No. 24-10031

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

TRACY TURNER,
Plaintiff-Appellant,

v.

BNSF RAILWAY CO.,
Defendant-Appellee.

On Appeal from the United States District Court
for the Northern District of Texas

BRIEF OF THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICUS CURIAE IN SUPPORT OF APPELLANT AND IN FAVOR OF REVERSAL

KARLA GILBRIDE
General Counsel

JENNIFER S. GOLDSTEIN
Associate General Counsel

ANNE NOEL OCCHIALINO
Assistant General Counsel

GEORGINA C. YEOMANS
Attorney

EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION
Office of General Counsel
131 M St. N.E., 5th Floor
Washington, D.C. 20507
202-921-2748
georgina.yeomans@eeoc.gov

TABLE OF CONTENTS

Table of Contents i

Table of Authorities ii

Statement of Interest 1

Statement of the Issues 1

Statement of the Case 2

- A. Statutory and Regulatory Background 2
  - 1. Federal Railroad Safety Act 2
  - 2. Federal Railroad Administration Regulations 3
  - 3. Americans with Disabilities Act 6
- B. Turner's Certification Denial 7
- C. District Court's Decision 9

Argument 10

- I. The FRSA does not preclude Turner's ADA claim. 11
  - A. The statutes' text and structure do not establish preclusion. 11
  - B. Several courts agree that the FRSA does not preclude enforcement of federal employee-protection statutes. 17
  - C. The district court's contrary reasoning misapprehends the FRSA statutory and regulatory landscape. 20
- II. Turner's failure of an allegedly discriminatory vision test not mandated by FRA regulations does not render him unqualified as a matter of law 22

Conclusion 29

Certificate of Compliance 31

Certificate of Service 32

TABLE OF AUTHORITIES

Cases

Albertson's, Inc. v. Kirkingburg,
527 U.S. 555 (1999) 25, 28

Atkins v. Salazar,
677 F.3d 667 (5th Cir. 2011) 27

Axon Enter., Inc. v. FTC,
598 U.S. 175 (2023) 29

Bates v. United Parcel Serv., Inc.,
511 F.3d 974 (9th Cir. 2007) (en banc) 24, 27

Bey v. City of New York,
999 F.3d 157 (2d Cir. 2021) 26

Bratton v. Kansas City S. Ry. Co.,
No. CIV.A. 13-3016, 2015 WL 789127 (W.D. La. Feb. 24, 2015) 18

Carpenter v. Mineta,
432 F.3d 1029 (9th Cir. 2005) 6, 15, 22

Cleveland v. Pol'y Mgmt. Sys. Corp.,
526 U.S. 795 (1999) 14

Coffey v. Norfolk S. Ry. Co.,
23 F.4th 332 (4th Cir. 2022) 26

Cowden v. BNSF Ry. Co.,
690 F.3d 884 (8th Cir. 2012) 20

Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.,
561 U.S. 477 (2010) 29

Glow v. Union Pac. R.R. Co.,
652 F. Supp. 2d 1135 (E.D. Cal. 2009) 17, 21

Gonzales v. City of New Braunfels,
176 F.3d 834 (5th Cir. 1999) 24

Henderson v. Nat'l R.R. Passenger Corp.,
87 F. Supp. 3d 610 (S.D.N.Y. 2015) 18, 19

Jones v. BNSF Ry. Co.,
306 F. Supp. 3d 1060 (C.D. Ill. 2017) 18, 19

Kapche v. City of San Antonio,
176 F.3d 840 (5th Cir. 1999) 24

Lane v. R.A. Sims, Jr., Inc.,
241 F.3d 439 (5th Cir. 2001) 9, 18, 19

Lillian v. Nat'l R.R. Passenger Corp.,
174 F. Supp. 3d 1017 (N.D. Ill. 2016)...12, 14

Madden v. Anton Antonov & AV Transp., Inc.,
156 F. Supp. 3d 1011 (D. Neb. 2015) 18, 19

Meachen v. Iowa Pac. Holdings, LLC,
No. 13-cv-11359, 2016 WL 7826660 (D. Mass. Feb. 10, 2016) 19

Mills v. Union Pac. R.R. Co.,
No. 1:22-CV-00143-DCN, 2024 WL 185246 (D. Idaho Jan. 16, 2024) 20, 25

Peters v. Union Pac. R.R. Co.,
80 F.3d 257 (8th Cir. 1996) 10, 21

POM Wonderful LLC v. Coca-Cola Co.,
573 U.S. 102 (2014)...*passim*

Rohr v. Salt River Project Agric. Imp. & Power Dist.,
555 F.3d 850 (9th Cir. 2009) 26

Vann-Foreman v. Illinois Cent. R.R. Co.,
No. 19 C 8069, 2022 WL 180749 (N.D. Ill. Jan. 20, 2022).................14, 17, 18

Weeks v. Union Pac. R.R. Co.,
No. 1:13-CV-1641, 2017 WL 1740123 (E.D. Cal. May 4, 2017) (ADA and FRSA "address different subject matters entirely") 14

