judgment based in part on preclusion using *POM* framework); Jones v. BNSF Ry. Co., 306 F. Supp. 3d 1060, 1070 (C.D. Ill. 2017) ("to the extent that the *Waymire* decision is premised on the idea that allowing federal claims about railroad safety undermines national uniformity, *POM Wonderful* has displaced *Waymire*"); Oliveros v. BNSF Ry. Co., No. 8:14CV135, 2016 WWWL 7475663, at *2 (D. Neb. Mar. 28, 2016) (denying motion for summary judgment on basis of preclusion in order to square procedural posture for 8th. Cir. to decide); Meachen v. Iowa Pac. Holdings, LLC., No. 13-CV-11359-LTS, 2016 WL 7826660, at *3–4 (D. Mass. Feb. 10, 2016) (holding FELA claims regarding maintenance of boom truck were not precluded by FRSA, relying on congressional intent and statutory language emphasized in *POM*); Madden v. Anton Antonov & AV Transp., Inc., 156 F. Supp. 3d 1011, 1021–22 (D. Neb. 2015) (rejecting *Waymire* and holding that FRSA did not preclude FELA claim based in part on lack of congressional intent expressed in *POM*); Henderson v. Nat'l R.R. Passenger Corp., 87 F. Supp.3d 610, 621 (S.D.N.Y. 2015) (holding that FRSA regulation re: roadway worker warnings did not preclude FELA claim based in part on failure to warn signal foreman of incoming train); Hananburgh v. Metro-North Commuter R.R., No. 13-CV-2799, 2015 WL 1267145, at *4 (S.D.N.Y. Mar. 18, 2015) (displacing *Waymire's* national uniformity argument); Bratton v. Kan. City. S. Ry. Co, No. CIV A.13-3016, 2015 WL 789127 (W.D. La. Feb. 24, 2015) (using *POM* framework to hold that FELA claim based on negligent training and certification is not precluded by the FRSA) (disagrees with *Lane*, but applies the pre-POM cover analysis to reason that some FRSA regulations may still cover the basis of the FELA claim and therefore preclude); Norfolk S. Ry. Co. v. Hartry, 837 S.E.2d 303, 572–573 (Ga. 2019) (applying *POM* framework to hold FRSA and its regulations do not preclude FELA claims.); Shiple v. CSX Transp., Inc., 75 N.E.3d 1281, 1291–92 (Ohio Ct. App. 2017) (holding FELA claim for unlevel walkway was not precluded by FRSA because FRSA did not "cover" walkways and also because POM's framework dispelled *Waymire's* "national uniformity argument); Noice v. BNSF Ry. Co., 383 P.3d 761, 769–70 (N.M. 2016) (holding that FELA claim based on excessive-speed not precluded by FRSA, attacks *Waymire* line of reasoning post-*POM*).

152. *Madden*, 156 F. Supp. 3d at 1021–22.

153. *Id.*

154. *Id.* at 1020.

unpersuasive.[155] Like *POM*, the court noted that "disuniformity" created by FELA claims was materially different than the "disuniformity" created by each state enforcing a different set of railway safety regulations.[156] Like *POM*, the court also noted that the purposes of the statutes in conflict were different, with FELA serving as a remedy to protect railroad employees and FRSA designed to improve railroad safety and reduce accidents.[157]

The court also used *POM's* framework to reason that the statutes at issue were not in conflict, but rather complimented each other.[158] The court found that FELA claims could bring attention to potential safety hazards that escaped the FRA's regulatory eye, thus enhancing both the protection of railroad employees and overall railroad safety.[159] Finally, the court addressed the intent of Congress.[160] The court noted that the long co-existence of FELA and FRSA without any amendment to FRSA explicitly limiting FELA, combined with strong precedent against "cut[ting] down [FELA] by inference or implication," strongly disfavored preclusion.[161] Thus, preclusion of FELA by FRSA was unmerited in any situation.[162]

