No. 19-

IN THE

Supreme Court of the United States

METRO-NORTH COMMUTER
RAILROAD CO.,

Petitioner,

v.

JAMEY MURPHY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF CONNECTICUT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Federal Railroad Safety Act declares 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). The Act empowers the Secretary of Transportation to "prescribe regulations and issue orders for every area of railroad safety." *Id.* § 20103(a). And it expressly preempts state-law claims whenever the Secretary has prescribed a regulation "covering the subject matter of the State requirement." *Id.* § 20106(a)(2).

Pursuant to the Act, the Secretary has prescribed regulations providing criteria for determining the class of each track and fixing maximum operating speeds for each class. *See* 49 C.F.R. § 213.9. In *CSX Transportation, Inc. v. Easterwood*, this Court held that § 213.9 "should be understood as covering the subject matter of train speed with respect to track conditions." 507 U.S. 658, 675 (1993). The Court accordingly concluded that the Act preempts state-law claims that a train "was traveling too quickly given the time and place." *Id.* at 675 & n.15 (internal quotation marks omitted).

The question presented is:

Does the Federal Railroad Safety Act preempt a state-law claim that a train may not travel on a track next to a passenger platform at the operating speed set by 49 C.F.R. § 213.9?

PARTIES TO THE PROCEEDING, CORPORATE DISCLOSURE STATEMENT, AND LIST OF RELATED PROCEEDINGS

The caption contains the names of all of the parties to the proceeding in the court whose judgment is sought to be reviewed. Two other entities—Wilton Enterprises, Inc., and the Town of Darien, Connecticut—were initially named as defendants in the state trial court, but they were dismissed prior to the proceeding in the state supreme court. *See* Pet. App. 2a n.1.

Petitioner Metro-North Commuter Railroad Company is a public benefit corporation created by New York law and a wholly owned subsidiary of the Metropolitan Transportation Authority, which is a public benefit corporation of the State of New York.

The only directly related proceedings within the meaning of this Court's Rule 14.1(b)(iii) are the proceedings below:

- *Murphy v. Town of Darien*, FBTCV 136039787, Superior Court of Connecticut, Fairfield at Bridgeport. Judgment entered April 10, 2017.
- *Murphy v. Town of Darien*, SC 19983, Supreme Court of Connecticut. Judgment entered July 9, 2019.

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The opinion of the Supreme Court of Connecticut is reported at 332 Conn. 244, 210 A.3d 56. The opinion of the Superior Court of Connecticut is reported at 64 Conn. L. Rptr. 267. Both opinions are reproduced in the appendix to this petition. Pet. App. 1a-50a.

JURISDICTION

The Supreme Court of Connecticut entered judgment on July 9, 2019. Pet. App. 1a. On September 26, 2019, Justice Ginsburg extended the time to file this petition to December 6, 2019.

This Court has jurisdiction under 28 U.S.C. § 1257. The decision below conclusively rejects Metro-North's federal preemption defense; further proceedings below might insulate the federal question from review in the future; reversal on this federal issue would put an end to this litigation; and failure to immediately review the decision below might seriously erode the federal policy favoring uniform standards for railroad safety. The judgment below is therefore "final" under *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 482-83 (1975). *See, e.g.*, *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 178-80 (1988) (holding that a state court ruling rejecting federal preemption was final under *Cox Broadcasting*'s "pragmatic approach" to § 1257 finality).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The relevant provisions of the Federal Railroad Safety Act of 1970, as amended, 49 U.S.C. § 20101 et seq., and regulations promulgated thereunder are set forth in the appendix. Pet. App. 51a-55a.

STATEMENT OF THE CASE

A. Legal Background

1. Congress enacted the Federal Railroad Safety Act (FRSA) "to promote safety in every area of railroad operations and reduce railroad-related accidents." 49 U.S.C. § 20101. FRSA empowers the Secretary of Transportation to "prescribe regulations and issue orders for every area of railroad safety." *Id.* § 20103(a). The Secretary has in turn delegated regulatory authority to the Federal Railroad Administrator. 49 C.F.R. § 1.89.

FRSA directs 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). To that end, FRSA expressly preempts state law whenever the Secretary "prescribes a regulation or issues an order covering the subject matter of the State requirement." *Id.* § 20106(a)(2); *see also id.* § 20106(b).[1]

2. Exercising the powers conferred by FRSA, the Secretary has promulgated regulations sorting tracks into numbered classes and setting maximum operating speeds for each class. The regulations classify tracks based on a range of attributes that the

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[1] The preemption provision contains an exception for certain state laws that are "necessary to eliminate or reduce an essentially local safety or security hazard." 49 U.S.C. § 20106(a)(2). This exception is not at issue here. The preemption provision also allows state-law claims alleging breach of a standard of care established by or pursuant to federal law. *See id.* § 20106(b). There is no such allegation in this case. Pet. App. 11a, 28a.

Secretary deemed relevant to operating speed, including gage, track alinement, track surface, and number of crossties per segment of track. *See* 49 C.F.R. §§ 213.51-213.143. The maximum speeds for trains operating on track in Classes 1 through 5 are codified at 49 C.F.R. § 213.9.

Section 213.9 also specifies a limited number of exceptions to its maximum operating speeds. These exceptions apply where the track fails to meet all of the requirements for the lowest class of track, *id.* § 213.9(b); where the track curves, *id.* §§ 213.57(b), 213.59(a); where the rail contains certain specified defects, *id.* § 213.113; and where railroad "frogs" (equipment used where two tracks cross) are in poor condition, *id.* § 213.137(b) and (c).

Two of these exceptions to § 213.9(a)'s maximum operating speeds prohibit train operation at *any* speed. First, trains may only operate on track that "does not at least meet the requirements for Class 1 track … for a period of not more than 30 days." *Id.* § 213.9(b). Second, "operation over the … rail is not permitted" if the track "contains any of the defects listed in" § 213.113(c). *Id.* § 213.113(a).

Under the regulations, the class of a segment of track does not turn on whether it runs adjacent to a passenger platform. Nor do the regulations recognize any exception to § 213.9's operating speeds for track that runs adjacent to a platform. In short, while the Secretary deemed numerous features relevant to the maximum operating speed consistent with railroad safety, the proximity of the track to an area where people might be (such as a passenger platform) is not among them.

"This omission is intentional": The "current regulations governing train speed do not afford any adjustment of train speeds in urban settings or at grade crossings." 63 Fed. Reg. 33,992, 33,999 (June 22, 1998). The decision to set maximum operating speeds on the basis of a discrete set of considerations, to the exclusion of other considerations, does not merely advance efficiency and national uniformity. It also advances the fundamental interest in railroad safety:

> FRA believes that locally established speed limits may result in hundreds of individual speed restrictions along a train's route, increasing safety hazards and causing train delays. The safest train maintains a steady speed. Every time a train must slow down and then speed up, safety hazards, such as buff and draft forces, are introduced. These kinds of forces can enhance the chance of derailment with its attendant risk of injury to employees, the traveling public, and surrounding communities.

Id.

3. This Court addressed the preemptive effect of FRSA and § 213.9 in *CSX Transportation, Inc. v. Easterwood*, 507 U.S. 658 (1993). Interpreting FRSA's preemption provision, the *Easterwood* Court held that "pre-emption will lie only if the federal regulations substantially subsume the subject matter of the relevant state law." *Id.* at 664. The Court then applied that standard to an excessive speed claim under state law. *See id.* at 673-75.

The decedent in *Easterwood* was killed when a train hit his truck at a railroad crossing. *Id.* at 661.

The train was operating on Class 4 track, and the plaintiff conceded that it did not exceed the maximum operating speed for Class 4 track under § 213.9. *Id.* at 673. Nonetheless, the plaintiff claimed that CSX had "breached its common-law duty to operate its train at a moderate and safe rate of speed" at the crossing. 507 U.S. at 673. CSX responded that the claim was preempted "because the federal speed limits are regulations covering the subject matter of the common law of train speed." *Id.*

The Court began by acknowledging that, "[o]n their face, the provisions of § 213.9(a) address only the maximum speeds at which trains are permitted to travel given the nature of the track on which they operate." *Id.* at 674. But the Court also recognized that "related safety regulations adopted by the Secretary reveal that the limits were adopted only after the hazards posed by track conditions were taken into account." *Id.* "Understood in the context of the overall structure of the regulations, the speed limits must be read as not only establishing a ceiling, but also precluding additional state regulation." *Id.*

Having concluded that "§ 213.9(a) should be understood as covering the subject matter of train speed with respect to track conditions, including the conditions posed by grade crossings," the Court held that FRSA preempted the plaintiff's claim that the "train was traveling too quickly given the time and place." *Id.* at 675 & n.15 (internal quotation marks omitted). *Easterwood* thus stands for the proposition that state-law "excessive speed claim[s] cannot stand in light of the Secretary's adoption of the regulations in § 213.9." *Id.* at 675.

In a footnote that is significant here, the *Easterwood* Court identified one limit to its ruling: "[T]his case does not present, and we do not address, the question of FRSA's pre-emptive effect on" state-law claims "for breach of … the duty to slow or stop a train to avoid a specific, individual hazard." *Id.* at 675 n.15. *Easterwood* presented an "excessive speed" claim, not an "imminent collision" claim. *See id.* at 661, 673.

4. In this case, the court below has deviated from the rules of preemption every other court has followed since *Easterwood*. With the exception of the decision now at issue, the lower courts have applied the holding of *Easterwood* faithfully, frequently rejecting excessive speed claims as precluded in light of § 213.9. *See, e.g.*, *Macfarlane v. Canadian Pacific Railway Co.*, 278 F.3d 54, 57-59 (2d Cir. 2002); *Bouchard v. CSX Transportation, Inc.*, 196 F. App'x 65, 72 (3d Cir. 2006); *Lane v. R.A. Sims, Jr., Inc.*, 241 F.3d 439, 443-44 (5th Cir. 2001); *Ludwig v. Norfolk Southern Railway Co.*, 50 F. App'x 743, 747-49 (6th Cir. 2002); *Waymire v. Norfolk & Western Railway Co.*, 218 F.3d 773, 775-76 (7th Cir. 2000); *St. Louis Southwestern Railway Co. v. Pierce*, 68 F.3d 276, 278 (8th Cir. 1995); *Michael v. Norfolk Southern Railway Co.*, 74 F.3d 271, 273-74 (11th Cir. 1996); *Herndon v. Nat'l Railroad Passenger Corp.*, 814 A.2d 934, 936-38 (D.C. 2003); *Illinois Central Gulf Railroad Co. v. Travis*, 106 So.3d 320, 332 (Miss. 2012); *Hightower v. Kansas City Southern Railway Co.*, 70 P.3d 835, 844-49 (Okla. 2003); *Veit ex rel. Nelson v. Burlington Northern Santa Fe Corp.*, 249 P.3d 607 (Wash. 2011).

By the same token, courts have also recognized that state law cannot "supplement" the factors that the federal regulations look to in determining track class, which would permit state law to indirectly influence the speeds at which trains may operate. *See Zimmerman v. Norfolk Southern Corp.*, 706 F.3d 170, 186-87 (3d Cir. 2013).

