NO. 1015291

SUPREME COURT OF THE STATE OF WASHINGTON

WASTE MANAGEMENT OF WASHINGTON, INC., WASTE MANAGEMENT DISPOSAL SERVICES OF OREGON, INC., MJ TRUCKING & CONTRACTING, and DANIEL ANDERSON TRUCKING & EXCAVATION, LLC,

Petitioners,

v.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION, an agency of the State of Washington,

Respondent,

MURREY'S DISPOSAL COMPANY, INC.,

Intervenor/Respondent.

WASHINGTON REFUSE & RECYCLING ASSOCIATION,

Intervenor/Respondent.

INTERVENOR MURREY'S DISPOSAL COMPANY, INC.'S ANSWER TO PETITION FOR REVIEW

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

STATE CASES

FEDERAL CASES

AGENCY DECISIONS AND RULEMAKINGS

FEDERAL STATUTES

STATE STATUTES

LEGISLATIVE HISTORY

RULES

REGULATIONS

OTHER AUTHORITIES

I. INTRODUCTION

Murrey's Disposal Company, Inc. ("Murrey's") requests this Court deny the Petition for Review filed by Waste Management of Washington, Inc., Waste Management Disposal Services of Oregon, Inc., MJ Trucking & Contracting and Daniel Anderson Trucking and Excavation, LLC ("Appellants"). The Court of Appeals correctly rejected Appellant's preemption arguments and concluded the State's jurisdiction to regulate solid waste carriers in the public interest encompasses solid waste carriers who transport solid waste for disposal by truck to a rail transloading facility.[1] Congress expressly limited the scope of federal preemption under 49 U.S.C. § 10501(b) to preclude only state regulation of transportation by rail carriers. Appellants may have subcontracted a portion of their service to a railroad, but they are not rail carriers. Thus, state regulation of their solid waste

[1] *Waste Mgmt. of Washington, Inc. v. Washington Utilities & Transportation Comm'n,* ___ Wn. App. 2d____, 519 P.3d 963, 971 (2022).

collection activity is not preempted and the Court should deny review.[2]

II. RESTATEMENT OF ISSUES

Whether state law regulating the collection and transportation of solid waste by motor vehicle over public roads is preempted by the exclusive jurisdiction of the United States Surface Transportation Board to regulate transportation by rail carrier merely because solid waste is incidentally transported to a rail carrier?

III. COUNTERSTATEMENT OF THE CASE

Murrey's initiated this case through a formal complaint to the Washington Utilities and Transportation Commission ("WUTC" or "Commission") to enforce its property rights under its Commission-issued certificate of public convenience and necessity against the Appellants, who were collecting and transporting solid waste by motor vehicle for disposal within

[2] Murrey's endorses the WUTC's arguments regarding the Petitioners' failure to establish grounds for review under RAP 13.4(b).

Murrey's exclusive service territory. Appellants admitted their services would be subject to state regulation, but insisted regulation was preempted by 49 U.S.C. § 10501(b) because a portion of its transportation was subcontracted to a railroad prior to disposal.[3]

The Commission ultimately prohibited Appellants from engaging in "solid waste collection" services as defined by state law.[4] Thus, contrary to Petitioners' contention, the WUTC's Order cannot directly impact or govern rail carrier transportation, which operates over rails rather than public highways.

A. Regulatory background

a. The landscape before 1980

(1) Regulation of rail transportation

Appellants contend trailer-on-flatcar/container-on-flatcar ("TOFC/COFC")[5] is a unique form of service combining rail

[3] Administrative Record ("AR") 039.
[4] AR 572-87.
[5] 49 C.F.R. § 1090.1.

and truck transportation.[6] While TOFC/COFC indeed relies on use of standardized intermodal containers transferred from one mode of transportation to another, federal and state law regulate each mode separately and distinctly.