In *Jones v. BNSF Ry. Co.*, the U.S. District Court for the Central District of Illinois went directly against its circuit's precedent, set forth in *Waymire*, and held that FRSA and its applicable regulations did not preclude FELA claims, "even where the regulations cover the same subject matter as claimed negligence."[163] The *Jones* court argued that it could disregard *Waymire* under the presumption that the Supreme Court's holding in *POM* displaced *Waymire*.[164] The *Jones* court first considered the text of the two statutes in conflict.[165] The court reasoned that the FRSA preemption provision's explicit mention of superseding *state-law* claims – and express omission of federal laws – meant that Congress did not mean

155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.* at 1020–21.

160. *Id.* at 1021–22.

161. *Id.* at 1021 (citing Cowden v. BNSF Ry. Co. at 892 (8th Cir. 2012)) (quoting Urie v. Thompson, 337 U.S. 163, 189 (1949)).

162. *Id.* at 1020. In a footnote, the court noted that it was not convinced by *Waymire*'s argument that inconsistent recoveries for railroad employees versus non-railroad employees favored preclusion. *Id.* at 1022 n.6. The court noted that risk was not unique to the FRSA/FELA dispute, citing the FELA's relaxed standard of causation as another catalyst for inconsistent recoveries. *Id.*

163. 306 F. Supp. 3d 1060, 1070 (C.D. Ill. 2017).

164. *Id.* ("[T]o the extent that the *Waymire* decision is premised on the idea that allowing federal claims about railroad safety undermines national uniformity, *POM Wonderful* has displaced *Waymire*").

165. *Id.* at 1068.

for the provision to cover FELA.[166] Additionally, the co-existence of FELA and FRSA for over forty years without amendment to either statute expressly limiting the other – like the Lanham Act and FDCA in *POM* – strongly disfavored preclusion.[167]

Next, the court looked at the purpose and enforcement mechanisms of FELA and FRSA.[168] The court noted the historically "liberal construction" of FELA, coupled with the fact that preclusion would strip claimants of their sole remedy, was persuasive in holding against preclusion.[169] Like *POM*, the *Jones* court noted that the enforcement mechanisms of FELA and FRSA – like those of the FDCA and Lanham Act – complemented each other and should be allowed to co-exist, thereby "tak[ing] advantage of synergies among multiple methods of regulation."[170] Like in *Madden*, the court also held that any "disuniformity" created by allowing FELA claims was different than "disuniformity" created by states enforcing their own set of railway safety regulations, and thus the preemption provision should not apply.[171] Like *Madden*, the *Jones* court held that FRSA regulations never preclude FELA claims.[172]

While *Madden* and *Jones* are illustrative of the majority position's stance on preclusion in the post-*POM* era, there is still a minority of jurisdictions that find preclusion merited when an applicable FRSA regulation covers the theory of a FELA claim.[173] In *Gailey v. Norfolk S. Ry. Co.*, the U.S. District Court for the Middle District of Pennsylvania held that the plaintiff's FELA claim for injuries sustained while walking on uneven ballast was partially precluded by an applicable FRSA regulation on ballast.[174] Noting that the Third Circuit had not addressed the issue of the applicable ballast regulation's preclusive effect on FELA claims, the *Gailey* court turned to the Sixth Circuit's holding in *Nickels*.[175] The court reasoned that the applicable regulation "was intended to provide specific guidelines for railroads to determine what type of ballast is necessary on each track," and thus covered ballast used for track-related purposes.[176] However, the court found that the regulation did not cover

166. *Id.*

167. *Id.*

168. *Id.*

169. *Id.* at 1068–69.

170. *Id.* at 1069 (quoting POM Wonderful v. Coca-Cola Co., 573 U.S. 102, 115–116 (2014)).

171. *Id.* at 1069–70.

172. *Id.* at 1070.

173. *See infra* notes 175–88 and accompanying text.