B. Factual and Procedural Background

1. The train tracks through the Noroton Heights station in Darien, Connecticut, are Class 4 tracks. Pet. App. 47a. Section 213.9 sets the maximum operating speed for passenger trains on Class 4 tracks at 80 miles per hour. 49 C.F.R. § 213.9(a).

In March 2013, a Metro-North commuter train on an express route to Stamford was approaching the Noroton Heights station on the track next to the platform. Pet. App. 2a-3a. The train, which is referred to as a "through train" because it was not making a stop at the station, was traveling at around 70 miles per hour. Pet. App. 3a, 47a. As the train approached the station, the engineer saw that there was a man on the track. Pet. App. 3a. The engineer sounded the horn and applied the emergency brake, but he was unable to stop the train from hitting and killing the man. *Id.*

The decedent's widow, Respondent Jamey Murphy, filed this suit in Connecticut state court. Pet. App. 2a. The operative complaint claims that Metro-North breached a duty imposed by state tort law "by moving a through train traveling in excess of 70 miles per hour on the track immediately adjacent to the platform" rather than "an interior track away from the platform." Pet. App. 29a. Metro-North

moved for summary judgment on the basis of FRSA preemption. Pet. App. 4a.

2. The trial court granted Metro-North's motion, reasoning that Respondent's claim "is inherently an excessive speed claim" and is thus preempted under this Court's decision in *Easterwood*. Pet. App. 47a. The court explained that "the speed of the train is an intrinsic part of the plaintiff's negligence allegation." *Id.* And "the plaintiff's railroad safety expert … continuously references train speed and the specific speed of the train in question in his opinion for why the train should have been routed on an interior track." *Id.*; *see also id.* (noting that the expert witness "discusses through trains versus trains making a scheduled stop and the different speeds in which they enter the station, to explain why faster moving and/or through trains should be placed on tracks that are not alongside platforms").

The trial court recognized that what distinguishes through trains from trains making a stop at a given station is the speed at which they operate through that station. *Id.* After all, "trains *must* stop alongside a platform to discharge and pick up passengers." *Id.* And "it is the fact that a track adjacent to a platform was used for a train traveling at a high *speed* that is objected to" in Respondent's complaint. *Id.*

Because "[t]he speed of the train is a necessary corollary to the plaintiff's claim" and the train was undisputedly operating below the federal maximum speed, the trial court concluded that the claim "is expressly preempted" by FRSA. Pet. App. 47a; *see also id.* ("the train was traveling between 60-73 miles per hour, which is below the speed limit set forth for a

Class 4 track, which is 80 miles per hour for a passenger train" (citing 49 C.F.R. § 213.9(a))).

3. The Supreme Court of Connecticut took the appeal directly from the trial court and reversed. Pet. App. 2a, 4a n.4. The court asserted that FRSA does not preempt state law "unless the subject matter is *clearly* subsumed by the regulations" such that "there is a federal regulation that *thoroughly* addresses the safety concern." Pet. App. 22a, 28a (emphases added). The court ruled for Respondent after concluding that "the claim in this case is not based on an area that is *clearly* covered by the federal regulations." Pet. App. 24a (emphasis added).

In rejecting Metro-North's argument that Respondent's excessive speed claim is preempted, the court relied heavily on two "imminent collision" cases, *Dresser v. Union Pacific Railroad Co.*, 809 N.W.2d 713 (Neb. 2011), and *Bashir v. National Railroad Passenger Corp.*, 929 F. Supp. 404 (S.D. Fla. 1996), *aff'd sub nom. Bashir v. Amtrak*, 119 F.3d 929 (11th Cir. 1997). *See* Pet. App. 29a-32a. *Dresser* and *Bashir* concerned state-law negligence claims alleging that the defendants had "fail[ed] to exercise ordinary care *once it appeared that a collision would probably occur*." *Dresser*, 809 N.W.2d at 723 (emphasis added). For instance, the complaint in *Dresser* "alleged that the train crew was negligent in failing to maintain a proper lookout, failing to slow or stop the train to avoid the collision, and failing to sound the horn." Pet. App. 29a (citing *Dresser*, 809 N.W.2d at 717).

Dresser and *Bashir* held that such "imminent collision" claims are not preempted under FRSA. *See Dresser*, 809 N.W.2d at 723 ("we are not presented

with any federal regulations that cover a railroad's duty to exercise ordinary care in situations where collisions are imminent"); *Bashir*, 929 F. Supp. at 412 (§ 213.9 "is silent as to the instances in which a train must stop to avoid colliding with an obstruction on the tracks"). The court in *Bashir* reasoned that, if imminent collision claims were preempted, then "railroads would be insulated from state tort liability regardless of whether a train attempted to stop to avoid even the most obvious obstructions, simply because federal law prescribes the speed at which they may travel absent obstructions." *Id.*

The court below conceded that, "[b]ecause the plaintiff's claim relates to the fact that the train did not stop at the Noroton Heights station, the speed of that train is tangentially related to the plaintiff's claim." Pet. App. 31a. Analogizing to *Dresser* and *Bashir*, however, the court concluded that § 213.9 "prescribes only the maximum speed at which trains may operate on certain track classifications," and thus does not preempt state-law claims asserting that "it is negligent to operate a through train on a track immediately adjacent to the platform when another track is available." Pet. App. 32a.

REASONS FOR GRANTING THE PETITION

Under regulations issued by the Secretary of Transportation, the Metro-North train in this case was entitled to operate at up to 80 miles per hour on the Class 4 track through the Noroton Heights station. 49 C.F.R. § 213.9(a); *see* Pet. App. 47a. It is undisputed that the train was operating consistent with federal law, at around 70 miles per hour. *See* Pet. App. 28a, 47a.

Despite forswearing any claim based on *federal* law (*see* Pet. App. 28a), Respondent argues as a matter of *Connecticut* law that the Class 4 track by the platform should be restricted to trains coming to a stop at the station, and thus operating well below the federal maximum speed, and that the train in this case was required to come to a stop or keep off of the track entirely. Pet. App. 29a. Respondent effectively seeks to designate tracks adjacent to passenger platforms within the State of Connecticut as state-law "slow lanes," even where federal law designates them as Class 4 tracks. But § 213.9 "cover[s]" this subject matter within the meaning of FRSA and makes clear that the train was entitled to operate at up to 80 miles per hour.

Therefore, under this Court's decision in *Easterwood*—which is on all fours with this case—Respondent's state-law claim that the "train was traveling too quickly given the time and place" is preempted. 507 U.S. at 675 n.15 (internal quotation marks omitted). In rejecting Metro-North's assertion of federal preemption, the court below blatantly disregarded *Easterwood*.

This Court should grant certiorari and reverse. Indeed, summary reversal of the decision below would be appropriate.

I. The decision below contravenes *Easterwood*

A. The court below founded its decision in this case on manifestly erroneous statements of the applicable rule of law. The court said that FRSA preempts state law only when "the subject matter is *clearly* subsumed by the regulations" and "there is a federal regulation that *thoroughly* addresses the safety concern" underlying the plaintiff's claim. Pet. App. 22a, 28a (emphases added). Purporting to apply this standard, the court concluded that "the claim in this case is not based on an area that is *clearly* covered by the federal regulations" and held that Respondent's claim is not preempted by FRSA. Pet. App. 24a (emphasis added).

The rule of law stated and applied below is directly contrary to this Court's decision in *Easterwood*. FRSA preempts state law whenever a federal regulation "cover[s] the subject matter of the State requirement." 49 U.S.C. § 20106(a)(2). As this Court explained in *Easterwood*, this language means that FRSA preempts state law "if the federal regulations substantially subsume the subject matter of the relevant state law." 507 U.S. at 664.

A vast gulf divides this Court's "substantially subsumes" standard from the "clearly subsumes" standard applied by the court below. The state court's phrasing implies that it would find preemption only if "left with the definite and firm conviction" that the federal regulations subsumed the subject matter of the state-law claim. *Cooper v. Harris*, 137 S. Ct. 1455,

1474 (2017) (quoting *Anderson v. City of Bessemer City*, 470 U.S. 564, 573 (1985)). The state court's "clearly subsumes" standard plainly placed "a serious thumb on the scale" against preemption. *U.S. Bank N.A. ex rel. CWCapital Asset Mgmt. LLC v. Village at Lakeridge, LLC*, 138 S. Ct. 960, 966 (2018). Indeed, the court below acknowledged as much when it said that FRSA preemption applies only when "there is a federal regulation that *thoroughly* addresses the safety concern." Pet. App. 28a (emphasis added).

The legal standard applied below was manifestly improper, and it will continue to work mischief in future cases. As this Court used the term in *Easterwood*, "substantially" does not mean anything like "clearly" or even "entirely" or "mostly." Rather, it merely means "in substance or in the main." *Pierce v. Underwood*, 487 U.S. 552, 565 (1988) (Scalia, J.); *cf. Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938) (the Administrative Procedure Act's phrase "substantial evidence" means "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion").

In this case, even if the plaintiff's claim is not "clearly" covered by the regulation, it is certainly covered by it "in substance." If the court below had understood the proper legal standard as established by this Court in *Easterwood*, then it would not have rejected Metro-North's preemption argument. And if the decision below is permitted to stand, future litigants could avoid preemption simply by recasting their speed claims as something else, even where, as here, the claim cannot logically be understood without considering the speed of the train.

B. Relatedly, the state court also premised its ruling on its belief that § 213.9 "prescribes only the maximum speed at which trains may operate on certain track classifications." Pet. App. 32a. This was another blatant legal error, because *Easterwood* considered and rejected that precise view:

> On their face, the provisions of § 213.9(a) address only the maximum speeds at which trains are permitted to travel given the nature of the track on which they operate. Nevertheless, related safety regulations adopted by the Secretary reveal that the limits were adopted only after the hazards posed by track conditions were taken into account. Understood in the context of the overall structure of the regulations, the speed limits must be understood as not only establishing a ceiling, but also precluding additional state regulation ….

507 U.S. at 674. The Court concluded that "§ 213.9 should be understood as covering the subject matter of train speed with respect to track conditions, including the conditions posed by grade crossings." *Id.* at 675.

The same goes for the conditions posed by train stations and passenger platforms. The Secretary has made a judgment about the appropriate classification and maximum operating speed for the track passing through the Noroton Heights station. As *Easterwood* makes clear, there is no room for a state court, applying the state law of negligence, to second-guess that expert judgment. To the contrary, FRSA preempts any claim that a train "was traveling too

quickly given the time and place." *Easterwood*, 507 U.S. at 675 n.15.

C. The court below went astray when it based its decision on two "imminent collision" decisions, *Dresser*, 809 N.W.2d 713, and *Bashir*, 929 F. Supp. 404. *See* Pet. App. 29a-32a. The question in those cases was whether FRSA preempts state-law claims based on the "duty to exercise ordinary care to avoid an accident … when it [would] appear[] to a reasonably prudent person that to proceed would probably result in a collision." *Dresser*, 809 N.W.2d at 720 (internal quotation marks omitted). The courts held that FRSA does not preempt state-law imminent collision claims. *See id.* at 723 ("The mere fact that the speed the train is traveling is tangentially related to how quickly it can be stopped does not transform the claim into an excessive speed claim."); *Bashir*, 929 F. Supp. at 412 (§ 213.9 "is silent as to the instances in which a train must stop to avoid colliding with an obstruction on the tracks").