Rail carriers have been subject to federal regulation since 1887, when Congress created and authorized the Interstate Commerce Commission (the "ICC") to establish railroad rates.[7] The ICC's powers evolved over time, eventually restricting states from economically regulating rail carriers.[8]

(2) Regulation of motor carriers

Motor carriers were already regulated by the states when Congress passed the Motor Carrier Act of 1935 (the "MCA"), vesting the ICC with concurrent jurisdiction to economically

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[6] Petition for Review ("Petition") at 2.
[7] Interstate Commerce Act of 1887, Pub. L. No. 49-104, 24 Stat. 379 (1887).
[8] William C. Coleman, *The Evolution of Federal Regulation of Intrastate Rates: The Shreveport Rate Cases*, 28 HARV. L. REV. 34 (1914); *The Waning Power of the States over Railroads: Curtailment of State Regulatory Activities by the Transportation Act*, 37 HARV. L. REV. 888 (1924).

regulate interstate motor carriage.[9] Congress intended the MCA to protect rail carriers from competition by motor carriers and limited their ability to serve similar routes.[10] Thus, the ICC regulated motor carriers' routes, territories and commodities carried.[11,12]

b. Federal deregulation; the law post-1980

Motor carrier deregulation began with the passage of the Motor Carrier Act of 1980,[13] which relaxed entry standards and gave greater rate flexibility to motor carriers.[14] Congress then passed the Staggers Rail Act of 1980 ("Staggers Act"),[15] which authorized the ICC to exempt from federal regulation services

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[9] Motor Carrier Act, 1935, Ch. 498, 49 Stat. 543 (1935).
[10] *Federal Regulation of Trucking: The Emerging Critique*, 63 COLUM. L. REV. 460, 462 (1963).
[11] 49 Stat. 552 (1935).
[12] 49 Stat. 551 (1935).
[13] Motor Carrier Act of 1980, Pub. L. No. 96-296, 94 Stat. 793 (1980); *See The Impact of Deregulation on the Trucking Industry*, 47 ADMIN. L. REV. 527 (1995).
[14] *Id.*
[15] Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 STAT. 1895 (1980)(pertinent provision codified in 49 U.S.C. § 10502).

that were "related to a rail carrier providing transportation."[16] The Staggers Act neither expanded nor diminished the ICC's jurisdiction, but authorized it to deregulate matters within its jurisdiction. Pursuant to its new exemption authority, the ICC commenced a series of rulemakings cited by Petitioners by which it exempted certain intermodal services from federal regulation.[17]

But the ICC stopped short of complete deregulation of intermodal service; instead, it expressly excluded from exemption, "Plan 1" TOFC/COFC services, by which motor carriers contracted for and were charged to provide the service and substituted a portion of their service to a rail carrier acting only as the motor carrier's agent.[18] Nonetheless, Congress had

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[16] 49 U.S.C. § 10505 (1980).
[17] Petition at 16-21.
[18] Improvement of TOFC/COFC Regulations (R.R.-Affiliated Motor Carriers & Other Motor Carriers), 1987 WL 99011 (I.C.C. July 21, 1987) (clarifying that "Plan 1" service, where a rail service is substituted for a portion of a motor carrier's service is not being exempted); 49 C.F.R. § 1090.2 (expressly excluding Plan 1 service from exemptions).

already eliminated nearly all federal economic regulation of motor carriage when, in 1994, it enacted the Federal Aviation Administration Authorization Act ("FAAAA"), which dramatically altered state regulation of motor carriers by preempting state regulation of rates, routes or service.[19] The effect of preemption was to remove all state entry and rate regulations for intrastate motor carriers.

c. ICCTA and the sunset of the ICC

After ICC jurisdiction was incrementally diminished over several decades, Congress enacted the Interstate Commerce Commission Termination Act of 1995 ("ICCTA"). ICCTA eliminated the ICC, created the United States Surface Transportation Board (the "STB"), and transferred much of the ICC's oversight of motor carriers to the United States

[19] Federal Aviation Administration Authorization Act of 1994, Pub. L. No. No. 103-305 (1994)(pertinent provision codified in 49 U.S.C. § 14501(c)).

Department of Transportation.[20] ICCTA ultimately removed the STB from most of its jurisdiction to regulate motor carriers.