174. No. 4:13-CV-2830, 2015 WL 4509071, at *5 (M.D. Pa. July 24, 2015) (applying 49 C.F.R. §213.103 to cover the theory of the FELA claim).

175. *Id.* at *4.

176. *Id.* at *5.

ballast used in non-track areas – such as walkways – and did not apply preclusion to the claim insofar as it asserted negligence based on ballast in non-track areas.[177]

Similarly, in *Kopplin v. Wisconsin Central, Ltd.*, the U.S. District Court for the Eastern District of Wisconsin held that an applicable FRSA regulation precluded plaintiff's FELA claim and granted the defendant railroad summary judgment.[178] In holding for preclusion, the court noted that *POM* did not abrogate the Seventh Circuit's holding in *Waymire*.[179] The court reasoned that since *POM* did not "mention or involve the FRSA/FELA regulatory scheme" and no federal circuit court had held *POM* altered the preclusion analysis, *POM* did not abrogate or reverse *Waymire*.[180] Therefore, FRSA could still preclude FELA claims under *Waymire*'s binding precedent.[181]

Finally, in *Schendel v. Duluth*, which involved the head-on collision discussed in the introduction to this Note,[182] the Sixth Judicial District Court of Minnesota held that Schendel's FELA claim, insofar as it alleged failure to install a proper warning signal, was precluded by the applicable FRSA regulation.[183] In its analysis the court distinguished *POM* from *Waymire*, *Lane*, and *Nickels*.[184] First, the court noted that unlike the FDCA and the Lanham Act in *POM*, FELA and FRSA shared the same overall purpose of railroad safety, "albeit from slightly different perspectives."[185] Next, the court noted that FELA was not a method of regulation, and thus the "multiple synergies" argument from *POM* was not applicable to the FRSA/FELA dispute.[186] While FELA and FRSA had co-existed for many years without any express limitation being amended into FRSA, the court reasoned that the two statutes were not complementary and instead "work at cross-purposes on a common set of facts."[187] Therefore, the court found that *Waymire*, *Lane*, and *Nickels* had not been abrogated by *POM* and held in favor of preclusion.[188]

177. *Id.* It is noteworthy that *POM*, although coming out a year before this opinion was issued, was cited nowhere in the opinion and nowhere in the briefings for either party.

178. Kopplin v. Wisconsin Cent., Ltd., No: 2016-cv-588, 2017 WL 7048811, at *2–3 (E.D. Wis. Oct. 17, 2017).

179. *Id.*

180. *Id.* at *2.

181. *Id.* at *3.

182. Schendel v. Duluth, No. 69DUCV132319, 2014 WL 5365131 (D. Minn. Sept. 29, 2014).

183. *Id.* at *5; *see* 49 C.F.R. § 236.0(c) (2020).

184. *Schendel*, 2014 WL 5365131, at *3–4.

185. *Id.* at *3.

186. *Id.* at *4.

187. *Id.*

188. *Id.* at *4.

IV. DISCUSSION

Framing the issue from a railroad employee's perspective, the majority' position regarding FRSA's preclusive effect on FELA claims in the post-*POM* era is encouraging. Numerous federal and state courts have rejected the *Waymire*, *Lane*, and *Nickels* line of reasoning and instead concluded that FELA and FRSA are not in conflict with one another.[189] Thus, the majority of jurisdictions agree that FELA claims should never be precluded by FRSA, even where the regulations "cover" the subject matter of the FELA claim.[190]

A. Remaining Issues with the Preclusion Argument After POM

While the authority is encouraging, the issue of FRSA preclusion still merits consideration. First, jurisdictions taking the minority position are correct that *POM* did not directly overrule or abrogate *Waymire*, *Lane*, and *Nickels*.[191] Nor have the Fifth, Sixth, and Seventh Circuits themselves abrogated or overruled the holdings of their respective cases. The *Jones* case, which was decided by the Central District of Illinois – within the Seventh Circuit's jurisdiction – remains the only case to go directly against its circuit court's precedent.[192] It is unlikely that the *Jones* court had the ability to declare their circuit's authority as non-binding,[193] but no appeal to the Seventh Circuit was filed. Additionally, *Bratton v. Kan. City. S. Ry. Co*, decided by the U.S. District Court for the Western District of Louisiana – within the Fifth Circuit's jurisdiction – did not directly challenge *Lane*.[194] Therefore, plaintiffs in Wisconsin, Illinois, Indiana, Michigan, Ohio, Kentucky, Tennessee, Texas, Louisiana, and Mississippi