Unlike the decision below, *Dresser* and *Bashir* are not inconsistent with *Easterwood*. As discussed above, *Easterwood* expressly reserved the question of FRSA's preemptive effect on the state-law "duty to slow or stop a train to avoid a specific, individual hazard." 507 U.S. at 675 n.15; *see also Dresser*, 809 N.W.2d at 723 (observing that this "issue was not presented [or] decided by the Court"); *Bashir*, 929 F. Supp. at 412 n.4 (same). But the duty to take action in the face of an imminent collision simply is not at issue in this case: Respondent does not allege that the Metro-North engineer failed to act reasonably to stop the train once he saw that there was a man on the

track. Rather, her claim is that the Metro-North train should not have been "traveling in excess of seventy miles per hour on the track immediately adjacent to the platform," regardless of whether there was an obstruction on the track or not. Pet. App. 29a. This is not an imminent collision case. Like *Easterwood*, it is an excessive speed case.

The distinction between excessive speed claims and imminent collision claims makes good sense. The imminent collision claims in *Dresser* and *Bashir* "relate[d] to an event which is not a fixed condition or feature of the railroad crossing and was not capable of being taken into account by the Secretary of Transportation in the promulgation of uniform, national speed regulations." *Dresser*, 809 N.W.2d at 723; *see also Bashir*, 929 F. Supp. at 412 ("State laws that direct a train to stop when, for instance, a child is standing on the tracks do not conflict with federal speed limits that prescribe the speed at which the same train may travel in normal circumstances on the same track.").

By contrast, the claims in this case and *Easterwood* seek to impose special speed-based duties on trains operating in the proximity of *permanent* conditions—railroad crossings in *Easterwood* and passenger platforms in this case—where accidents may be more likely to occur. But *Easterwood* makes clear that the federal "limits were adopted only after the hazards posed by track conditions were taken into account." 507 U.S. at 674. That is why "§ 213.9 should be understood as covering the subject matter of train speed with respect to track conditions, including the conditions posed by grade crossings," *id.*

at 675—and the conditions posed by passenger platforms. *Easterwood* controls this excessive speed case, where Respondent alleges that Metro-North's "train was traveling too quickly given the time and place." 507 U.S. at 675 n.15 (internal quotation marks omitted). *Dresser* and *Bashir* are inapposite.

II. The decision below infringes upon the federal interest in railroad safety

The Secretary's failure to impose lower speed limits for more heavily trafficked, potentially higher-risk areas was no oversight. The Federal Railroad Administration has made this clear: "FRA's current regulations governing train speed do not afford any adjustment of train speeds in urban settings or at grade crossings. This omission is intentional." 63 Fed. Reg. at 33,999.

"The safest train maintains a steady speed." *Id.* Thus, the most effective means of mitigating the risk of railroad collisions is to attempt to keep people and vehicles off of train tracks, rather than to require trains to "slow down and then speed up" "in urban settings or at grade crossings" in the hope of giving the train enough time to come to a complete stop if the engineer sees an obstruction on the track. *Id.* That is why federal law heavily regulates railroad crossings to ensure that drivers are aware of the risks and will not pull onto the track in front of an oncoming train. *See, e.g.*, 49 U.S.C. § 20134; *Easterwood*, 507 U.S. at 674 ("Because the conduct of the automobile driver is the major variable in grade crossing accidents, and because trains offer far fewer opportunities for regulatory control, the safety regulations established by the Secretary concentrate on providing clear and

accurate warnings of the approach of oncoming trains to drivers."); *Norfolk Southern Railway Co. v. Shanklin*, 529 U.S. 344, 348-49, 352-59 (2000).

While these means of mitigating risk are not perfect, requiring trains to slow down and then speed up frequently would be no panacea and, according to the Federal Railroad Administration, would "increas[e] safety hazards." 63 Fed. Reg. at 33,999. "Every time a train must slow down and then speed up, safety hazards, such as buff and draft forces, are introduced. These kinds of forces can enhance the chance of derailment with its attendant risk of injury to employees, the traveling public, and surrounding communities." *Id.*

Congress intended FRSA "to promote safety in every area of railroad operations and reduce railroad-related accidents," and directed that "[l]aws, regulations, and orders related to railroad safety … shall be nationally uniform to the extent practicable." 49 U.S.C. §§ 20101, 20106(a)(1). By threatening to superimpose a hodge-podge of speed restrictions created by state-court judges and inconsistent jury verdicts atop the federal agency's carefully considered national scheme, the decision below endangers both national uniformity and railroad safety.

CONCLUSION

The petition for a writ of certiorari should be granted. Because the decision below plainly conflicts with a decision of this Court on an important question of federal law, summary reversal would be appropriate.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE SUPREME COURT OF CONNECTICUT, DATED JULY 9, 2019

SUPREME COURT OF CONNECTICUT

332 Conn. 244

JAMEY MURPHY *et al.*

v.

TOWN OF DARIEN *et al.*

(SC 19983)

Argued November 5, 2018

Officially released July 9, 2019

Synopsis

Background: Commuter's wife brought action against railroad company alleging negligence in track selection arising from commuter's slip and fall from train station boarding platform and death on track that was immediately adjacent to platform when he was struck by a "through train" that was en route to another destination. The Superior Court, Judicial District of Fairfield, Kamp, J., 2017 WL 1656911, granted railroad company's motion for summary judgment. Wife appealed.

As a matter of first impression, the Supreme Court, Mullins, J., held that Federal Railroad Safety Act did not preempt wife's negligence claims.

Reversed and remanded with direction.

OPINION

MULLINS, J.

The sole issue in this appeal is whether the Federal Railroad Safety Act of 1970 (railroad act), 49 U.S.C. § 20101 *et seq.*, preempts the negligence claims brought by the plaintiff, Jamey Murphy, individually and as executrix of the estate of her late husband, Kevin Murphy (decedent), against the defendant Metro-North Commuter Railroad Company.[1] We conclude that the railroad act does not preempt the plaintiff's negligence claims and, accordingly, reverse the judgment of the trial court rendered in favor of the defendant on that ground.[2]

The following facts and procedural history are relevant to this appeal. On March 4, 2013, at approximately 6:30 a.m., the decedent, was walking on the platform adjacent to the westbound tracks at the Noroton Heights train station in Darien. The decedent was awaiting his commuter train to New York City. On that morning,

1. Although the plaintiff also brought claims against the town of Darien and Wilton Enterprises, Inc., she has subsequently withdrawn those claims. For the sake of simplicity, we refer to Metro-North Commuter Railroad Company as the defendant.

2. During the underlying proceedings, the defendant asserted that the Interstate Commerce Commission Termination Act, 49 U.S.C. § 10101 *et seq.*, also preempted the plaintiff's negligence claims. The defendant has withdrawn that claim, and, therefore, we do not address it in the present appeal.

there was a patch of ice on the platform, which measured approximately nine feet long and approximately one foot wide. As the decedent was walking on the platform, he encountered the ice patch, slipped and fell onto the westbound track closest to the platform.

At that time, one of the defendant's trains was coming around a curve and approaching the Noroton Heights station on the track closest to the westbound platform. This train was scheduled to travel through the Noroton Heights station without stopping and to do the same through four other commuter stations before completing its express route to Stamford. This type of train is referred to as a "through train."

As the train approached the Noroton Heights station, the engineer sounded the train's horn. He then saw an object on the track. When the engineer realized it was a person, he sounded the horn again and applied the emergency brake. Nevertheless, the train struck the decedent. As a result of the collision, the decedent suffered severe trauma and was pronounced dead at the scene.

The plaintiff subsequently brought this action against the defendant. See footnote 1 of this opinion. Specifically, the operative complaint[3] alleges that the decedent's injuries and death were proximately caused by the negligence of the defendant when "it violated practices and customs with respect to track selection by moving a through train

3. We note that the plaintiff amended her complaint five times. The operative complaint was filed on March 21, 2017.

traveling in excess of seventy miles per hour on the track immediately adjacent to the platform when reasonable care and general practice of [the defendant] required that train to be on an interior track away from the platform." The plaintiff also alleges that the defendant's negligence caused her to suffer loss of spousal consortium. After discovery, the defendant filed a motion for summary judgment, and the plaintiff filed an objection.

In support of that motion, the defendant asserted that the plaintiff's negligence claims were preempted by federal law. Specifically, the defendant asserted, in pertinent part, that the plaintiff's claims were barred by the railroad act. The trial court agreed with the defendant, concluding that, "[t]o the extent that the plaintiff's claim is viewed as relating to rail safety, it is preempted by the [railroad act]." Accordingly, the trial court granted the motion for summary judgment and rendered judgment thereon in favor of the defendant. This appeal followed.[4]

On appeal, the plaintiff asserts that the trial court incorrectly concluded that her claims were preempted by the railroad act. Specifically, the plaintiff asserts that the railroad act only preempts claims where a federal regulation covers the subject matter, and no such regulation exists for track selection. In response, the defendant asserts that the trial court properly granted its motion for summary judgment because the plaintiff's claims are preempted by the railroad act. Specifically,

4. The plaintiff appealed from the judgment of the trial court to the Appellate Court, and we transferred the appeal to this court pursuant to General Statutes § 51-199 (c) and Practice Book § 65-1.

the defendant asserts that the subject matter of the plaintiff's claim is covered by federal regulation—namely, regulations addressing speed and track classification. We agree with the plaintiff.

"The standard of review of a trial court's decision granting summary judgment is well established. Practice Book § 17-49 provides that summary judgment shall be rendered forthwith if the pleadings, affidavits and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.... Our review of the trial court's decision to grant the defendant's motion for summary judgment is plenary.... On appeal, we must determine whether the legal conclusions reached by the trial court are legally and logically correct and whether they find support in the facts set out in the memorandum of decision of the trial court." (Citation omitted; internal quotation marks omitted.) *Lucenti v. Laviero*, 327 Conn. 764, 772–73, 176 A.3d 1 (2018). "[T]he use of a motion for summary judgment to challenge the legal sufficiency of a complaint is appropriate when the complaint fails to set forth a cause of action and the defendant can establish that the defect could not be cured by repleading." (Internal quotation marks omitted.) *Ferri v. Powell-Ferri*, 317 Conn. 223, 236, 116 A.3d 297 (2015).

In the present case, the trial court granted the defendant's motion for summary judgment on the ground that the plaintiff's complaint was insufficient because the negligence claims raised therein were preempted by the railroad act. Accordingly, resolution of this appeal

requires us to examine the trial court's conclusion that the plaintiff's negligence claims are preempted by the railroad act.