Williams v. J.B. Hunt Transport, Inc.,
826 F.3d 806 (5th Cir. 2016) 10, 27, 28

Statutes

42 U.S.C. § 1981 15

42 U.S.C. § 2000e-5 15

42 U.S.C. § 12101 15

42 U.S.C. § 12111 ..... 1, 22, 23, 27

42 U.S.C. § 12112 ..... 6, 16, 22, 24

42 U.S.C. § 12113 ..... 7, 16

42 U.S.C. § 12116 1

42 U.S.C. § 12117 ..... 1, 15

42 U.S.C. § 12201 13

49 U.S.C. § 20101 ..... 1, 2, 15

49 U.S.C. § 20103 ..... 2, 15

49 U.S.C. § 20106 ..... 2, 12, 19

49 U.S.C. § 20109 ..... 3, 12

Implementing Recommendations of the 9/11 Commission Act of 2007, Pub. L. No. 110–53, § 1521, 121 Stat. 266 ..... 3, 12

Other Authorities

29 C.F.R. pt. 1630 app. 1630.10 ..... 7, 13, 21

29 C.F.R. § 1630.10 7

29 C.F.R. § 1630.15 16

49 C.F.R. § 242.1 4

49 C.F.R. § 242.101 ..... 4, 20

49 C.F.R. § 242.103 ..... 4, 20

49 C.F.R. § 242.117 ..... *passim*

49 C.F.R. § 242.201 7

49 C.F.R. § 242.501 5

49 C.F.R. § 242.505 ..... 5, 21, 22

49 C.F.R. Part 242 App'x D 4, 5, 8, 16, 20

49 C.F.R. Part 240 App'x F 16

49 C.F.R. § 391.41 28

49 C.F.R. § 391.47 28

Department of Transportation, Guidance Explaining the Federal Railroad Administration's Dispute Resolution Procedures for Locomotive Engineer and Conductor Certification (Feb. 24, 2022), available at https://tinyurl.com/mr4a33u3; 6, 22

STATEMENT OF INTEREST

Congress charged the Equal Employment Opportunity Commission (EEOC) with interpreting, administering, and enforcing Title I of the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12116, 12117(a). This appeal presents important questions about the reach of the ADA as it relates to the Federal Railroad Safety Act (FRSA), 49 U.S.C. §§ 20101 *et seq.*, as well as the meaning of "qualified individual" under the ADA, 42 U.S.C. § 12111(8). Because the EEOC has a substantial interest in the proper interpretation of the ADA, including whether the FRSA precludes ADA claims like the one at issue in this case, it files this brief pursuant to Federal Rule of Appellate Procedure 29(a).

STATEMENT OF THE ISSUES[1]

1. Whether the district court erred when it held that the FRSA and its regulations preclude plaintiff Tracy Turner's ADA claim.

2. Whether the district court erred when it held that Turner was not a "qualified individual" under the ADA, 42 U.S.C. § 12111(8), because

[1] The EEOC takes no position on any other issue in this appeal.

defendant BNSF Railway Co. denied Turner's certification and because Turner failed to petition for administrative review of that denial.

STATEMENT OF THE CASE

A. Statutory and Regulatory Background

We begin by setting forth the FRSA statutory and regulatory framework governing certification of "trainmen" like Turner, as well as the ADA, under which Turner has brought his claim.

1. Federal Railroad Safety Act

Congress enacted the FRSA in 1970 to "promote safety in every area of railroad operations and reduce railroad-related accidents and incidents." 49 U.S.C. § 20101.

Relevant to this suit, the FRSA directs the Secretary of Transportation to issue regulations "for every area of railroad safety supplementing laws and regulations." *Id*. § 20103(a). Once a regulation is in place, it generally preempts state law "covering the [same] subject matter." *Id*. § 20106(a)(2). This preemption provision acts in service of the statute's prescription that "[l]aws, regulations, and orders related to railroad safety . . . shall be nationally uniform to the extent practicable." *Id*. § 20106(a)(1).

The statute also guarantees employees certain protections, including against retaliation for reporting in good faith perceived violations of law or unsafe conditions. *Id*. § 20109(a)-(b). In 2007, Congress amended this portion of the statute to clarify that it does not preempt or diminish "any other safeguards against discrimination" under "Federal or State law," and generally does not "diminish" the federal- or state-granted "rights, privileges, or remedies of any employee." *Id*. § 20109(g)-(h); *see also* Implementing Recommendations of the 9/11 Commission Act of 2007, Pub. L. No. 110–53, § 1521, 121 Stat. 266 (codified as amended at 49 U.S.C. § 20109).

2. Federal Railroad Administration Regulations

The Federal Railroad Administration (FRA) issued FRSA-implementing regulations (hereinafter FRA regulations) regarding the certification of conductors, 49 C.F.R. Part 242, and locomotive engineers, *id*. Part 240.[2]

---

[2] The Complaint identifies Turner as a "trainman," not a conductor or locomotive engineer. ROA.7 ¶2. The regulatory parts dealing with conductors and engineers are largely the same as they relate to color-vision testing and certification. We focus on Part 242, concerning conductors, as did the district court.

The FRA regulations were promulgated to "ensure that only those persons who meet minimum Federal safety standards serve as conductors" in pursuit of the goal of "railroad safety." 49 C.F.R. § 242.1(a). The regulations prescribe "minimum" certification standards; railroads may adopt "additional or more stringent requirements consistent with" the regulations. *Id*. § 242.1(b). Railroads design their own certification programs, which the FRA reviews and approves; after approval the FRA leaves the administration of the programs to the railroads. *Id*. §§ 242.101, 242.103.