189. Madden v. Anton Antonov & AV Transp., Inc., 156 F. Supp. 3d 1011, 1020 (D. Neb. 2015).

190. *See id.*; *see also supra* note 151 and accompanying text.

191. "Under the prior precedent rule, [The Court of Appeals] [is] bound to follow a prior binding precedent unless and until it is overruled by [The Court of Appeals] en banc or by the Supreme Court." United States v. Vega–Castillo, 540 F.3d 1235, 1236 (11th Cir. 2008).

192. *See* Jones v. BNSF Ry. Co., 306 F. Supp. 3d 1060, 1070 (C.D. Ill. 2017).

193. *See* United States v. Spedalieri, 910 F.2d 707, 709 n.2 (10th Cir. 1990) (noting generally that a district court must follow the precedent set by its circuit court, regardless of the district court views concerning more favorable precedent in other circuits).

194. No. CIV.A. 13-3016, 2015 WL 789127, at *2 (W.D. La. Feb. 24, 2015). While the *Bratton* court found *Madden*'s application of *POM* to the FRSA/FELA analysis persuasive, the court decided to reject the preclusion argument on the basis that the applicable FRA regulation did not cover the negligent training and certification theory of the FELA claim. *Id.*

bringing FELA claims risk losing their sole avenue of recovery on the theory of FRSA preclusion.[195]

Second, as illustrated by the *Bratton* case, some jurisdictions find *POM* persuasive but nevertheless hold that FELA claims are precluded where the FRSA regulation at issue "covers" the theory of the FELA claim.[196] Thus, plaintiffs outside the Fifth, Sixth, and Seventh Circuits might still have to battle to prove that an applicable FRSA regulation does not cover the subject matter of their FELA claim.

Third, there are still several federal circuits which have yet to take a stance on the preclusion issue. With the U.S. District Court for the Western District of Missouri's recent holding in *Webb v. Union Pac. R.R. Co.*, which held for no preclusion but noted disagreement between jurisdictions,[197] the Eighth Circuit could be among the first of the undecided circuits to rule on the preclusion issue in the post-*POM* era and create a circuit split.

For these reasons, FRSA's preclusive effect on FELA claims is still a contested legal issue in need of a uniform solution. While an answer regarding the viability of FRSA preclusion from the United States Supreme Court or from Congress via amendment to either statute would resolve the issue, both are unlikely to come anytime soon.[198] Therefore, suggestions to undecided courts on how to resolve the controversy are outlined below.

B. POM, *Although It Did Not Abrogate/Overrule* Waymire, Lane, *and* Nickels, *Suggests that the FRSA Should Never Preclude FELA Claims*

While the minority position has tried to limit *POM*'s application to the FDCA and the Lanham Act,[199] *POM* should not be read so narrowly. Many of the factors used by the United States Supreme Court to analyze the preclusion issue in *POM* are directly analogous to the FRSA/FELA dispute. Like the FDCA, FRSA has an express preemption provision that

195. *See generally Geographic Boundaries*, U.S. CTS., https://www.uscourts.gov/sites/default/files/u.s._federal_courts_circuit_map_1.pdf (last visited. June 12, 2021).

196. *Bratton*, 2015 WL 789127, at *1–2.

197. Webb v. Union Pac. R.R. Co., No. 2:19-CV-04075-MDH, 2020 WL 4589713, at *3, *6 (W.D. Mo. Aug. 10, 2020) (quoting 49 U.S.C. § 20101).