In doing so, we note that the question of whether the plaintiff's negligence claims are preempted by the railroad act is one of law, and, therefore, our review is plenary. "Whether state causes of action are preempted by federal statutes and regulations is a question of law over which our review is plenary." *Byrne v. Avery Center for Obstetrics & Gynecology, P.C.*, 314 Conn. 433, 447, 102 A.3d 32 (2014); see also *Hackett v. J.L.G. Properties, LLC*, 285 Conn. 498, 502–504, 940 A.2d 769 (2008) (whether trial court's conclusion that municipal zoning regulations were preempted by federal law was a question of law over which court exercised plenary review). "[T]here is a strong presumption against federal preemption of state and local legislation…. This presumption is especially strong in areas traditionally occupied by the states …." (Citation omitted; internal quotation marks omitted.) *Dowling v. Slotnik*, 244 Conn. 781, 794, 712 A.2d 396, cert. denied sub nom. *Slotnik v. Considine*, 525 U.S. 1017, 119 S. Ct. 542, 142 L. Ed. 2d 451 (1998).

"The ways in which federal law may [preempt] state law are well established and in the first instance turn on congressional intent…. Congress' intent to supplant state authority in a particular field may be express[ed] in the terms of the statute…. Absent explicit [preemptive] language, Congress' intent to supersede state law in a given area may nonetheless be implicit if a scheme of federal regulation is so pervasive as to make reasonable

the inference that Congress left no room for the [s]tates to supplement it, if the [a]ct of Congress … touch[es] a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject, or if the goals sought to be obtained and the obligations imposed reveal a purpose to preclude state authority….

"The question of preemption is one of federal law, arising under the supremacy clause of the United States constitution…. Determining whether Congress has exercised its power to preempt state law is a question of legislative intent…. [A]bsent an explicit statement that Congress intends to preempt state law, courts should infer such intent where Congress has legislated comprehensively to occupy an entire field of regulation, leaving no room for the [s]tates to supplement federal law … or where the state law at issue conflicts with federal law, either because it is impossible to comply with both … or because the state law stands as an obstacle to the accomplishment and execution of congressional objectives …." (Citation omitted; internal quotation marks omitted.) *Hackett v. J.L.G. Properties, LLC*, supra, 285 Conn. at 503–504, 940 A.2d 769.

Furthermore, the United States Supreme Court has explained that "[w]here a state statute conflicts with, or frustrates, federal law, the former must give way. U.S. Const., [a]rt. VI, cl. 2; *Maryland v. Louisiana*, 451 U.S. 725, [746, 101 S. Ct. 2114, 68 L. Ed. 2d 576] (1981). In the interest of avoiding unintended encroachment on the authority of the [s]tates, however, a court interpreting a federal statute pertaining to a subject traditionally

governed by state law will be reluctant to find [preemption]. Thus, [preemption] will not lie unless it is 'the clear and manifest purpose of Congress.' *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, [230, 67 S. Ct. 1146, 91 L. Ed. 1447] (1947). Evidence of [preemptive] purpose is sought in the text and structure of the statute at issue. *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, [95, 103 S. Ct. 2890, 77 L. Ed. 2d 490] (1983). If the statute contains an express [preemption] clause, the task of statutory construction must in the first instance focus on the plain wording of the clause, which necessarily contains the best evidence of Congress' [preemptive] intent." *CSX Transportation, Inc. v. Easterwood*, 507 U.S. 658, 663–64, 113 S. Ct. 1732, 123 L. Ed. 2d 387 (1993); see also *Id.*, at 673–75, 113 S. Ct. 1732 (concluding that negligence claim relating to failure to maintain adequate warning devices at rail crossing was not preempted by railroad act, but negligence claim alleging excessive speed was preempted by railroad act).

A brief review of the railroad act provides context for our analysis. The railroad act "was enacted in 1970 to promote safety in all areas of railroad operations and to reduce [railroad related] accidents, and to reduce deaths and injuries to persons …. [Under the railroad act], the Secretary [of Transportation] is given broad powers to prescribe, as necessary, appropriate rules, regulations, orders, and standards for all areas of railroad safety …." (Citations omitted; internal quotation marks omitted.) *Id.*, at 661–63, 113 S. Ct. 1732; see also 49 U.S.C. § 20101 (2012) (statement of legislative purpose); 49 U.S.C. § 20103 (a) (2012) (delegating regulatory authority to Secretary of Transportation).

Appendix A

The railroad act contains an express preemption clause, codified at 49 U.S.C. § 20106, entitled "Preemption." That statute provides in relevant part: "(a) National Uniformity of Regulation.—(1) 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.

"(2) 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), or the Secretary of Homeland Security (with respect to railroad security matters), prescribes a regulation or issues an order covering the subject matter of the State requirement. A State may adopt or continue in force an additional or more stringent law, regulation, or order related to railroad safety or security when the law, regulation, or order—

"(A) is necessary to eliminate or reduce an essentially local safety or security hazard;

"(B) is not incompatible with a law, regulation, or order of the United States Government; and

"(C) does not unreasonably burden interstate commerce." 49 U.S.C. § 20106 (a) (2012).

In 2007, Congress amended the railroad act preemption clause by adding subsection (b). See Implementing Recommendations of the 9/11 Commission Act of 2007, Pub. L. No. 110-53, § 1528, 121 Stat. 266, 453. That

subsection, which is entitled "Clarification Regarding State Law Causes of Action," provides in relevant part: "Nothing in this section shall be construed to preempt an action under State law seeking damages for personal injury, death, or property damage alleging that a party—

"(A) has failed to comply with the Federal standard of care established by a regulation or order issued by the Secretary of Transportation (with respect to railroad safety matters), or the Secretary of Homeland Security (with respect to railroad security matters), covering the subject matter as provided in subsection (a) of this section;

"(B) has failed to comply with its own plan, rule, or standard that it created pursuant to a regulation or order issued by either of the Secretaries; or

"(C) has failed to comply with a State law, regulation, or order that is not incompatible with subsection (a) (2)." 49 U.S.C. § 20106 (b) (1) (2012).

As a result of this amendment, federal courts have concluded that "the preemption analysis under the amended [railroad act] requires a two step process. We first ask whether the defendant allegedly violated either a federal standard of care or an internal rule that was created pursuant to a federal regulation. If so, the plaintiff's claim avoids preemption. [See 49 U.S.C. § 20106 (b) (1) (A) and (B) (2012)]. Otherwise, we move to the second step and ask whether any federal regulation covers the plaintiff's claim. [See 49 U.S.C. § 20106 (a) (2) (2012)]. A regulation covers—and thus

preempts—the plaintiff's claim if it 'substantially subsume[s] the subject matter' of that claim. [*CSX Transportation, Inc. v. Easterwood*, supra, 507 U.S. at 664, 113 S.Ct. 1732] (noting that the regulation must do more than 'touch upon or relate to [the] subject matter')." *Zimmerman v. Norfolk Southern Corp.*, 706 F.3d 170, 178 (3d Cir.), cert. denied, 571 U.S. 826, 134 S. Ct. 164, 187 L. Ed. 2d 41 (2013); see also *Grade v. BNSF Railway Co.*, 676 F.3d 680, 686 (8th Cir. 2012); *Henning v. Union Pacific Railroad Co.*, 530 F.3d 1206, 1214–16 (10th Cir. 2008).[5]

The parties agree that the plaintiff's claim does not allege that the defendant violated any regulation or order, or failed to comply with its own plan, rule, or standard of care that it adopted pursuant to a federal regulation. Accordingly, the parties agree that the appropriate preemption analysis is contained within 49 U.S.C. § 20106 (a) (2). This provision provides that a state law cause of action is preempted if the Secretary of Transportation or the Secretary of Homeland Security has "prescribe[d] a regulation or issue[d] an order

5. To the extent that the trial court's decision can be read to conclude that the plaintiff's negligence claim relating to track selection is preempted by the railroad act solely because "there is no federal standard of care for the defendant to have violated," we disagree. Instead, we conclude that, under the two part test adopted by federal courts, if there is no express regulation governing the subject area of the plaintiff's complaint, the court must next consider whether there is a federal regulation or order covering the subject matter of state law related to the plaintiff's claim in order to resolve the question of preemption. Indeed, both parties agree on the applicable test.

covering the subject matter of the State requirement" on which the plaintiff's negligence claim is based. (Emphasis added.) 49 U.S.C. § 20106 (a) (2) (2012). Thus, the issue before this court is whether the Secretary of Transportation or the Secretary of Homeland Security has promulgated regulations covering the same subject matter as Connecticut negligence law pertaining to the selection of an interior track for a through train.

As the United States Supreme Court has explained, "[t]o prevail on the claim that the regulations have [preemptive] effect, [a] 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. [See Webster's Third New International Dictionary (1961) p. 524] (in the phrase 'policy clauses covering the situation,' cover means 'to comprise, include, or embrace in an effective scope of treatment or operation'). 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." (Citation omitted.) *CSX Transportation, Inc. v. Easterwood*, supra, 507 U.S. at 664–65, 113 S.Ct. 1732.

In the present case, the plaintiff's claim alleges that the defendant was negligent in selecting the track immediately adjacent to the platform to run a "through train." As we have explained, in order to resolve the plaintiff's appeal, we must determine whether there is a

federal regulation that covers, or substantially subsumes, the plaintiff's claim. The defendant does not point to any federal regulation that expressly governs track selection. Indeed, the trial court recognized that, "[a]s both parties have conceded, there is no federal rule or regulation that specifically governs track selection."

Nevertheless, the trial court reasoned that, "[al]though there is not a federal regulation that specifically covers track selection, the federal regulations in regards to tracks is extensive and, therefore, subsume the subject matter of the plaintiff's claim." In support of its conclusion, the trial court relied on several specific regulations contained within part 213 of title 49 of the Code of Federal Regulations, which is entitled "Track Safety Standards." See 49 C.F.R. § 213.9 (2012) (setting speed limits for trains operating on each class of track); 49 C.F.R. § 213.53 (2012) (measuring gage of track); 49 C.F.R. § 213.57 (2012) (establishing speed limitations based on curvature and elevation of track); 49 C.F.R. § 213.109 (2012) (establishing requirements for crossties); 49 C.F.R. § 213.121 (2012) (establishing requirements for rail joints); 49 C.F.R. § 213.231 *et seq.* (2012) (establishing requirements for track inspection). The trial court reasoned that, "[a]s part of an overall scheme to standardize railroad transportation and specifically as a scheme that expansively covers railroad track safety … the subject matter of the plaintiff's claim is clearly 'covered' and 'substantially subsumed' by these federal regulations." (Citation omitted; emphasis omitted.) We disagree.

We first turn to the regulations on which the trial court relied, namely, part 213 of title 49 of the Code of

Federal Regulations. The scope of these regulations is explained as follows: "This part prescribes minimum safety requirements for railroad track that is part of the general railroad system of transportation. In general, the requirements prescribed in this part apply to specific track conditions existing in isolation. Therefore, a combination of track conditions, none of which individually amounts to a deviation from the requirements in this part, may require remedial action to provide for safe operations over that track. This part does not restrict a railroad from adopting and enforcing additional or more stringent requirements not inconsistent with this part." 49 C.F.R. § 213.1 (a) (2012). Accordingly, part 213 of title 49 of the Code of Federal Regulations expressly states that it provides minimum safety requirements and that conditions may be present that require a greater standard of care.