Among other things, the regulations require that conductors have "[t]he ability to recognize and distinguish between the colors of railroad signals." *Id*. § 242.117(h)(3). As part of their certification programs, railroads must therefore adopt vision acuity standards and procedures for examination. *Id*. § 242.117. The regulations require that railroads administer an initial color-vision assessment from a list of acceptable exams. *Id*. Part 242 App'x D. If the examinee fails the initial test, they may be "further evaluated as determined by the railroad's medical examiner" to "provide [the] examinee with at least one opportunity to prove that a vision test failure does not mean the examinee cannot safely perform as a conductor."

Id. Part 242 App'x D(4); *see also id*. § 242.117(j). The regulations give the medical examiner discretion regarding what type of further evaluation to conduct, and explicitly allow the medical examiner to consider the "experience of the examinee." *Id*. Part 242 App'x D(4). And the railroad's medical examiner is empowered to determine that, despite being unable to pass a color-vision test, the examinee is nonetheless able "to safely perform as a conductor." *Id*. § 242.117(j).

Anyone denied certification can petition the FRA's Operating Crew Review Board (Review Board) "to review the railroad's decision." *Id.* § 242.501(a). The Review Board may only assess "whether the denial or revocation of certification . . . was improper . . . (*i.e.*, based on an incorrect determination that the person failed to meet the certification requirements of this part)." *Id*. § 242.505(k). "The Board will not otherwise consider the propriety of a railroad's decision, *i.e.*, it will not consider whether the railroad properly applied its own more stringent requirements." *Id.*

Other than granting a petition for review, the regulations are silent on the Board's remedial authority. The FRA has interpreted this silence to mean its authority is "limited to determining whether the denial or revocation was improper," i.e., incorrect; it is "not empowered to mitigate

any other consequences of the railroad's decision to deny or revoke certification." Department of Transportation, Guidance Explaining the Federal Railroad Administration's Dispute Resolution Procedures for Locomotive Engineer and Conductor Certification at 7 (Feb. 24, 2022), available at https://tinyurl.com/mr4a33u3 (Department of Transportation Guidance); *see also Carpenter v. Mineta*, 432 F.3d 1029, 1035 (9th Cir. 2005) (agreeing with FRA that it lacks authority to order retesting or certification through the administrative process).

3. Americans with Disabilities Act

Finally, the ADA, under which Turner sued, prohibits employers from discriminating against qualified individuals "on the basis of disability." 42 U.S.C. § 12112(a). Prohibited discrimination includes failing to make "reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability," unless doing so "would impose an undue hardship on the operation" of the employer's business. *Id*. § 12112(b)(5)(A).

It also includes "using qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability," *id*. § 12112(b)(6), unless the employer can show the

qualification standard is "job-related and consistent with business necessity, and . . . cannot be accomplished by reasonable accommodation." *Id*. § 12113(a); *see also* 29 C.F.R. § 1630.10(a). EEOC guidance states that this "screen out" provision is meant to "ensure that individuals with disabilities are not excluded from job opportunities unless they are actually unable to do the job." 29 C.F.R. pt. 1630, app. 1630.10(a). And "[t]his provision is applicable to all types of selection criteria, including safety requirements" and "vision" requirements. *Id*.

B. Turner's Certification Denial

Turner "suffer[s] from a genetic anomaly that causes him to be color-vision deficient." ROA.9 ¶ 19. His color-vision deficiency prevented him from passing the initial vision test prescribed by the FRA regulations. *Id*. He passed BNSF-administered secondary field tests every three years, as required by FRA regulations, 49 C.F.R. § 242.201(c), however, and obtained his certification. ROA.7, 9 ¶¶ 2, 22.

In 2020, after fifteen years on the job without ever having misread a signal, Turner failed the secondary field test and BNSF denied his certification and terminated him. ROA.7 ¶¶ 2-3. According to the complaint, "BNSF this time used a field test that did not replicate what

[Turner] must actually see to be able to safely do his job to assess his color vision." *Id*. ¶ 3. Further, BNSF did not allow Turner to wear "monochromatic lenses" even though the use of such lenses is prohibited by regulation only for the initial vision test. ROA.10 ¶ 25; *see also* 49 C.F.R. Part 242 App'x D.[3] "Nothing about Turner's vision had changed" between when he was previously certified and when he failed the 2020 test. ROA.7 ¶ 3. In revoking his license, BNSF relied solely on his failure of the 2020 test and "ignore[ed] the mountains of evidence demonstrating that he can sufficiently distinguish between railroad signals despite being color-vision deficient." *Id*.

Turner sued BNSF under the ADA, claiming that BNSF discriminated against him based on disability when it "refused to recertify and effectively terminated him." ROA.11 ¶ 38. He also alleged that BNSF failed to accommodate him and that BNSF's vision-screening protocol screens out or tends to screen out individuals with a disability. *Id*. ¶¶ 39-40.

---

[3] The complaint does not say whether BNSF allowed Turner to wear lenses on prior tests.