Congress also adopted ICCTA to permit the railroad industry to operate nationally, freed from varying state restrictions.[21] To accomplish this, Congress expressly preempted state regulation of rail transportation and facilities.[22]

Yet, ICCTA does not preclude all state regulation impacting railroads. Federal Courts of Appeals presume states may regulate within fields traditionally occupied by the states as matters of local public health and safety unless preemption was the clear and manifest purpose of Congress.[23] Thus, ICCTA preempts only state laws managing or regulating rail

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[20] Pub. L. No. 104–88, 109 Stat. 803.
[21] S. Rep. No. 104-176, at 6 (1995); H.R. Rep. No. 104-311, at 95-96 (1995).
[22] 49 U.S.C. § 10501(b).
[23] *Florida E. Coast Ry. Co. v. City of W. Palm Beach*, 266 F.3d 1324, 1328 (11th Cir. 2001).

transportation rather than merely having a "more remote or incidental effect on rail transportation."[24]

d. Solid waste collection remained a matter of local public health and safety subject to state regulation

Throughout the numerous changes in federal transportation regulation, solid waste collection consistently remained a matter of state regulation.[25] Indeed, because of local public health and safety concerns, solid waste regulation has long been considered at the zenith of state police power.[26]

In Washington, state agencies and municipalities, not the federal government, ultimately bear responsibility for adequate solid waste management.[27] The WUTC has been charged with economic entry, service and rate regulation of solid waste

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[24] *Id.* at 1331.
[25] Stephen M. Richmond, Marc J. Goldstein, *Collision Course: Rail Transportation and the Regulation of Solid Waste*, NAT. RESOURCES & ENV'T 3 (2006).
[26] *See Hunt v. Washington State Apple Advert. Comm'n*, 432 U.S. 333, 349, 97 S. Ct. 2434, 2445, 53 L. Ed. 2d 383 (1977); *Ventenbergs v. City of Seattle*, 163 Wn.2d 92, 101, 178 P.3d 960, 965 (2008).
[27] *Id.*

collection companies as a distinct carrier classification since 1961.[28]

Although economic regulation of garbage and refuse companies was conceptually similar to that of motor carriers particularly as to tariff and service oversight, solid waste collection operates fundamentally differently than motor carriage. Motor Carriers transport property, and the receiver and shipper have an interest in how it is shipped and its ultimate destination. Conversely, solid waste is disposed of, and the generator has little interest in its destination because it has "negative value,"[29] meaning the landfill or transfer station to which it is delivered charges for its acceptance and disposal.[30]

For these reasons, the ICC consistently rejected the premise that its jurisdiction encompassed solid waste

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[28] Chapter 295, Laws of 1961.*Id.*
[29] *See I. C. C. v. Browning-Ferris Indus., Inc.*, 529 F. Supp. 287 (N.D. Ala. 1981).
[30] Richmond, *supra,* 5.

collection.[31] The question of its jurisdictional reach involving solid waste was first presented when Joray Trucking Company applied in 1965 for a certificate of public convenience and necessity to transport rock, debris and other materials from excavations and demolitions to landfill for disposal. The ICC ultimately denied Joray's application, concluding solid waste was not "property" within the meaning of the MCA because the "commodity" shipped had negative value.[32]

Following *Joray*, the ICC consistently concluded solid waste was not "property" and its jurisdiction to regulate motor carriers excluded solid waste collection, which was essentially local in nature.[33] Congress too acknowledged the states' traditional role in regulating solid waste, stating: "…the

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[31] Richmond, *supra*.
[32] *Joray Trucking Corp. v. Common Carrier Application*, 99 M.C.C. 109 (I.C.C. Jun. 29, 1965).
[33] *Browning-Ferris*, 529 F. Supp. 287.

collection and disposal of solid wastes should continue to be primarily the function of State, regional, and local agencies."[34]

Similarly, local control over solid waste collection has been respected repeatedly by the courts when confronting attempts to avoid state regulation. For instance, the 9th Circuit has observed: "[o]ne could hardly imagine an area of regulation that has been considered to be more intrinsically local in nature than collection of garbage and refuse, upon which may rest the health, safety, and aesthetic well-being of the community."[35]

In enacting the FAAAA in 1994, Congress deliberately excluded solid waste collection from federal preemption of motor carrier regulation.[36] Thus, multiple courts have

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[34] 42 U.S.C. § 6901(a)(4).
[35] *AGG Enterprises v. Washington Cty.*, 281 F.3d 1324, 1327 (9th Cir. 2002).
[36] *See Wash. Util. and Transp. Com'n v. Haugen*, 94 Wn. App. 552 (1999); *AGG*, 281 F.3d 1324; *Boyz Sanitation Serv., Inc. v. City of Rawlins, Wyoming*; 889 F.3d 1189, 1200 (10th Cir. 2018).