Indeed, although the regulations cited by the trial court touch upon tracks, nothing in those regulations indicates that they subsume the subject matter of selecting tracks for through trains. Those regulations set forth how the gage of a track is to be measured and the required size for various tracks. See 49 C.F.R. § 213.53 (2012). Another regulation regulates the maximum elevation of the outer rail on a curve. See 49 C.F.R. § 213.57 (2012). Other regulations regulate the components of a rail—i.e. crossties and rail joints. See 49 C.F.R. §§ 213.109 and 213.121 (2012). Yet another regulation delineates the speed a train can travel on tracks of various classes. See 49 C.F.R. § 213.9 (2012). Each of these regulations covers a different subject matter than that raised by the plaintiff's claim—namely, selection of an interior or exterior track

for operation of a through train. None of the regulations relied on by the defendant or cited by the trial court even mentions selection of an interior or exterior track. Accordingly, the express terms of these provisions support a conclusion that the plaintiff's claim is not covered by the regulations.

Although no court has addressed a track selection claim similar to the plaintiff's claim in this case, a review of the case law regarding preemption of state law claims under the railroad act is instructive. For instance, in *CSX Transportation, Inc. v. Easterwood*, supra, 507 U.S. at 667–68, 113 S.Ct. 1732,[6] the United States Supreme Court held that the railroad act did not preempt a state common-law negligence claim regarding the railroad's duty to maintain warning devices at a railroad crossing. In doing so, the United States Supreme Court rejected the railroad's claim that the subject matter of the plaintiff's claim was covered by regulations requiring that all traffic control devices installed comply with the Federal Highway Administration's manual on uniform traffic control devices. *Id.*, at 665–66, 113 S. Ct. 1732. Instead, the United States Supreme Court explained that, although the states were required to employ warning devices that conformed to standards set forth in the regulations in order to obtain

6. We recognize that *CSX Transportation, Inc. v. Easterwood*, supra, 507 U.S. at 661–65, 113 S.Ct. 1732, was decided prior to the 2007 amendment to the preemption provision in the railroad act. Nevertheless, it is well established that the interpretation of the preemption provision in *Easterwood* remains good law for the purpose of interpreting 49 U.S.C. § 20106 (a). See, e.g., *Zimmerman v. Norfolk Southern Corp.*, supra, 706 F.3d at 177–78.

federal funding, state negligence law always played a role in maintaining safety at railroad crossings, and "there is no explicit indication in the regulations … that the terms of the [f]ederal [g]overnment's bargain with the [s]tates require modification of this regime of separate spheres of responsibility." *Id.*, at 668, 113 S. Ct. 1732. Accordingly, the United States Supreme Court reasoned that, "[i]n light of the relatively stringent standard set by the language of [the railroad act's preemption provision] and the presumption against preemption, and given that the regulations provide no affirmative indication of their effect on negligence law, [the court is] not prepared to find [preemption] solely on the strength of the general mandates of [regulations governing warning devices at railroad crossings]." *Id.*

On the other hand, in *Norfolk Southern Railway Co. v. Shanklin*, 529 U.S. 344, 352–53, 120 S. Ct. 1467, 146 L. Ed. 2d 374 (2000), the United States Supreme Court did conclude that a state law negligence claim alleging that there were inadequate warning signs at a railroad crossing was preempted when the federal regulations applicable to that railroad crossing required the installation of a particular warning device at a particular railway crossing. Accordingly, the United States Supreme Court concluded that, "[b]ecause those regulations establish requirements as to the installation of particular warning devices … when [those regulations] are applicable, state tort law is [preempted].... Unlike the [regulations at issue in *Easterwood*, these regulations], displace state and private [decision-making] authority by establishing a [federal law] requirement that certain protective devices be installed or

federal approval obtained…. As a result, those regulations effectively set the terms under which railroads are to participate in the improvement of crossings." (Citations omitted; internal quotation marks omitted.) *Id.*[7]

The United States Court of Appeals for the Second Circuit also has examined whether a state law claim was preempted by the railroad act. In *Island Park, LLC v. CSX Transportation*, 559 F.3d 96, 108 (2d Cir. 2009), the Second Circuit concluded that a state agency order to close a private rail crossing was not preempted by the railroad act. Although it concluded that the closure order implicated railroad safety, it concluded that it was not preempted by the railroad act because the railroad act "allows states to impose rail safety requirements as long as they are not inconsistent with federal mandates. [The plaintiff] points to no federal rail safety regulation that covers rail crossing closures. Accordingly, the state closure order is not [preempted] by [the railroad act]." *Id.*

In *Strozyk v. Norfolk Southern Corp.*, 358 F.3d 268, 269 (3d Cir. 2004), the United States Court of Appeals for the Third Circuit concluded that a state common-law negligence claim against a railroad alleging poor visibility at a railroad crossing was not preempted by the railroad act. The railroad asserted that the plaintiff's claim was preempted by the regulations because the regulations

7. As noted subsequently in this opinion, a separate claim that the railroad had failed to remove excessive vegetation from the area surrounding the crossing was the subject of further proceedings on remand. See *Shanklin v. Norfolk Southern Railway Co.*, 369 F.3d 978, 987 (6th Cir. 2004).

addressing the installation of warning devices at railroad crossings mentioned limited visibility. *Id.*, at 273. The Third Circuit rejected the railroad's claim and concluded that a regulation's "bare mention" of limited visibility did "not indicate an intent to regulate" that condition. *Id.*

Similarly, the United States Court of Appeals for the Sixth Circuit concluded that a state law negligence claim alleging that vegetative growth on railroad property obstructed the motorist's view of an oncoming train was not preempted. *Shanklin v. Norfolk Southern Railway Co.*, 369 F.3d 978, 987 (6th Cir. 2004); see also footnote 8 of this opinion. The railroad asserted that the plaintiff's claim was preempted by regulations under the railroad act that addressed the installation of warning devices and one that provided that "[v]egetation on railroad property which is on or immediately adjacent to [the] roadbed shall be controlled so that it does not … [o]bstruct visibility of railroad signs and signals," preempted the plaintiff's claim. (Internal quotation marks omitted.) *Id.* The Sixth Circuit explained that the regulation regarding vegetation preempts any state law claim "regarding vegetative growth that blocks a sign immediately adjacent to a crossing, but it does not impose a broader duty to control vegetation so that it does not obstruct a motorist's visibility of oncoming trains." (Internal quotation marks omitted.) *Id.* Accordingly, the Sixth Circuit concluded that the plaintiff's claim was not preempted because, although these regulations touched upon vegetation, they did not substantially subsume the subject matter of the plaintiff's claim. *Id.*, at 988; see also 49 C.F.R. § 213.37 (b) (1993).

Appendix A

The Third Circuit addressed preemption under the railroad act again in *MD Mall Associates, LLC v. CSX Transportation, Inc.*, 715 F.3d 479, 491 (3d Cir. 2013), cert. denied, 571 U.S. 1126, 134 S. Ct. 905, 187 L. Ed. 2d 778 (2014). In that case, the Third Circuit concluded that a mall owner's state law claim against a railroad owner alleging negligence and storm water trespass was not preempted by the railroad act. *Id.*, at 490–91. In doing so, the Third Circuit rejected the railroad owner's claim that a regulation promulgated under the railroad act, which requires that a railroad's drainage facilities "under or immediately adjacent" to the track "be maintained and kept free of obstruction" preempted the mall owner's state law claims. (Internal quotation marks omitted.) *Id.*; see also 49 C.F.R. § 213.33 (2010). The Third Circuit explained that it could not "read the silence of [49 C.F.R.] § 213.33 on a railroad's duties to its neighbors when addressing track drainage as an express abrogation of state storm water trespass law. Given that the [railroad act] provides no express authorization for disposing of drainage onto an adjoining property, the presumption must be that state laws regulating such action survive …." (Citation omitted.) *MD Mall Associate, LLC v. CSX Transportation, Inc.*, at 491.

Another instructive case is *Haynes v. National Railroad Passenger Corp.*, 423 F. Supp. 2d 1073 (C.D. Cal. 2006). In *Haynes*, the estate and children of a passenger who suffered a deep vein thrombosis after traveling on an Amtrak train from Chicago to Los Angeles brought an action in state court alleging that Amtrak violated common-law and statutory duties of care that common

carriers must exercise with respect to their passengers. *Id.*, at 1077. Specifically, the plaintiffs alleged that dangerous seats and seating configurations in Amtrak trains and Amtrak's failure to warn passengers about deep vein thrombosis caused the decedent to suffer deep vein thrombosis and die. *Id.*, at 1078.

The railroad filed a motion to dismiss for failure to state a claim on which relief can be granted. *Id.*, at 1077. In its motion, the railroad claimed, *inter alia*, that the plaintiffs' claims were preempted by the railroad act. *Id.*, at 1081. Specifically, the railroad claimed that the federal regulations addressing seats and their configuration on passenger trains covered the subject matter of the plaintiffs' complaint, thereby rendering the plaintiff's claim preempted by the railroad act. *Id.*, at 1082. The United States District Court for the Central District of California explained that federal regulations addressed safe passenger seats, how seats must be fastened to the car body, the load the seats must be able to withstand, and the inspection process for train seats. *Id.*, at 1082.

Nevertheless, the court explained that "[t]he regulations relied upon by the [railroad] govern seat safety for circumstances involving train crashes and broken seats. There is no discussion in the regulations of leg room, seat pitch, or ensuring that seats do not contribute to discomfort or illnesses like [deep vein thrombosis]. The [c]ourt finds that there are no federal safety or security regulations that substantially subsume state tort actions regarding potential of [deep vein thrombosis] from poorly designed seats or seating arrangements." *Id.*

The court also concluded that there were no federal regulations that substantially subsumed the plaintiffs' claims based on a duty to warn passengers about deep vein thrombosis. *Id.* The court reasoned that, although there are federal regulations regarding passenger safety on trains in an emergency situation, because deep vein thrombosis arises in nonemergency situations, the safety regulations did not subsume the subject matter of deep vein thrombosis warnings. *Id.*

The rationale employed in *Haynes* is instructive in the present case because it demonstrates that, even when courts have found an extensive regulatory scheme in a particular area—such as passenger seating on trains—the breadth of regulation does not mean that the subject matter of a complaint is substantially subsumed by the regulations.[8]

A review of the case law regarding preemption under the railroad act demonstrates that courts have been reticent to find that a regulatory scheme covers or substantially

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8. In *Haynes v. National Railroad Passenger Corp.*, supra, 423 F. Supp. 2d at 1073, the railroad also asserted that the plaintiffs' claims were preempted under the commerce clause of the United States constitution because allowing states to regulate these areas would place an undue burden on the flow of commerce across state borders. See U.S. Const., art. I, § 8, cl. 3. The court concluded that the plaintiffs' claims regarding seats and seat configuration were preempted under a dormant commerce clause analysis but that the plaintiffs' claims relating to the railroad's duty to warn passengers were not. *Haynes v. National Railroad Passenger Corp.*, supra, at 1083–84.

subsumes the subject matter of a plaintiff's claim. Indeed, even when regulations form a broad regulatory scheme or mention the subject of a plaintiff's claim, courts have not found preemption unless the subject matter is clearly subsumed by the regulations. This construction of the railroad act is consistent with the principle that, "[i]n the interest of avoiding unintended encroachment on the authority of the [s]tates … a court interpreting a federal statute pertaining to a subject traditionally governed by state law will be reluctant to find [preemption]. Thus, [preemption] will not lie unless it is 'the clear and manifest purpose of Congress.' " *CSX Transportation, Inc. v. Easterwood*, supra, 507 U.S. at 663–64, 113 S.Ct. 1732. Furthermore, the limited application of preemption of the railroad act is also consistent with the express preemption provision contained in the railroad act, which "displays considerable solicitude for state law …." *Id.*, at 665, 113 S. Ct. 1732.