C. District Court's Decision

The district court granted BNSF's motion for judgment on the pleadings holding (1) that the FRSA and its implementing regulations precluded Turner's ADA claim and (2) that Turner failed to plausibly allege that he was a "qualified individual" under the ADA.

1. The court held that the FRSA and its regulations preclude an ADA action challenging a railroad's denial of conductor certification. The court reasoned that, were the court to allow Turner to proceed on an ADA claim challenging BNSF's decision to deny his certification, it would "'mak[e] the railroad safety regulations established under the FRSA virtually meaningless.'" ROA.162 (quoting *Lane v. R.A. Sims, Jr., Inc.*, 241 F.3d 439, 443 (5th Cir. 2001)). And, the court said, it would undermine "the FRSA's purpose of protecting public health and safety." *Id*. The court clarified that railroad employees' ADA rights are not entirely precluded by the FRSA but held that challenges to the substance of a railroad's certification program and its certification decisions are precluded. *Id*. The court explained its view that the FRA has "vastly greater competence . . . in designing field tests" than the court, and that the regulations' "comprehensive administrative adjudication system" regarding

certification decisions signaled preclusive effect. ROA.162-63 (quoting *Peters v. Union Pac. R.R. Co.*, 80 F.3d 257, 262 (8th Cir. 1996)).

2. The court then held that Turner is not a "qualified individual" under the ADA "because (1) he was denied recertification after failing a primary and secondary [vision] test and a determination by the medical examiner that he could not safely perform his job duties, and (2) he did not seek review of the determination under the FRA's dispute resolution procedures." ROA.164. The court relied on *Williams v. J.B. Hunt Transport, Inc.*, 826 F.3d 806 (5th Cir. 2016), a case involving an ADA challenge to the rescission of a Department of Transportation commercial driver certification arising from conflicting medical evaluations.

ARGUMENT

The district court's holdings were incorrect. First, under federal preclusion principles articulated in *POM Wonderful LLC v. Coca-Cola Co.*, 573 U.S. 102 (2014), there is no basis to conclude that Turner's ADA claim is precluded by the FRSA or its regulations. Second, on the merits of Turner's ADA claim, Turner's failure of an allegedly discriminatory qualification standard does not render him unqualified under the ADA as a matter of law. The district court's contrary conclusion would lead to absurd results

wherein an employer could craft discriminatory gatekeeping standards that served the dual purpose of screening out individuals with disabilities while simultaneously insulating the employer from ADA liability. We address each holding in turn.

I. The FRSA does not preclude Turner's ADA claim.

This Court has not addressed whether the FRSA precludes ADA claims like Turner's. Analysis of the two statutes' text and structure shows that no such preclusion applies, and the district court was wrong to conclude otherwise.

A. The statutes' text and structure do not establish preclusion.

POM Wonderful LLC v. Coca-Cola Co., 573 U.S. 102 (2014), a case about the potential preclusive effect of the Federal Food, Drug, and Cosmetic Act (FDCA) on the Lanham Act, is the leading authority on how to analyze whether one federal statute precludes enforcement of another. Under *POM Wonderful*, "statutory text . . . controls," with the statutes' structure also informing the analysis. *Id*. at 112-15. Under these principles, the FRSA does not preclude ADA claims like Turner's.[4]

---

[4] Although the district court focused on the preclusive effect of *regulations* implementing the FRSA, it is appropriate to assess the statute itself for

1. On its face, the FRSA does not explicitly preclude enforcement of federal civil rights laws. In service of "national uniformity," it explicitly preempts only state law or regulation that overlaps with FRA regulations. 49 U.S.C. § 20106(a)(1)-(2).

In a separate section governing employee protections against retaliation, the FRSA guarantees that "[n]othing" in that section of the Act "preempts or diminishes any other safeguards against discrimination, demotion, discharge, suspension, threats, harassment, reprimand, retaliation, or any other manner of discrimination provided by Federal or State law." 49 U.S.C. § 20109(g). Congress added that provision in 2007, well after the ADA's 1990 enactment. *See* Implementing Recommendations of the 9/11 Commission Act of 2007, Pub. L. No. 110–53, § 1521, 121 Stat. 266 (codified as amended at 49 U.S.C. § 20109); *see also Lillian v. Nat'l R.R. Passenger Corp.*, 174 F. Supp. 3d 1017, 1021 (N.D. Ill. 2016) (holding plaintiff not required to abandon rights under FRSA in order to pursue an ADA claim, and vice versa).

---

preclusive effect, as "[a]n agency may not reorder federal statutory rights without congressional authorization." 573 U.S. at 120.

When a statute explicitly preempts overlapping state law, does not explicitly preclude any federal law, and expressly disavows precluding or preempting federal or state anti-discrimination law, courts can reasonably conclude that Congress "did not intend the [statute] to preclude requirements arising from" federal anti-discrimination law. *POM Wonderful*, 573 U.S. at 114.

For its part, the ADA disavows any intent to "invalidate or limit the remedies, rights, and procedures of any Federal law" if that law "provides greater or equal protection for the rights of individuals with disabilities" than the ADA affords. 42 U.S.C. § 12201(b). Here, the FRSA does not provide employees with disabilities with any greater protections than the ADA, meaning that, as far as the ADA is concerned, the statutes' protections may co-exist. And although not conclusive on the question of preclusion, the EEOC has long maintained that the ADA's prohibition on discriminatory qualification standards, tests, and other selection criteria "is applicable to . . . safety requirements, vision or hearing requirements, . . . and employment tests." 29 C.F.R. pt. 1630 app. 1630.10(a).