concluded the UTC's jurisdiction to regulate solid waste collection continues after the FAAAA.[37]

e. The hijacking of ICCTA preemption: solid waste transloading facilities

In addition to economic regulation, solid waste carriers and solid waste handling facilities, including transfer stations, are subject to comprehensive state regulation over safety, construction, permitting and environmental standards in Washington.[38] Conversely, pursuant to ICCTA, states are not permitted to regulate the construction of rail transportation facilities and railroads may construct support facilities without any state or local regulatory approval.[39]

Recognizing the rail carriers' advantage, a number of solid waste collection businesses have attempted to define themselves as rail carriers to avoid state regulation under the

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[37] *See, e.g., Kleenwell Biohazard Waste & Gen. Ecology Consultants, Inc. v. Nelson*, 48 F.3d 391 (9th Cir. 1995).
[38] *See* RCW 70A.205 *et seq*.
[39] *See Borough of Riverdale Petition for Declaratory Order the New York Susquehanna & W. Ry. Corp.*, 4 S.T.B. 380 (S.T.B. Sep. 9, 1999).

auspices ICCTA preemption.[40] These efforts have led to numerous agency orders and court opinions defining the scope of ICCTA preemption.

First, Hi Tech Trans, LLC ("Hi Tech") petitioned the STB for a declaratory order that motor carriers transporting solid waste to a truck-to-rail transloading facility were subject to its exclusive jurisdiction.[41] As a licensee of a railroad, Hi Tech constructed a truck-to-rail transloading facility on railroad-owned land where it transferred solid waste from trucks to rail cars and then shipped the materials on the CP's lines. In its Petition, Hi Tech contended it was "handling freight in a continuous intermodal rail move" and insisted its operations were an "integral component of" freight by rail.[42]

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[40] John V. Edwards, *ICCTA Preemption: The Spaghetti Western Starring Solid Waste*, 35 TRANSP. L.J. 223 (2008).
[41] *Hi Tech Trans, LLC-Petition for Declaratory Order-Hudson Cty., NJ*, 34192, 2002 WL 31595417 (S.T.B. Nov. 19, 2002).
[42] *Id.*

The STB rejected this premise, finding truck-to-transloading-facility movements were not "transportation" under ICCTA and concluding Hi Tech's premise would mean all state and local regulation of activities occurring before a product is delivered to a railroad would be preempted.[43] Thus, the STB firmly concluded only the transfer of materials at the transloading facility itself (where rail equipment is operated by a rail carrier), and not the previous truck movement may be deemed "transportation".[44]

Undeterred, Hi Tech sought another declaratory order, this time arguing that, as a licensee of the railroad, its transloading operations were preempted under ICCTA.[45] However, applying a new case-by-case test, the STB concluded ICCTA preempted activities only if they constitute both

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[43] *Id.*
[44] *Id.*
[45] *Hi Tech Trans, LLC-Petition for Declaratory Order-Newark, NJ*, 34192 (SUB 1), 2003 WL 21952136 (S.T.B. Aug. 14, 2003).

"transportation" *and* activities "performed by a rail carrier".[46] While applying a broad interpretation of "transportation," the STB interpreted the meaning of "rail carrier" strictly, rejecting Hi Tech's position that "rail carrier" means any transportation service "related to rail service.[47] The STB reasoned such an expansive interpretation would impermissibly preempt any third party that even remotely supports or uses rail carriers. Instead, the STB ruled ICCTA preemption applied only to those transportation activities performed by an STB-authorized rail carrier or those entities *controlled* by a rail carrier.[48]

In yet another putative effort to circumvent state economic regulation of solid waste collection, Hi Tech sought a declaration from the U.S. District Court that ICCTA preempted state solid waste facility permitting requirements and market entry standards requiring a certificate of public convenience and