In the present case, the defendant asserts that the trial court correctly concluded that, although there is no regulation expressly addressing the selection of an interior or exterior track for trains, the general regulatory scheme of track classification substantially subsumes the subject matter of the plaintiff's claim. We disagree.

The defendant claims, and trial court concluded, that *Zimmerman v. Norfolk Southern Corp.*, supra, 706 F.3d at 170, supports the defendant's contention that the plaintiff's claim is preempted by the act. In *Zimmerman*, the plaintiff was a motorcyclist who was partially paralyzed in a collision with a train at a railroad crossing. *Id.*, at 175.

The plaintiff claimed, *inter alia*, that the railroad should have been liable for misclassification of the track. *Id.*, at 186–87. Specifically, the plaintiff claimed that the railroad violated a federal standard of care established by part 213 of title 49 of the Code of Federal Regulations, which contains regulations for each class of tracks. *Id.*, at 187. The plaintiff claimed that, under these regulations, the railroad was obligated to classify the track as class two or higher due to the limited sight distance on the track. *Id.* The Third Circuit rejected the plaintiff's claim that there was a federal standard of care regarding classification of the tracks based on sight distance. *Id.* Instead, the Third Circuit concluded that no regulation established the sight distance necessary for each class of tracks, so no relevant federal standard of care existed. *Id.*

The Third Circuit further explained that, "[d]espite the absence of a federal standard of care, [the plaintiff] may still avoid preemption if his claim falls outside the scope of the original [railroad act] preemption provision…. As we have previously made clear, state claims are within the scope of this provision if federal regulations 'cover' or 'substantially subsume' the subject matter of the claims…. The regulations must do more than 'touch upon or relate to that subject matter.' " (Citations omitted.) *Id.* The Third Circuit then concluded that the regulations in part 213 of title 29 of the Code of Federal Regulations "subsume[d] [the plaintiff's] misclassification claim. These regulations establish varying requirements for each class of tracks—governing everything from gage, alinement, and elevation, to crossties, curve speed, and rail joints." *Id.*

Appendix A

The trial court in this case relied on the following language from *Zimmerman*: "The regulations are part of a broad scheme to standardize railroad tracks. Admittedly, there is no regulation that classifies tracks based on sight distance. But the breadth of the scheme implies a decision not to classify on that basis. At the very least, it implies that the federal government did not want states to decide how tracks would be classified. We doubt that the federal government would create a detailed system with the expectation that states would impose extra classification requirements—especially given the risk that the requirements would vary from state to state. This regulatory scheme preempts [the plaintiff's] misclassification claim." *Id.* The trial court in this case then concluded that, "[a]s in *Zimmerman*, the plaintiff's track selection claim is subsumed by this regulatory scheme. Although there is no regulation that classifies tracks on the basis of track selection, such as the choice of using an exterior or interior track, 'the breadth of the scheme implies a decision not to classify on that basis.' … As part of an overall scheme … that expansively covers railroad track safety … the subject matter of the plaintiff's claim is clearly 'covered' *and* 'substantially subsumed' by these federal regulations…. The plaintiff's track selection claim is therefore preempted by this regulatory scheme." (Citations omitted; emphasis in original.)

We disagree that the foregoing analysis from *Zimmerman* is applicable to the plaintiff's claim in the present case. Unlike *Zimmerman*, the claim in this case is not based on an area that is clearly covered by the federal regulations. In *Zimmerman*, it was undisputed that the

regulations dictate whether a track is classified as class one, two or three on the basis of various factors set forth in those regulations. *Zimmerman v. Norfolk Southern Corp.*, supra, 706 F.3d at 179. It was also undisputed in *Zimmerman* that the basis of the claim at issue was whether the defendant properly classified the track. *Id.*, at 187. In *Zimmerman*, the plaintiff's claim essentially sought to impose another factor into the decision of how to classify tracks—namely, the sight distance of a particular track. *Id.* In concluding that the claim in *Zimmerman* was preempted, the Third Circuit concluded that the regulations already covered and subsumed the factors by which a track should be classified as class one, two or three. *Id.*

Indeed, as the United States Court of Appeals for the Fifth Circuit has explained, preemption under the railroad act "is even more disfavored than preemption generally.... The restrictive terms of its preemption provision [indicate] that [preemption] will lie only if the federal regulations *substantially subsume* the subject matter of the relevant state law.... When applying [railroad act] preemption, the [c]ourt eschews broad categories such as railroad safety, focusing instead on the specific subject matter contained in the federal regulation.... In sum, when deciding whether the [railroad act] preempts state laws designed to improve railroad safety, we interpret the relevant federal regulations narrowly to ensure that the careful balance that Congress has struck between state and federal regulatory authority is not improperly disrupted in favor of the federal government." (Citations omitted; emphasis in original; footnote omitted; internal quotation marks omitted.) *United Transportation Union v. Foster*, 205 F.3d 851, 860 (5th Cir. 2000).

In the present case, the regulations do not differentiate between interior or exterior tracks and, most certainly, do not provide a set of factors by which interior or exterior tracks are chosen. Accordingly, the regulations do not cover the selection of interior or exterior tracks. Unlike the trial court, we are not persuaded that the failure to address the selection of interior or exterior tracks implies a decision not to differentiate between the two. As the case law we have discussed herein demonstrates, in light of the limited preemption provision in the railroad act, the mere exclusion of a topic from the federal regulations does not imply an intent to preempt state law on that topic.

On the basis of the foregoing, although we agree with the trial court that there are extensive federal regulations that address various topics related to tracks, we cannot conclude that the subject matter of the plaintiff's negligence claim—namely, the selection of an exterior track for operating a through train—is "covered by" a federal regulation. To the contrary, the federal regulations relating to tracks touch upon, but do not substantially subsume, the subject matter of the plaintiff's complaint.[9]

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9. We also note that, in California, the California High-Speed Train Project regulates track selection for through trains and has done so for almost ten years. See California High-Speed Train Project, "Technical Memorandum 2.2.4: High-Speed Train Station Platform Geometric Design" (2010) p. 11, available at http://www.hsr.ca.gov/docs/programs/eir_memos/Proj_Guidelines_TM2_2_4R01.pdf (last visited July 3, 2019). This memorandum provides that, "[w]here practical, do not locate the platform adjacent to mainline high-speed tracks. If this is not possible, passenger access to platforms adjacent to tracks where trains may pass through stations

Our conclusion is further buttressed by a review of cases in which a court has found that a federal regulation covers, or substantially subsumes, the subject matter of a complaint. For instance, in *In re Derailment Cases*, 416 F.3d 787, 794 (8th Cir. 2005), the United States Court of Appeals for the Eighth Circuit concluded that the plaintiff's claim alleging negligent inspection of freight cars was preempted by the railroad act. The Eighth Circuit concluded that the plaintiff's claim was preempted under the railroad act because "[i]t is clear that the [federal railway administration's] regulations are intended to prevent negligent inspection by setting forth minimum qualifications for inspectors, specifying certain aspects of freight cars that must be inspected, providing agency monitoring of the inspectors, and establishing a civil enforcement regime. These intentions are buttressed by the [federal railway administration] inspection manual for federal and state inspectors." *Id.*; see also *BNSF Railway Co. v. Swanson*, 533 F.3d 618, 619–20 (8th Cir. 2008) (concluding that state statute making it illegal to, *inter alia*, "discipline, harass or intimidate [a railroad] employee to discourage the employee from receiving medical attention" was preempted by federal regulation mandating that railroads adopt policy statement declaring that "harassment or intimidation of any person that is calculated to discourage or prevent such person from receiving proper medical treatment or from reporting such accident, incident, injury or illness will not be permitted

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without stopping may require mitigation …." *Id.* The existence of the regulatory scheme in California further supports our conclusion that the railroad act does not preempt state law governing track selection.

or tolerated" [emphasis omitted; internal quotation marks omitted]), citing 49 C.F.R. § 225.33 (a) (1) (2008). As these cases demonstrate, courts have found preemption under the railroad act only when there is a federal regulation that thoroughly addresses the safety concern raised in the plaintiff's complaint, not merely mentions it or tangentially relates to it. See *CSX Transportation, Inc. v. Easterwood*, supra, 507 U.S. at 664–65, 113 S.Ct. 1732 (regulations cover subject matter of plaintiff's complaint when they "comprise, include, or embrace [that concern] in an effective scope of treatment or operation" [internal quotation marks omitted]).

The defendant further asserts that the plaintiff's claim is preempted because, although framed as a claim relating to track selection, it is essentially an excessive speed claim, which is preempted by the railroad act. We disagree.

It is well established that there are federal regulations that cover the subject matter of train speed with respect to track conditions. See *Id.*, at 675, 113 S. Ct. 1732 ("concluding that relevant regulation "should be understood as covering the subject matter of train speed with respect to track conditions, including the conditions posed by grade crossings"), citing 49 C.F.R. § 213.9 (a) (1992). To be clear, the plaintiff in this case does not assert that the defendant violated a federal standard of care because the train was not traveling above the speed limit. Cf. *Zimmerman v. Norfolk Southern Corp.*, supra, 706 F.3d at 179. Accordingly, if the plaintiff's claim was based on the speed of the train, it would be preempted by

the railroad act because all parties agree that the train was traveling within the established speed limit.[10]

The plaintiff claims that the defendant "violated practices and customs with respect to track selection by moving a through train traveling in excess of seventy miles per hour on the track immediately adjacent to the platform when reasonable care and general practice of [the defendant] required that train to be on an interior track away from the platform." The defendant asserts that this "can only be characterized as a speed claim." We disagree.

We find *Dresser v. Union Pacific Railroad Co.*, 282 Neb. 537, 809 N.W.2d 713 (2011), instructive. In *Dresser*, a motor vehicle passenger who was injured in a collision with a train brought a state law negligence action against the railroad company. *Id.*, at 538, 809 N.W.2d 713. The complaint alleged that the train crew was negligent in failing to maintain a proper lookout, failing to slow or stop the train to avoid the collision, and failing to sound the horn. *Id.*, at 540, 809 N.W.2d 713. The trial court

10. The plaintiff's initial complaint included a claim that the defendant "failed to maintain a proper operating speed of the train …." The defendant subsequently filed motions *in limine* seeking to preclude the plaintiff from offering any evidence, testimony, or argument regarding a claim of negligence based on the speed of the train and any evidence, testimony, or argument regarding any claim preempted by the railroad act or the Interstate Commerce Commission Termination Act. The trial court granted the defendant's motions. Thereafter, the plaintiff filed the operative complaint, which does not contain any claim related to the speed of the train. Indeed, the plaintiff concedes that "the sole remaining theory of negligence is limited to track selection."

concluded that the plaintiff's claim was preempted. *Id.*, at 541, 809 N.W.2d 713. The trial court reasoned that the engineer's failure to exercise ordinary care to avoid the accident by failing to slow or stop the train was essentially an excessive speed claim, which was preempted by the railroad act. *Id.*, at 549, 809 N.W.2d 713.