2. The statutes' structures, including their scope and purpose, confirm that the FRSA does not preclude ADA claims like Turner's.

The Court in *POM Wonderful* held that the FDCA and the Lanham Act complement each other because they "each ha[ve their] own scope and purpose." 573 U.S. at 115. The Court also found it relevant that the two statutes' enforcement mechanisms and remedies differed, and that precluding enforcement of the Lanham Act would weaken consumer protection. 573 U.S. at 115-16; *cf. Cleveland v. Pol'y Mgmt. Sys. Corp.*, 526 U.S. 795, 797-98, 802-03 (1999) (pursuit and receipt of Social Security Disability Insurance under Social Security Act does not automatically give rise to presumption against successful ADA claim because the two claims may "comfortably exist side by side").

The FRSA and ADA also have distinct scopes, purposes, and remedial schemes. *See Lillian*, 174 F. Supp. 3d at 1022 ("[T]he ADA and FRSA protect wholly distinct interests and do not offer comparable substantive protections" (quotation marks and alteration omitted)); *Weeks v. Union Pac. R.R. Co.*, No. 1:13-CV-1641, 2017 WL 1740123, *7 (E.D. Cal. May 4, 2017) (ADA and FRSA "address different subject matters entirely"); *cf. Vann-Foreman v. Illinois Cent. R.R. Co.*, No. 19 C 8069, 2022 WL 180749, at *4 (N.D. Ill. Jan. 20, 2022) (finding FRSA and Title VII "address different

subject matters entirely," as one is a "safety statute" and the other addresses "discrimination").

The FRSA's purpose is "promot[ing] safety in every area of railroad operations and reduc[ing] railroad-related accidents and incidents." 49 U.S.C. § 20101. Its implementing regulations cover "every area of railroad safety." 49 U.S.C. § 20103(a). And those regulations provide for limited review of a certification denial, with tightly circumscribed, if any, remedial authority. *See Carpenter*, 432 F.3d at 1033-34.

For its part, the ADA's purpose is "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. § 12101(b)(1); *see also id*. § 12101(b)(2)-(4). Its scope is broad, covering employment as well as public services and public accommodations. *See id*. §§ 12101, *et seq*. It is enforceable by individuals and the federal government in federal court and provides for remedial relief, including equitable relief, back pay, and damages. *Id*. § 2000e-5(g)(1); *id*. § 1981a(a)(2); *see also id*. § 12117(a); *id*. § 2000e-5(f)(1), (3).

Importantly, enforcing the ADA in this case would not undermine the FRSA's stated purpose of promoting safety. *See* 49 U.S.C. § 20101. The

FRA regulations regarding certification are primarily concerned with ensuring that conductors can safely perform their duties. *See* 49 C.F.R. Part 242 App'x D; *id*. Part 240 App'x F; *id*. § 242.117(j). And the ADA generally provides to employers a defense that a challenged practice is "job-related" and "consistent with business necessity," or that accommodating an employee would constitute an "undue hardship on the operation of the business." 42 U.S.C. §§ 12112(b)(6), 12112(b)(5)(A), 12113(a). The statute also allows employers to require "that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace." *Id*. § 12113(b). Finally, the EEOC's implementing regulations provide a defense to employers where the employer's other federal obligations actually conflict with the ADA's requirements. *See* 29 C.F.R. § 1630.15(e). The availability of these defenses under the ADA ensures that the FRSA's safety-oriented goals will not be thwarted.

There may be some overlap between the two statutes' spheres of regulation. For instance, as this case demonstrates, a railroad employer may be required to modify its discretionary certification protocol to accommodate a disability unless doing so would impose an undue hardship or be inconsistent with safe train operation. But that overlap—

wherein "a remedy ordered or undertaken" brushes up against, but does not trample, the FRSA's sphere of regulation—does not automatically render the ADA unenforceable. *Cf. Glow v. Union Pac. R.R. Co.*, 652 F. Supp. 2d 1135, 1146 (E.D. Cal. 2009) ("minimal, incidental" overlap between California's Fair Employment and Housing Act, requiring accommodation of employees with disabilities, and FRSA, did not require finding of preemption); *POM Wonderful*, 573 U.S. at 115 (finding no preclusion despite fact that two statutes "touch on" the same subject matter). Holding otherwise would dramatically erode ADA protections for railroad employees.

B. Several courts agree that the FRSA does not preclude enforcement of federal employee-protection statutes.

Several courts have held that, under *POM Wonderful*'s preclusion analysis, the FRSA does not preclude enforcement of federal employee-protection statutes.