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[46] *Id.*
[47] *Id.*
[48] *Id.*

necessity. The lower court abstained from ruling and dismissed the complaint, but on appeal, the Third Circuit Court of Appeals applied the STB's two-step test to determine whether the service was "transportation" and "by a railroad."[49] The Court of Appeals there focused on whether a licensee of a rail carrier transporting materials to a rail carrier in rail car equipment could be considered a railroad under ICCTA, and concluded at most "it involves transportation '*to* rail carrier.'"[50]

The Third Circuit thus concluded Hi Tech's operations fell outside the STB's exclusive jurisdiction because preemption of all transportation *to* a rail carrier would prevent state regulation of any nonrail carrier's operations if "at some point in a chain of distribution, it handles products that are eventually shipped by rail by a railcarrier."[51]

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[49] *Hi Tech Trans, LLC v. New Jersey*, 382 F.3d 295 (3d Cir. 2004)(emphasis in original).
[50] *Id.* at 308.
[51] *Id.*

Following the *Hi-Tech* decisions, the STB's two-part test has been widely adopted and consistently applied by the federal courts of appeals.[52] But the test left open the possibility that an actual rail carrier could circumvent state solid waste regulation. When eventually considering ICCTA preemption of a transloading facility actually operated by a rail carrier, a federal court of appeals indeed concluded ICCTA preempted rail solid waste transloading.[53] This ruling created a broad regulatory gap, permitting railroads to circumvent state regulation of solid waste handling facilities on railroad property. But rather than authorizing this circumvention, Congress enacted the Clean Railroads Act of 2008,[54] which allowed states to regulate certain environmental and public health and safety aspects of

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[52] *See Texas Cent. Bus. Lines Corp. v. City of Midlothian*, 669 F.3d 525, 531 (5th Cir. 2012); *Grosso v. Surface Transp. Bd.*, 804 F.3d 110, 114 (1st Cir. 2015); *New York & Atl. Ry. Co. v. Surface Transp. Bd.*, 635 F.3d 66 (2d Cir. 2011); *New York Susquehanna & W. Ry. Corp. v. Jackson*, 500 F.3d 238 (3d Cir. 2007).

[53] *See New York Susquehanna*, 500 F.3d 238.

[54] 49 U.S.C. § 10908; *see also* Edwards, *supra*, at 244.

solid waste transloading facilities and requires that the STB consider risks to public health and safety when permitting such facilities.[55]

IV. ARGUMENT

Petitioners present a recurrent and disingenuous ellipsis in logic by assuming use of an intermodal container constitutes preempted rail transportation simply because of its eventual truck delivery to a rail facility. To the contrary, ICCTA preempts state law only if it has the effect of managing or regulating rail carrier transportation. Here, Petitioners request the Court accept review and find their activities are preempted, despite the fact the state law at issue regulates only motor vehicle collection and transportation of solid waste. Accepting Petitioners' dangerous new premise would entirely shield and insulate activities wholly within traditional public health and safety paramount interests from local and state environmental

[55] *Id.*

and economic regulation and indeed contravene the intent of Congress.

A. The Court of Appeals correctly rejected Petitioners' express preemption theory

Consideration of the preemptive effect of federal legislation starts with the assumption historic police powers of the states are not superseded unless that was the clear and manifest purpose of Congress.[56] "[T]he purpose of Congress is the ultimate touchstone of preemption analysis."[57] And analysis of the purpose of Congress is primarily discerned from the language of the preemption statute and the statutory framework surrounding it.[58]

Courts have consistently recognized regulation of solid waste collection and transportation is a classic state police

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[56] *Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 516, 112 S. Ct. 2608, 2617, 120 L. Ed. 2d 407 (1992); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 67 S. Ct. 1146, 91 L. Ed. 1447 (1947).
[57] *Cipollone*, 505 U.S. at 516.
[58] *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 486, 116 S. Ct. 2240, 2251, 135 L. Ed. 2d 700 (1996).

power function exercised to protect and promote local public health and safety.[59] When considering whether federal law preempts state regulation of solid waste, courts begin their analysis recognizing the strong presumption against federal preemption of solid waste regulation, and then analyzing the preemption language and legislative history to assess whether Congress clearly demonstrated an intent to preempt state regulation.[60]

For example, when considering whether the FAAAA's deregulation of intrastate motor carriage applied to state regulation of solid waste collection companies, the Ninth Circuit Court of Appeals' review began by addressing the presumption against preemption.[61] After acknowledging the strong state interest in regulation of solid waste collection as a matter of public health and safety, it next considered the