The Supreme Court of Nebraska reversed the judgment of the trial court. *Id.*, at 553, 809 N.W.2d 713. In doing so, the Supreme Court of Nebraska reasoned: "We do not agree with the [trial] court that appellants' state law negligence claim based on [the railroad's] alleged failure to exercise ordinary care once it appeared that a collision would probably occur is speed based and thus preempted. State tort law is not preempted 'until' a federal regulation 'cover[s]' the same subject matter, and we are not presented with any federal regulations that cover a railroad's duty to exercise ordinary care in situations where collisions are imminent. The mere fact that the speed the train is traveling is tangentially related to how quickly it can be stopped does not transform the claim into an excessive speed claim. Nebraska tort law duties to exercise reasonable care could be violated even if the federal train speed limits are being followed." (Footnote omitted.) *Id.*

Similarly, in *Bashir v. National Railroad Passenger Corp.*, 929 F. Supp. 404, 412 (S.D. Fla. 1996), aff'd sub nom. *Bashir v. Amtrak*, 119 F.3d 929 (11th Cir. 1997), the United States District Court for the Southern District of Florida concluded that a plaintiff's state law negligence claims based on a failure to stop was not preempted by the railroad act. The railroad had asserted that the failure to stop

claims were covered by the federal regulations on excessive speed. *Id.* The court rejected that claim, reasoning that the railroad was "quite correct" that the relevant regulation; see 49 C.F.R. § 213.9 (1993); "preempts inconsistent state laws regarding speed. As the [c]ourt understands [the] [p]laintiff's negligent failure to stop claims, however, they are not necessarily inconsistent with [that regulation]. This section simply prescribes the maximum speed at which trains may operate given certain track types and conditions. It is silent as to the instances in which a train must stop to avoid colliding with an obstruction on the tracks. State laws that direct a train to stop when, for instance, a child is standing on the tracks do not conflict with federal speed limits that prescribe the speed at which the same train may travel in normal circumstances on the same track. Indeed, if [the railroad's] position were correct, railroads would be insulated from state tort liability regardless of whether a train attempted to stop to avoid even the most obvious obstructions, simply because federal law prescribes the speed at which they may travel absent obstructions. *Easterwood* does not support this result." *Bashir v. National Railroad Passenger Corp.*, supra, at 412.

Like the claims in *Dresser* and *Bashir*, the speed of the train in the present case is tangentially related to the plaintiff's claim. In other words, the plaintiff's claim alleges that the defendant was negligent in choosing to operate a train that did not stop at the Noroton Heights station on the track immediately adjacent to the platform. Because the plaintiff's claim relates to the fact that the train did not stop at the Noroton Heights station, the speed of that train is tangentially related to the plaintiff's claim.

As the courts in *Dresser* and *Bashir* explained, title 49 of the Code of Federal Regulations, § 213.9, prescribes only the maximum speed at which trains may operate on certain track classifications. Nothing in that regulation covers the subject of the plaintiff's claim—namely, whether it is negligent to operate a through train on a track immediately adjacent to the platform when another track is available. Accordingly, we disagree that the plaintiff's claim is essentially an excessive speed claim that is preempted by the railroad act.

In light of the presumption against preemption, the narrow preemption provision in the railroad act, the express acknowledgment in title 49 of the Code of Federal Regulations, § 213.1, that the federal regulations provide the minimum safety standards, and the lack of a regulatory provision expressly addressing track selection, we cannot conclude that the defendant has met its burden of demonstrating that the plaintiff's claim was preempted under the railroad act. Accordingly, we conclude that the trial court improperly granted the defendant's motion for summary judgment.

The judgment is reversed and the case is remanded with direction to deny the defendant's motion for summary judgment and for further proceedings according to law.

In this opinion the other justices concurred.

All Citations

332 Conn. 244, 210 A.3d 56

APPENDIX B — OPINION OF THE SUPERIOR COURT OF CONNECTICUT, FAIRFIELD AT BRIDGEPORT, DATED APRIL 10, 2017

SUPERIOR COURT OF CONNECTICUT,
FAIRFIELD AT BRIDGEPORT.

JAMEY MURPHY, INDIVIDUALLY AND
EXECUTRIX OF THE ESTATE OF
KEVIN MURPHY,

v.

TOWN OF DARIEN, *et al.*

April 10, 2017

OPINION

KAMP, J.

Pending before the court is the defendant Metro–North Commuter Railroad Company's motion for summary judgment on the ground that the plaintiff's sole cause of action sounding in common-law negligence is barred because it is preempted by federal law. For the reasons set forth below, the defendant's motion is granted.

FACTS

On December 2, 2013, the plaintiff, Jamey Murphy, individually and as executrix of the estate of Kevin Murphy, commenced this wrongful death action against the

defendants, Metro–North Commuter Railroad Company (Metro–North), Wilton Enterprises, Inc., and Town of Darien. On October 25, 2016, the plaintiff withdrew as to the defendants Wilton Enterprises, Inc. and Town of Darien. In the plaintiff's fifth amended complaint (docket entry no. 253), the plaintiff alleges the following facts. On March 4, 2013, the plaintiff's decedent, Kevin Murphy, was struck and killed by a Metro–North train. While walking on the southbound platform at the Noroton Heights station, Mr. Murphy slipped on an accumulation of ice which caused him to fall onto the tracks, where he was then struck and killed. The train that struck Mr. Murphy was a Metro–North train which was not scheduled to stop at Noroton Heights and was operating on the exterior track closest to the platform. Because the train was not scheduled to stop at Noroton Heights it was referred to as a "through train." The plaintiff alleges in the first count that Metro–North was negligent in that it operated the through train on a track immediately adjacent to the platform when reasonable care required Metro–North to select an interior track away from the platform. In the second count the plaintiff, individually, asserts a claim for loss of spousal consortium.

On October 24, 2016, Metro–North filed two motions in limine. The first sought an order "precluding any other party to this action from introducing evidence, testimony or argument in advance of any claim of negligence based on the speed of the train which struck plaintiff's decedent." (Docket entry no. 213.) The second motion in limine sought an order "precluding any other party to this action from introducing evidence, testimony or argument

that 'through trains,' including the train that struck the plaintiff's decedent, should not be run on tracks adjacent to station platforms." (Docket entry no. 214.)

On March 4, 2017, after hearing oral argument on the motions in limine, this court granted Metro–North's motion in limine with regard to the speed of the train. Specifically, this court held that "the Federal Railroad Safety Act (FRSA), 49 U.S.C. § 20101, specifically § 20106 and 49 C.F.R. § 213.9 preempt all state law claims." (Docket entry no. 213.10.) On that same date, this court granted the defendant's motion in limine with regard to the choice of track selection allegations. The court held that any such claims are preempted by the Interstate Commerce Commission Termination Act, 49 U.S.C. § 10101 (ICCTA). (Docket entry no. 214.10.)

On March 23, 2017, Metro–North filed a motion for summary judgment and accompanying memorandum in support, along with several supporting exhibits.[1] The plaintiff filed an objection to the defendant's motion on March 24, 2017.[2] The parties waived oral argument on the motion and objection thereto.

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1. The defendant's exhibits included (A) the M.T.A. Police Department Incident Report; (B) excerpts from the deposition of Peter Navarra; (C) excerpts from the deposition of George Gavalla; and (D) the safety analysis report prepared by George Gavalla dated July 20, 2016.

2. The plaintiff's exhibits included (A) the affidavit of George Gavalla and his safety analysis report dated July 20, 2016; (B) excerpts from the deposition of James Brandt; (C) technical memorandum California High–Speed Train Project; (C) excerpts

Appendix B

DISCUSSION

I

SUMMARY JUDGMENT STANDARD AND ARGUMENTS

"Summary judgment is a method of resolving litigation when pleadings, affidavits, and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law ... The motion for summary judgment is designed to eliminate the delay and expense of litigating an issue when there is no real issue to be tried ... However, since litigants ordinarily have a constitutional right to have issues of fact decided by a jury ... the moving party for summary judgment is held to a strict standard ... of demonstrating his entitlement to summary judgment." (Citation omitted; footnote omitted; internal quotation marks omitted.) *Grenier v. Commissioner of Transportation,* 306 Conn. 523, 534–35, 51 A.3d 367 (2012). "[T]he use of a motion for summary judgment to challenge the legal sufficiency of a complaint is appropriate when the complaint fails to set forth a cause of action and the defendant can establish that the defect could not be cured by repleading." (Internal quotation marks omitted.) *Ferri v. Powell–Ferri,* 317 Conn. 223, 236, 116 A.3d 297 (2015).

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from the deposition of George Gavalla; (D) a copy of *Battley v. Great West Casualty Ins. Co.,* United States District Court, Docket No. 14–494–JJB–SCR (M.D.La. January 12, 2015); and (D) a copy of *Battley v. Great West Casualty Ins. Co.,* United States District Court, Docket No. 14–494–JJB (M.D.La. March 18, 2015).

In the present case, the defendant asserts that as a result of the court's ruling on the motion in limine regarding track selection, the plaintiff no longer has a viable claim based upon Connecticut common-law negligence.[3] In response, the plaintiff maintains that the court's ruling that the track selection claim is expressly preempted by federal law was in error. More specifically, the plaintiff argues that unless there is a federal rule, regulation or statute that expressly dictates or mandates train track selection, claims based on Connecticut common law are not preempted.[4]

II

INTERSTATE COMMERCE COMMISSION TERMINATION ACT 49 U.S.C. § 10101

"In determining the nature and reach of federal preemption, Congress's intent is the ultimate touchstone ... Congress can indicate its preemptive intent either expressly through a statute's plain language, or impliedly through a statute's structure and purpose ... Regardless of how Congress indicates its intent, [courts] begin with the assumption that the historic police powers of the States are not to be superseded by the Federal Act unless

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3. The plaintiff has withdrawn its negligence claim regarding the speed of the train that was the subject of the court's ruling on the defendant's motion in limine. (Docket no. 213.10.)

4. Unlike the issue regarding the speed of the train both the plaintiff and defendant agree that there is no federal rule, regulation or statute that expressly governs train track selection.

that was the clear and manifest purpose of Congress ... [This] assumption applies with less force when Congress legislates in a field with a history of significant federal presence." (Citations omitted; internal quotation marks omitted.) *Elam v. Kansas City Southern Railway Co.*, 635 F.3d 796, 803–04 (5th Cir. 2011).