198. Either course of action is unlikely because Congress has failed to amend either statute to resolve the issue since the issue arose and the Supreme Court rejected certiorari on *Waymire* and *Nickels*. *See* Waymire v. Norfolk & West. Ry. Co., 218 F.3d 773, 775 (7th Cir. 2000), *cert. denied*, 531 U.S. 1112 (2001); Nickels v. Grand Trunk West. R.R., Inc., 560 F.3d 426, 428 (6th Cir. 2009), *cert. denied*, 558 U.S. 1147 (2010).

199. Schendel v. Duluth, No. 69DUCV132319, 2014 WL 5365131, at *3–4 (D. Minn. Sept. 29, 2014).

prohibits certain state law claims.[200] Like the FDCA, FRSA's express preemption provision is silent on its effect on other federal laws.[201] Like the FDCA, enforcement of FRSA is committed to a federal regulatory agency – the FRA – which is responsible for the enforcement of the statute and its regulations.[202] Like the Lanham Act, FELA authorizes a cause of action for private actors – in this case railroad employees – to protect their interests – in this case, compensation for injuries sustained as a result of the railroads' negligence.[203] Like FDA regulations, no FRSA regulation has expressly barred private actors from bringing claims under other federal statutes. Like the defendants in *POM*, the defendants in FRSA/FELA disputes argue that a finding against preclusion is contrary to the congressional intent emphasizing national uniformity.[204] Like the FDCA and the Lanham Act, FELA and FRSA have co-existed for decades without Congress amending either statute to curtail the other.[205]

So, while some courts are correct that the holding in *POM* was limited to resolving the FDCA/Lanham Act dispute, it would be absurd to ignore the statutory conflict analysis the Supreme Court enumerated and render *POM* meaningless in FRSA/FELA cases. Both the FDCA/Lanham Act dispute and the FRSA/FELA dispute involved conflict between a federal regulation promulgated by a federal regulatory agency and a long-standing federal statute.[206] Therefore, *POM* is instructive in the FRSA/FELA conflict analysis and should be applied to resolve these disputes.

With *POM* as the applicable framework in these cases, undecided jurisdictions going forward should adopt a position similar to *Jones* to hold that FRSA does not preclude FELA claims in any instance, even where the applicable FRSA regulations "cover" the subject matter of the FELA claim. The "cover" standard expressed in *Easterwood* should be read to apply only to cases involving preemption and not preclusion, since the Supreme Court in *POM* made it clear that preemption and preclusion are

200. 49 U.S.C. § 20106(a)(2).

201. *Id.*

202. *See* 49 U.S.C. § 20111(a).

203. 45 U.S.C. § 51.

204. *See, e.g.*, Def.'s Mtn. in Limine to Preclude Evidence Related to the Design and Configuration of Def.'s Freight Cars and Locomotives, at ¶ 13, Gailey v. Norfolk S. Ry. Co., No. 4:13-CV-2830, 2015 WL 4509071, (M.D. Pa. July 24, 2015) (No. 4:13-CV-2830), 2016 WL 3218337 ("Permitting FELA negligence actions to proceed notwithstanding FRSA regulations that cover the same subject matter would undermine the statutory goal that railroad safety regulation 'be nationally uniform to the extent practicable.'").

205. *See* Madden v. Anton Antonov & AV Transp., Inc., 156 F. Supp. 3d 1011, 1021 (D. Neb. 2015).

206. *See* POM Wonderful LLC v. Coca-Cola Co., 573 U.S. 102, 112 (2014) ("Nor does [the conflict analysis] change because an agency is involved").

two completely different doctrines.[207] Additionally, undecided jurisdictions should see that allowing FELA claims even where their subject matter is "covered" by an applicable FRSA regulation actually enhances Congress's goal of improving railroad safety rather than rendering FRSA meaningless. The FRA – which is responsible for enforcement of FRSA and the regulations promulgated under it – has limited resources to enforce violations of the applicable regulations by railroads.[208] Preserving FELA claims helps bring attention to violations that the FRA might miss. Additionally, FELA claims help bring attention to safety concerns that could lead to additional regulations, thus furthering the goal of railroad safety.