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[59] *AGG*, 281 F.3d at 1327.
[60] *See, e.g.*, *Id.*; *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 449, 125 S. Ct. 1788, 1801, 161 L. Ed. 2d 687 (2005).
[61] *AGG*, 281 F.3d at 1327.

legislative history of the FAAAA, where Congress acknowledged that, under ICC case law, "garbage collectors" are not considered "motor carriers of property" and thus fell outside of the scope of FAAAA preemption.[62] The court ultimately held "it verges on the inconceivable that Congress had such an intent [to preempt local regulation of solid waste collection]."[63]

Other courts have reached similar conclusions, consistently holding federal laws that were silent on the preemption of solid waste collection did not demonstrate a "clear and manifest intent" by Congress.[64]

Petitioners boldly claim no such presumption against preemption applies here because the regulation of rail carrier transportation is a traditional field of federal regulation.[65] But as

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[62] *Id*. at 1329.
[63] *Id.* at 1330.
[64] *Wash. Util. and Transp. Com'n v. Haugen*, 94 Wn. App. 552 (1999); *Boyz Sanitation Serv., Inc. v. City of Rawlins, Wyoming*, 889 F.3d 1189, 1200 (10th Cir. 2018).
[65] Petition, 27-28.

the Court of Appeals correctly concluded, "…the question is whether the federal statute preempts state regulation of solid waste collection," not whether the federal government traditionally has regulated rail transportation.[66]

In this case, the statutory language conferring exclusive jurisdiction on the STB requires activities within STB's jurisdiction must be "transportation by rail carriers."[67] Petitioners' attempt to facilely expand this language to include transportation *related to* rail carriers, but their arguments find no support in the express language of 49 U.S.C. Section 10501(b), nor in the plethora of cases interpreting it.[68]

To start, Congress defined "rail carrier" as "a person providing common carrier railroad transportation for compensation."[69] As noted above, the STB and federal courts

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[66] *Waste Mgmt.*, 519 P.3d at 970.
[67] 49 U.S.C. § 10501(b)(1).
[68] *See e.g., Grosso*, 804 F.3d at 118; *Texas Cent.*, 669 F.3d 525; *New York Susquehanna & W. Ry. Corp. v. Jackson*, 500 F.3d 238 (3d Cir. 2007); *Hi Tech*, 382 F.3d 295.
[69] 40 U.S.C. § 10102(5).

have unanimously concluded only a company actually authorized by the STB as a rail carrier, or one acting under the control of a rail carrier, constitute a rail carrier.[70]

Petitioners confess they are neither actually rail carriers nor operating under the auspices of a rail carrier. In fact, they admit the railroad acts as Waste Management's subcontractor.[71] Thus, they are not rail carriers within the express language of the law.

The Court of Appeals exercised judicial restraint and did not address whether Petitioners' conduct would be considered "transportation" under ICCTA. But here, too, Petitioners' contentions lack substance. The STB concluded that, to constitute "transportation," the activities must include: (1) a facility related to movement of property by rail; and (2) services related to that movement by rail, including delivery, receipt,

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[70] *See, e.g.*; *Hi Tech* (S.T.B. Nov. 19, 2002); *Hi Tech*, 382 F.3d 295; *Texas Cent.*, 669 F.3d 525.
[71] AR 039.

transfer and handling of property. The STB characterizes these additional services subject to its jurisdiction as ones "integrally related to the railroad's ability to provide rail transportation services."[72]

Petitioners nevertheless argue the definition of "transportation is expansive"[73] and go on to assert it includes transportation of solid waste.[74] But they never attempt to address how their activities constitute "transportation" under ICCTA, despite the fact it does not preempt every activity touching or concerning a railroad.[75] Indeed, activities performed outside of a rail facility prior to rail transportation fall outside of the STB's jurisdiction.[76] Petitioners cannot demonstrate their truck transportation involves a rail facility,

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[72] *Hi Tech*, (S.T.B. Nov. 19, 2002).
[73] Petition at 7-8.
[74] *Id.* at 9.
[75] *Grosso*, 804 F.3d at 118.
[76] *Id.*

and it can readily be performed without a railroad's involvement.