For instance, in *Vann-Foreman v. Illinois Central Railroad Company*, the District Court for the Northern District of Illinois held that the FRSA and its regulations did not preclude the plaintiff's Title VII claim alleging that the employer denied the plaintiff's locomotive-engineer certification

because of race and retaliation. 2022 WL 180749 at *4. And several courts have held that, under *POM Wonderful*, the FRSA does not preclude enforcement of the Federal Employers Liability Act (FELA). *See Jones v. BNSF Ry. Co.*, 306 F. Supp. 3d 1060, 1070 (C.D. Ill. 2017) (applying *POM Wonderful* to hold that "FRSA and its regulations do not preclude FELA claims, even where the regulations cover the same subject matter as the claimed negligence"); *Henderson v. Nat'l R.R. Passenger Corp.*, 87 F. Supp. 3d 610, 621 (S.D.N.Y. 2015) (same); *Madden v. Anton Antonov & AV Transp., Inc.*, 156 F. Supp. 3d 1011, 1019-22 (D. Neb. 2015) (same); *Bratton v. Kansas City S. Ry. Co.*, No. CIV.A. 13-3016, 2015 WL 789127, at *2 (W.D. La. Feb. 24, 2015) (FRSA did not preclude FELA claim alleging negligent training and certification of locomotive engineers).

This Court has not decided the preclusion question at issue in this case. It has, however, held that the FRSA precludes certain claims of railroad negligence under the FELA. *Lane*, 241 F.3d at 443-44. In *Lane*, which the district court cited, the Fifth Circuit held that a railroad employee could not bring a negligence action against a railroad whose engine was traveling below the maximum speeds established by FRA regulation. The *Lane* court relied heavily on the FRSA's national uniformity

clause, which provides in the context of preempting overlapping state law that "[l]aws, regulations, and orders related to railroad safety. . . shall be nationally uniform to the extent practicable." 49 U.S.C. § 20106(a)(1); *see also Lane*, 241 F.3d at 442, 443-44.

Lane is not controlling on this case, as it did not opine on the ADA's interaction with the FRSA, and the text and purpose of the ADA and the FELA are distinct. Moreover, any persuasive effect *Lane* might have held is undermined by the fact that it predates *POM Wonderful* and therefore did not apply its preclusion framework. Indeed, *POM Wonderful* rejects a central portion of *Lane*'s reasoning: that a uniformity clause regarding state preemption somehow demonstrates Congressional intent to preclude enforcement of federal law. *See* 573 U.S. at 117. Accordingly, several courts have suggested that *POM Wonderful* abrogated *Lane*.[5] *See, e.g., Henderson*, 87 F. Supp. 3d at 615-16, 621; *Madden*, 156 F. Supp. 3d at 1019-20; *Meachen v. Iowa Pac. Holdings, LLC,* No. 13-cv-11359, 2016 WL 7826660, at *4 (D. Mass. Feb. 10, 2016); *see also Jones*, 306 F. Supp. 3d at 1068-69 (holding that Seventh Circuit case on which *Lane* relied was abrogated by *POM*

[5] The Fifth Circuit has not addressed *Lane*'s viability post-*POM Wonderful*.

Wonderful); *cf. Cowden v. BNSF Ry. Co.*, 690 F.3d 884, 891 (8th Cir. 2012) (questioning how enforcement of a federal law touching on railway safety could "threaten the uniformity sought by the FRSA").

C. The district court's contrary reasoning misapprehends the FRSA statutory and regulatory landscape.

The district court's decision that the FRSA precludes the ADA appears to rest on a misunderstanding of the FRSA and FRA regulations.

For instance, the court reasoned that an ADA challenge to a railroad's secondary testing criteria would make "the railroad safety regulations established under the FRSA virtually meaningless." ROA.162. But, as discussed above, the FRA regulations do not set forth a specific secondary testing protocol, but instead leave the format and content of secondary tests largely to the railroads' discretion. 49 C.F.R. §§ 242.101, 242.103; *id*. Part 242 App'x D(4); *see also Mills v. Union Pac. R.R. Co.*, No. 1:22-CV-00143-DCN, 2024 WL 185246, at *11 (D. Idaho Jan. 16, 2024) (because railroads have significant discretion in fashioning secondary color-vision testing, said testing "may be subject to questions about its appropriateness and justifiable application"). A railroad could therefore modify its vision test to avoid discriminating against individuals with disabilities without

deviating from the regulations so long as the medical examiner can still comfortably confirm the employee's "ability to safely perform as a conductor." *See* 49 C.F.R. § 242.117(j); *cf. Glow*, 652 F. Supp. 2d at 1146 (holding that state-law disability claims may require as a remedy that railroads modify equipment, but that does not mean enforcement of state law "impinge[s] on the field of train safety"); *see also* 29 C.F.R. pt. 1630 app. 1630.10(a) (ADA implementing regulation concerned with "ensur[ing] that individuals with disabilities are not excluded from job opportunities unless they are actually unable to do the job").

The district court also reasoned that an ADA challenge would be inappropriate in the context of the FRA regulations' "comprehensive administrative adjudication system for handling certification disputes." ROA.162 (quoting *Peters*, 80 F.3d at 262). As discussed above, however, the Review Board may only "determine whether the denial or revocation of certification or recertification was improper under this part (i.e., based on an incorrect determination that the person failed to meet the certification requirements of this part)." 49 C.F.R. § 242.505(k). The Review Board does not appear to have any authority to say whether a company's discretionary testing criteria are discriminatory, let alone to remedy discriminatory

testing methods. *See id*.; *see also* Department of Transportation Guidance at 7 (discussing limited scope of review); *and see Carpenter*, 432 F.3d at 1035 (same).