Furthermore, undecided jurisdictions should look at congressional intent surrounding FELA and precedent from the United States Supreme Court holding that the FELA should not be "cut down by inference or implication,"[209] to find that preclusion by FRSA is not merited in any scenario. Courts should also look to the Supreme Court's language in *Epic Systems Corp. v. Lewis* to further support a finding against preclusion.[210] There, the Supreme Court reasoned that Congress' intention to have one federal statute preclude another must be "clear and manifest" and that there is a strong presumption against repeals of statutes by implication.[211] Nothing in the legislative history or subsequent amendments to FELA or FRSA shows the "clear and manifest" congressional intent for FRSA and its regulations to limit FELA.[212] Therefore, courts should apply the presumption against repeal by implication to find against FRSA/FELA preclusion in all scenarios.[213] Finally, undecided jurisdictions might consider FRSA as a *de facto* amendment to FELA.[214] In light of these

207. *Id.* at 111–12; *see also* Henderson v. Nat'l R.R. Passenger Corp., 87 F. Supp. 3d 610, 621 (S.D.N.Y. 2015) ("If Congress had intended that the FRSA both preclude covered FELA claims and pre-empt covered state law claims, it would have said so.").

208. THOMAS MCGARITY ET AL., CTR. FOR PROGRESSIVE REFORM, THE TRUTH ABOUT TORTS: REGULATORY PREEMPTION AT THE FEDERAL RAILROAD ADMINISTRATION, WHITE PAPER #910, 9–15 (2009) (arguing that evidence of FRA inspections only covering 2% of railroads' operations each year and investigating only 13% of serious crossing collisions, combined with the exodus of high-level FRA officials from the agency to companies they once regulated is evidence of agency capture).

209. *Henderson*, 87 F. Supp. 3d at 618 (quoting Urie v. Thompson, 337 U.S. 163, 186 (1949)).

210. 138 S. Ct. 1612, 1624.

211. *Id.* (quoting Morton v. Mancari, 417 U.S. 535, 551 (1974)) (quotations omitted).

212. *Id.*

213. *Id.* (quoting United States v. Fausto, 484 U.S. 439, 452 (1988)).

214. Joseph M. Miller, *Federal Preemption and Preclusion: Why the Federal Railroad Safety Act Should Not Preclude the Federal Employer's Liability Act*, 51

considerations, *Waymire*, *Lane*, and *Nickels* should be abandoned in favor of the majority rule that FRSA does not preclude FELA in any circumstance.

V. CONCLUSION

It remains to be determined whether the Eighth Circuit or any Missouri Court will choose to adopt the post-*POM* standard and decline to hold FELA claims precluded by FRSA. The precedent set by *Waymire*, *Lane, and Nickels* stripped railroad employees of their sole remedy for injuries sustained as a result of their employer's negligence for over a decade. While *POM* has seemingly turned the tide in the conflict analysis to find against preclusion in an overwhelming majority of cases, precedent within the Fifth, Sixth, and Seventh Circuits still remains good law, and district courts in those jurisdictions have struggled to reconcile *POM* with the binding law in their respective circuits. Congress should act to amend FRSA to express whether or not FELA claims should be precluded when covered by applicable FRSA regulations. If Congress decides not to act – which is likely considering its continued silence for the past twenty years – the Supreme Court should grant certiorari on a case that allows it to put the issue to bed and to expressly expand or limit the scope of the *POM* holding. If no action is taken, injured railroad employees, who serve as reliable cogs in America's powerful railway industry machine, may continue to be stripped of their sole remedy.

LOY. L. REV. 947, 975–78 (2005) (discussing the *Urie* courts treatment of LIA and FSAA as amendments to FELA).