The STB also previously concluded motor carrier legs of a "continuous movement" are not integrally related to movements of property by rail.[77] Specifically, the STB found highway shipments of solid waste made part of a continuous intermodal rail movement are not integrally related to rail transportation. Finding instead only the transloading onto rail cars itself might be considered integral to rail transportation, the STB stated to hold otherwise would mean all activities preceding a rail movement would be preempted. The STB thus has previously concluded "[p]reemption clearly does not go that far; nor does the Board's jurisdiction."[78]

B. The STB's exemption authority cannot expand the scope of ICCTA preemption

Regarding their reliance on the ICC's TOFC/COFC rulemakings, Petitioners engage in circular reasoning, first

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[77] *Hi Tech,* (S.T.B. Nov. 19, 2002).
[78] *Id.*

explaining the exemptions establish jurisdiction and thus preemption, and later claiming preemption is actually based on ICCTA. In that regard, the Petitioners' claims ultimately raise more questions than they answer and hardly demonstrate a clear and manifest intent to preempt state solid waste regulations.

First, Petitioners claim the exemptions authorized under Section 10502 preempt state law of solid waste carriers because the remedies under Sections 10101 through 11908 with respect to rail carrier transportation are exclusive.[79] Petitioners' only cited authority there, *Bass v. City of Edmonds*, 199 Wash.2d 403 (2022), addresses standards for implied state preemption. But *Bass* offers neither guidance on the Petitioners' express preemption theory nor an explanation as to how the remedies provided in 49 U.S.C. Sections 10101 through 11908 are exclusive as to non-rail carriers.

[79] Petition at 6-7.

Then, Petitioners contend the STB's exemption authority under 49 U.S.C. § 10502 makes all TOFC/COFC service "rail transportation."[80] Yet Congress authorized the STB to regulate both rail carriers and motor carriers.[81] How then does the exemption of motor carrier legs of intermodal service make trucks into trains under the law? Petitioners never logically explain. Instead, they broadly proclaim the ICC and STB treated them that way. Here, Petitioners cite to and heavily quote the ICC's Order in *Improvement of TOFC/COFC Regulations (Railroad-Affiliated Motor Carriers and Other Motor Carriers)*, EP No. 230 (Sub-No. 6), 3 I.C.C.2d 869 (1987) ("Sub-No. 6"). Yet the agency's rationale there cannot support Petitioners' overreaching conclusion here that all TOFC/COFC service is rail transportation. To the contrary, the ICC found "TOFC/COFC transportation cannot be 'compartmentalized . . . as either rail or motor or water. . . .'

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[80] *Id.* at 12-32.
[81] *Compare* 49 U.S.C. §§ 10501(b) and 13501.

Rather, 'all piggyback service is, by its essential nature, bimodal.'"[82] Additionally, the subsequent appellate court opinions regarding those rulemakings neither relied upon nor interpreted the ICC's *jurisdiction*. Instead, those cases addressed whether the exemption authority conferred on the ICC in the statute now codified in 49 U.S.C. § 10502 permitted the ICC to exempt motor carriers from regulation.[83] Because Congress authorized the ICC to exempt movements *related to* rail, the courts concluded the exemption authority did indeed extend to motor carriers providing certain legs of specific intermodal movements.[84]

And here, once again, Petitioners beg the question by assuming motor carrier intermodal service is actually rail transportation. If Congress intended that to be the case, why

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[82] *Id.* at 12-32.
[83] *See I.C.C. v. Texas*, 479 U.S. 450 (1987); *Central States Motor Freight Bureau, Inc. v. ICC*, 924 F.2d 1099 (D.C. Cir. 1991); *Am. Trucking Ass'ns. v. ICC*, 656 F.2d 1115 (5th Cir. 1981).
[84] *Id.*

would it need to extend the STB's exemption authority to services *related to* rail carrier transportation at all? After all, if the services *are* rail transportation, they need not be *related to* rail transportation.