Accordingly, the two statutes can comfortably coexist in this context and the district court erred in concluding otherwise.

II. Turner's failure of an allegedly discriminatory vision test not mandated by FRA regulations does not render him unqualified as a matter of law.

The ADA prohibits employment-related discrimination against "a qualified individual on the basis of disability." 42 U.S.C. § 12112(a). Naturally, one component of pleading a disability-discrimination claim is alleging that the employee is a "qualified individual," which the statute defines as "an individual who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." *Id*. § 12111(8). A reasonable accommodation can include making "appropriate adjustments or modifications of examinations." *Id*. § 12111(9)(B).

The gravamen of Turner's complaint is that BNSF violated the ADA by devising a secondary testing protocol that, Turner claims, is not reflective of safe performance because it does "not mirror what [a

conductor] must see in the field." ROA.10 ¶ 23. BNSF then used that allegedly inapt testing protocol to screen him out, despite his fifteen-year record of performance otherwise indicating he can perform the job safely. *Id*. ¶¶ 26-29. The district court did not reach the merits of Turner's ADA claim, however, because it held that Turner was not a "qualified individual" under the ADA, 42 U.S.C. § 12111(8). It based that conclusion on the fact that (1) Turner failed BNSF's secondary testing protocol and (2) he did not petition the Review Board to review that failure. Both conclusions were wrong.

1. The district court's conclusion that Turner was not a qualified individual as a matter of law based in part on his failure of BNSF's secondary testing protocol was error. To the contrary, Turner has plausibly pled that he is a qualified individual, given his allegation that he successfully performed the job at issue for over fifteen years and nothing about his disability changed during that time. ROA.9-10 ¶¶ 18, 20, 29.

The ADA does not permit an employer to craft a qualification standard that screens out, or tends to screen out, individuals with disabilities based on criteria that are not mandated by federal regulation and to then make that test the barometer of whether an employee is a

"qualified individual" under the ADA, unless the standard is job-related and consistent with business necessity. *See* 42 U.S.C. § 12112(b)(6); *see generally Kapche v. City of San Antonio*, 176 F.3d 840, 842-43 (5th Cir. 1999) (employers may not impose "eligibility requirements that tend to screen out the disabled" unless the standard is job-related and consistent with business necessity); *Gonzales v. City of New Braunfels*, 176 F.3d 834, 839 (5th Cir. 1999) (same). "[I]ndeed, it would make little sense to require an ADA plaintiff to show that he meets a qualification standard that he undisputedly *cannot* meet because of his disability and that forms the very basis of his discrimination challenge." *Bates v. United Parcel Serv., Inc.*, 511 F.3d 974, 990 (9th Cir. 2007) (en banc). Turner's failure of a discretionary and allegedly flawed test does not defeat Turner's claim as a matter of law, but rather goes to his allegation that BNSF's secondary testing criteria "is a *facially discriminatory* qualification standard because it focuses directly on an individual's disabling or potentially disabling condition" – here, the ability to distinguish between colors. *Bates*, 511 F.3d at 988 (discussing UPS's hearing-qualification standard).

To be sure, FRA regulations require BNSF to ensure that an examinee can "safely perform as a conductor." 49 C.F.R. § 242.117(j). But BNSF is

given broad discretion in how it makes that determination. The FRA regulations prescribe no specific secondary testing protocol, asking only that the medical examiner be able to certify that the individual can "safely perform." *Id*. That broad discretion distinguishes this case from cases like *Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555, 577 (1999), which BNSF cited in the district court. In *Albertson's*, the Supreme Court held that the employer, Albertson's, could lawfully terminate a commercial truck driver based on his failure to meet DOT's vision acuity requirements. *Id*. at 567-78. The driver, who had an uncorrectable visual condition that left him with 20/200 vision in one eye, could not meet the DOT's mandatory vision acuity standards, which required corrected distance vision acuity of at least 20/40. *Id*. at 558-60. Unlike the FRA regulations at issue here, however, the DOT regulations in *Albertson*'s "contain[ed] no qualifying language about individualized determinations." *Id*. at 570. The driver's sole recourse was to apply for an experimental waiver that could be granted only by the DOT; Albertson's could not itself modify the regulatory vision acuity standards. *Id*. at 559; *see also Mills*, 2024 WL 185246, at *11 ("*[U]nlike* Albertson's, [defendant railroad company] has insisted upon a job qualification of its own devising."). BNSF acknowledged in the district court that *Albertson*'s

dealt with "mandatory medical standards," R.21 at 15,[6] which distinguishes those cases from the FRA's discretionary, safety-oriented scheme. *See Rohr v. Salt River Project Agric. Imp. & Power Dist.*, 555 F.3d 850, 862-63 (9th Cir. 2009) (employer bore burden of justifying specific qualification standard it crafted under broad OSHA regulations); *cf. Coffey v. Norfolk S. Ry. Co.*, 23 F.4th 332, 341 (4th Cir. 2022) (declining to fault the employer for taking action "compelled by binding FRA regulation"); *Bey v. City of New York*, 999 F.3d 157, 168 (2d Cir. 2021) ("An accommodation is not reasonable . . . if it is specifically prohibited by a binding safety regulation promulgated by a federal agency.").

Because Turner has plausibly pled that he can perform his job based on his unblemished tenure with BNSF, this Court should vacate and remand to the district court to evaluate whether Turner has otherwise plausibly alleged a violation of the ADA. If he has, of course, BNSF will have the chance to "prove a valid defense to its use of the" specific criteria.

---

[6] BNSF's brief is not included in the Record Excerpts Turner filed. We refer to its docket entry in the district court and the page numbers stamped on the upper-right-hand corner of each page.

Bates, 511 F.3d at 994; *see also Atkins v. Salazar*, 677 F.3d 667, 681 (5th Cir. 2011) (same).

2. The district court's reasoning that Turner was not qualified in part because he failed to appeal his certification denial to the Review Board was also wrong.

As discussed above, the Review Board has no authority to assess whether BNSF's secondary testing protocol is discriminatory or to order BNSF to retest Turner under different criteria. *See supra* §§ A.2, I.C. The Review Board therefore could not have answered the question whether Turner was "an individual who, with or without reasonable accommodation" could "safely perform as a conductor." 42 U.S.C. § 12111(8); 49 C.F.R. § 242.117(j).

The district court did not consider the scope of the Review Board's authority, relying instead largely on *Williams v. J.B. Hunt Transport, Inc.*, 826 F.3d 806 (5th Cir. 2016), which had to do with medical certification of commercial vehicle drivers. Under DOT regulations, commercial vehicle drivers must obtain certification from a medical examiner confirming, among other things, that the driver "[h]as no current clinical diagnosis . . . known to be accompanied by syncope" or any "condition which is likely to

cause loss of consciousness or any loss of ability to control a commercial motor vehicle." 49 C.F.R. § 391.41(b)(4), (8). When a driver receives conflicting medical diagnoses calling his medical fitness into question, he can petition the Federal Motor Carrier Safety Administration to resolve the dispute. *Id*. § 391.47. Like the vision acuity standards in *Albertson's*, this certification of medical criteria is mandatory.

The plaintiff in *Williams* was initially diagnosed with ventricular tachycardia accompanied by fainting, then given a conflicting, all-clear diagnosis. 829 F.3d at 808-09. Williams did not go through the DOT's process for resolving conflicting medical diagnoses. Accordingly, the court held he was not a qualified individual. *Id*. at 811-13. Had Williams gone through the administrative process, the DOT could have determined that he did not in fact suffer from syncope—a mandatory barrier to his certification. *Id*. at 809, 812.

The analysis from *Williams* does not apply here. Unlike in *Williams*, Turner does not challenge a medical diagnosis whose accuracy can be revisited in the administrative review process, nor does he challenge a mandatory regulatory prerequisite to certification. Instead, he argues that it was discriminatory to exclude him from certification merely based on his

failure of BNSF's discretionary testing protocol, since the FRA regulations themselves recognize that persons with color-vision deficiency can, in certain circumstances, safely perform as conductors. *See* 49 C.F.R. § 242.117(j). The FRA review process has no bearing on the issue he raises in this lawsuit. This Court should reject the district court's decision to exclude Turner from ADA coverage merely because he did not pursue an inapposite administrative process. *Cf. Axon Enter., Inc. v. FTC*, 598 U.S. 175, 186 (2023) (parties may bypass otherwise jurisdictional administrative review scheme that cannot "reach[] the claim in question"); *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 489-91 (2010) (similar).

CONCLUSION

For the foregoing reasons, the judgment of the district court should be vacated and the case remanded for further proceedings.

Respectfully submitted,

KARLA GILBRIDE
General Counsel

JENNIFER S. GOLDSTEIN
Associate General Counsel

ANNE NOEL OCCHIALINO
Assistant General Counsel

s/*Georgina C. Yeomans*
GEORGINA C. YEOMANS
Attorney
EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION
Office of General Counsel
131 M St. N.E., 5th Floor
Washington, D.C. 20507
202-921-2748
georgina.yeomans@eeoc.gov

May 16, 2024

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) and 32(a)(7)(B) because it contains 5,593 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

This brief complies with the typeface and type style requirements of Fed. R. App. P. 32(a)(5) and 32(a)(6) and Fifth Circuit Rule 32.1 because it has been prepared in a proportionally spaced typeface using Microsoft Word for Office 365 in Book Antiqua 14 point.

s/*Georgina C. Yeomans*
GEORGINA C. YEOMANS
Attorney
EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION
Office of General Counsel
131 M St. N.E., 5th Floor
Washington, D.C. 20507
202-921-2748
georgina.yeomans@eeoc.gov

May 16, 2024

CERTIFICATE OF SERVICE

I certify that on May 16, 2024, I electronically filed the foregoing brief in PDF format with the Clerk of Court via the appellate CM/ECF system. I certify that all counsel of record are registered CM/ECF users, and service will be accomplished via the appellate CM/ECF system.

s/*Georgina C. Yeomans*
GEORGINA C. YEOMANS
Attorney
EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION
Office of General Counsel
131 M St. N.E., 5th Floor
Washington, D.C. 20507
202-921-2748
georgina.yeomans@eeoc.gov