Confronting these arguments, the Court of Appeals also correctly noted the exemptions in 49 C.F.R. 1090.2 contain no preemption language.[85] Perhaps more importantly, the exemption enabling legislation set forth in 49 U.S.C. §10502 also lacks preemption language. But Petitioners obfuscate again, incorrectly insisting the Court of Appeals erred here because preemption can be found by applying the language in 49 U.S.C. § 10501(b).[86] Where is it contained in the statute they point to in response? Again, they point to no such reference. And as addressed above, they cannot, because it does not exist. As made clear by both the STB and the courts repeatedly, ICCTA applies only to actual rail carriers engaged in rail

[85] *Waste Mgmt.*, 519 P.3d at 973.
[86] Petition at 32.

transportation, not motor carriers providing one part of a bimodal service. And, as the ICC concluded in *Joray*, solid waste collection companies are not subject to its jurisdiction and thereby regulated as motor carriers.[87] Thus, Petitioners' transportation of solid waste over the public roadways never fell within the ICC's motor carrier jurisdiction in the first place. Consequently, the Court of Appeals correctly concluded that the express language of 49 U.S.C. § 10501(b), the exemption authority in 49 U.S.C. § 10502, and the exemptions in 49 CFR § 1090.2 do not preempt the State of Washington's authority to regulate solid waste collection companies under RCW 81.77.040.

C. Because Petitioners are not rail carriers, the limited authority they cite cannot apply

While Petitioners are not accurate in their assertions, at least they are consistent in their inaccuracy. Petitioners misplace their reliance upon *New England Transrail, LLC d/b/a*

[87] *Joray*, 99 M.C.C. 109.

Wilmington & Woburn Terminal Railway et al. 2007 WL 1989841 (STB July 10, 2007), in which a sharply divided STB found a prospective rail loading facility handling solid waste provisionally subject to the STB's exclusive jurisdiction.[88] Unlike in that circumstance, where actual rail facilities were involved, Petitioners operate over highways, and the challenge here relates to collection and transportation movements before any interaction with rail yards, loading of rail cars, or subsequent transportation by rail.

Similarly misdirected is Petitioners' reliance upon *Ass'n of Am. Railroads v. S. Coast Air Quality Mgmt. Dist.*, 622 F.3d 1094, 1098 (9th Cir. 2010). That case addressed ICCTA preemption of California state emissions requirements expressly applicable to railroads. Conversely, RCW 81.77.040, authorizes the Commission to regulate solid waste collection companies operating over public roadways, which impacts a

[88] Petition at 10.

railroad here only because Petitioners chose to subcontract part of their unauthorized service to it.

Petitioners rely on similar misdirection in their citation to a number of cases addressing ICCTA preemption of rail transportation.[89] Those involved actual rail carriers, not a related industry seeking to cloak its activities in the unregulated environment in which its subcontracted railroad operates. Thus, they represent nothing more than the broad preemptive effect of ICCTA on state regulation of railroad transportation. No party challenged whether the STB's exclusive jurisdiction preempts Washington law directly impacting and regulating transportation activities by a rail carrier. This case does not involve rail carriers. And the courts and STB have repeatedly concluded that Congress did not intend for ICCTA to preempt state regulation of motor vehicle transportation to a railroad.

[89] Petition at 28-30.

V. CONCLUSION

The Court of Appeals unquestionably reached the correct conclusion. Petitioners are engaged in solid waste collection in violation of state law while neither managing nor directly regulating rail carriers engaged in transportation. Petitioners are neither motor carriers of property subject to federal jurisdiction nor rail carriers subject to the STB's exclusive jurisdiction. That they may transport solid waste in intermodal containers to a railroad should make no difference. Otherwise, Petitioners will have successfully cloaked themselves with ICCTA preemption to prevent the state from effectively regulating in its traditional interests of public health and safety. Respectfully, the Supreme Court should thus deny the Petition for Review.

I certify that the foregoing contains 4,958 words in compliance with RAP 18.17 (excluding Appendices; Title Sheet/Caption; Tables of Contents/Authorities; Certificates of Compliance/Service; Signature Blocks; and Pictorial Images/Exhibits), as calculated by the word processing software used to prepare this document.

DATED this 3rd day of February, 2023.

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CERTIFICATE OF SERVICE

I certify under the penalty of perjury according to the laws of the State of Washington that on this date I caused to be served a copy of the foregoing Intervenor Murrey's Disposal Company Inc.'s Answer to Petition for Review via electronic service on all parties as follows:

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