Congress has exercised broad regulatory authority over rail transportation for 130 years, since the Interstate Commerce Act (ICA) created the Interstate Commerce Commission (ICC) in 1887. "The ICA was 'among the most pervasive and comprehensive of federal regulatory schemes and has consequently presented recurring pre-emption questions from the time of its enactment.'" *Island Park, LLC v. CSX Transportation, Inc.*, 559 F.3d 96, 102 (2d Cir. 2009). In 1995, Congress enacted the Interstate Commerce Commission Termination Act (ICCTA), 49 U.S.C. § 10101. The ICCTA abolished the Interstate Commerce Commission and created a new Surface Transportation Board (STB) to regulate rail transportation. 49 U.S.C. § 10501(a)(1). The ICCTA creates exclusive federal regulatory jurisdiction and exclusive federal remedies. Specifically, the ICCTA provides:

> The jurisdiction of the [STB] over—
>
> (1) transportation by rail carriers, and the remedies provided in this part with respect to rates, classifications, rules (including car service, interchange, and other operating rules), practices, routes, services, and facilities of such carriers; and

> (2) the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are located, or intended to be located, entirely in one State,
>
> > *is exclusive*. Except as otherwise provided in this part, *the remedies provided under this part with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law.* (Emphasis added.) 49 U.S.C. § 10501(b).

Rail "transportation" is expansively defined to include: (A) a locomotive, car, vehicle, vessel ... property, facility, instrumentality, or equipment of any kind related to the movement of passengers or property, or both, by rail ... and (B) services related to that movement ..." 49 U.S.C. § 10102(9).

There is no reported Connecticut appellate authority regarding federal preemption pursuant to the ICCTA. In addition, the court was unable to find any reported authority either in the federal court system or any state court decisions regarding ICCTA preemption regarding a claim involving track selection. The present case appears to be one of first impression. Numerous courts other than in Connecticut, however, have spoken on the question of the scope of preemption under the ICCTA.

"[T]he plain language of Section 10501 reflects clear congressional intent to preempt state and local regulation of integral rail facilities. It is difficult to imagine a broader statement of Congress's intent to preempt state regulatory authority over railroad operations." (Internal quotation marks omitted.) *Green Mountain Railroad Corp. v. Vermont,* 404 F.3d 638, 645 (2d Cir. 2005). Accordingly, "the ICCTA completely preempts state law tort actions that 'fall squarely' under § 10501(b)." *Elam v. Kansas City Southern Railway Co., supra*, 635 F.3d 806. A state law will fall "squarely under" § 10501(b) if it "may reasonably be said to have the effect of managing or governing rail transportation ..." *Island Park, LLC v. CSX Transportation, Inc., supra*, 559 F.3d 102; see also *Elam v. Kansas City Southern Railway Co., supra*, 806–07 ("a state law tort remedy that would directly regulate a railroad's switching rates and services falls squarely under § 10501[b]").

In *Island Park, LLC v. CSX Transportation, Inc.*, the Second Circuit concluded that New York State's rail crossing closure order was not preempted under the ICCTA. *Island Park, LLC v. CSX Transportation, Inc., supra*, 559 F.3d 103–05. In that case, New York sought to terminate the use of a private roadway that traversed railroad tracks, which was used by Island Park to transport farm equipment to a field on the other side of the tracks. *Id.*, 99. New York, however, "[did] not seek to impose its authority over the tracks themselves or over 'rail carriers' that use the tracks. Rather, the result of the state regulation at issue ... [was] the termination of Island Park's use of the crossing." *Id.*, 103. "[A]lthough ICCTA's

pre-emption language is unquestionably broad, it does not categorically sweep up all state regulation that touches upon railroads-interference with rail transportation must always be demonstrated." *Id.*, 104. Closing a rail crossing to a non-rail carrier, that did not move passengers or property by rail; see 49 U.S.C. § 10102(9)(A); did not interfere with or burden rail operations. *Island Park, LLC v. CSX Transportation, Inc., supra*, 105. This case was thus distinguishable from the situations in *Green Mountain Railroad Co. v. Vermont, supra*, 404 F.3d 643–45, where a permit requirement was preempted because it interfered with rail operations, such as the construction of facilities, and in *Friberg v. Kansas City Southern Railway Co.,* 267 F.3d 439 (5th Cir. 2001), where an anti-blocking statute was preempted because of its interference with how a railroad operated its trains. *Id.*, 443. In that case, the court found that Texas's Anti–Blocking Statute, which regulated how long a train could occupy a rail crossing, was preempted, because "[r]egulating the time a train can occupy a rail crossing impacts, in such areas as train speed, length and scheduling, the way a railroad operates its trains, with concomitant economic ramifications ..." *Id.*

The STB itself, in *CSX Transportation, Inc.*— Petition for Declaratory Order, SBT Finance Docket No. 34662 (March 14, 2005) (*CSX I*), has discussed the scope of ICCTA preemption and recognized that its preemptive effect is "broad and sweeping." *CSX I, supra*, p. 7. In that decision, the STB granted CSXT's petition for a declaratory order that a D.C. Act, which placed restrictions on the transportation of certain classes of hazardous materials as well as empty hazardous materials

rail cars, was preempted by § 10501(b). *Id.*, pp. 2, 5. "[S]ection 10501(b) does not leave room for state and local regulation of activities related to rail transportation, including routing matters. As the courts have observed, [i]t is difficult to imagine a broader statement of Congress' intent to preempt state regulatory authority over railroad operations' than that contained in section 10501(b) ... Every court that has examined the statutory language has concluded that the preemptive effect of section 10501(b) is broad and sweeping, and that it blocks actions by states or localities that would impinge on the Board's jurisdiction or a railroad's ability to conduct its rail operations." (Citations omitted.) *Id.*, p. 7. "By enacting section 10501(b), Congress foreclosed state or local power to determine how a railroad's traffic should be routed." *Id.*, p. 8; see also *CSX Transportation, Inc.—Petition* for Declaratory Order, SBT Finance Docket No. 34662 (May 3, 2005) (*CSX II*) (reaffirming prior decision and denying requests for reconsideration) ("under the plain language of the statute, any state or local attempt to determine how a railroad's traffic should be routed is preempted").

In the present case, the plaintiff argues that her claims are not expressly preempted because there is no direct federal regulation or statute that governs track selection. Rather, the plaintiff argues that the defendant must submit competent evidence to establish that track selection issues are impliedly preempted which the defendant has failed to do. The existence or lack thereof of a federal regulation or statute regarding track selection is not necessary for the plaintiff's claims to be expressly preempted by § 10501(b). That statute provides the STB

with *exclusive* jurisdiction over the transportation of rail carriers and the remedies provided under that part with respect to rules, including operating rules, practices, and routes; see 49 U.S.C. § 10501(b)(1); as well as with respect to the operation of "spur, industrial, team, switching, or side tracks." See 49 U.S.C. § (b)(2). The selection of which track to use would clearly go to the heart of a railroad's operation of its rails and involves consideration of such things as routing and scheduling, operational decisions that a state *cannot* interfere with. See e.g., *Friberg v. Kansas City Southern Railway Co., supra*, 267 F.3d 443; *CSX I*, Docket No. 34662, *supra*, p. 7.

The plaintiff cites to the Connecticut Superior Court decision of *Lin v. National Railroad Passenger Corp.,* Superior Court, judicial district of New Haven, Docket No. CV–99–0431868–S (February 11, 2002, Zoarski, J.T.R.) [31 Conn. L. Rptr. 380], as authority for her argument that preemption should not apply. In *Lin,* the estate of a pedestrian brought a wrongful death action against the railroad arising from an accident in which the train struck the plaintiff's decedent while she was walking across a railroad trestle. *Lin v. National Railroad Passenger Corp., supra*. The court concluded that the plaintiff's claims with regards to inadequate walkways and fencing were not preempted because there was no clear congressional intent or mandate to preempt such causes of action. *Id.* This case is inapposite because it dealt with preemption under the Federal Railroad Safety Act, 49 U.S.C. § 20101, rather than the ICCTA, and involved claims not related to rail operation, or that would only incidentally effect rail transportation. See *Island*

Park, LLC v. CSX Transportation, supra, 559 F.3d 102. Furthermore, as will be discussed below, the plaintiff's claim would also be preempted under the FRSA.

Because the ICCTA completely preempts state law or actions that would attempt to manage rail operations or determine how a railroad's traffic should be routed, the plaintiff's claims with regards to track selection are expressly preempted.

III

FEDERAL RAILROAD SAFETY ACT 49 U.S.C. § 20101

The plaintiff's objection to the defendant's motion for summary judgment primarily focuses on the lack of a federal regulation or rule with regards to track selection and preemption under the Federal Railroad Safety Act of 1970 (FRSA), 49 U.S.C. § 20101 *et seq*. The plaintiff argues that her claim does not seek to manage rail operations, but rather, concerns rail safety, specifically with regards to the choice to use a track adjacent to a platform for a fast moving through train. To the extent that the plaintiff's claim is viewed as relating to rail safety, it is preempted by the FRSA.

"The purpose of [the FRSA] is to promote safety in every area of railroad operations and reduce railroad-related accidents and incidents." 49 U.S.C. § 20101. The FRSA confers authority upon the Secretary of Transportation to "prescribe regulations and issue

orders for every area of railroad safety." 49 U.S.C. § 20103(a). Preemption is specifically addressed by the FRSA and subsection (a)(1) sets forth the scope: "Laws, regulations, and orders related to railroad safety ... shall be nationally uniform to the extent practicable ..." 49 U.S.C. § 20106(a)(1). Subsection (a)(2) provides in relevant part that: "A State may adopt or continue in force a law, regulation, or order related to railroad safety ... until the Secretary of Transportation ... prescribes a regulation or issues an order covering the subject matter of the State requirement. A state may adopt or continue in force an additional or more stringent law, regulation, or order related to railroad safety ... when the law, regulation, or order—

> (A) is necessary to eliminate or reduce an essentially local safety ... hazard;
>
> (B) is not incompatible with a law, regulation, or order of the United States Government; and
>
> (C) does not unreasonably burden interstate commerce. 49 U.S.C. § 20106(a) (2).

Congress amended this provision in 2007 and added subsection (b) which provides in relevant part: (1) Nothing in this section shall be construed to preempt an action under State law seeking damages for personal injury, death, or property damage alleging that a party—

> (A) has failed to comply with the Federal standard of care established by a regulation or

> order issued by the Secretary of Transportation ... covering the subject matter as provided in subsection (a) of this section;
>
> (B) has failed to comply with its own plan, rule, or standard that it created *pursuant to a regulation or order issued by* [the Secretary of Transportation]; or
>
> (C) has failed to comply with a State law, regulation, or order that is not incompatible with subsection (a)(2).

(Emphasis added.) 49 U.S.C. § 20106(b)(1).

Courts have concluded that "the preemption analysis under the amended FRSA requires a two-step process. [A court] first ask[s] whether the defendant allegedly violated either a federal standard of care or an internal rule that was created pursuant to a federal regulation. If so, the plaintiff's claim avoids preemption ... Otherwise, [courts] move to the second step and ask whether any federal regulation covers the plaintiff's claim ... A regulation covers—and thus preempts—the plaintiff's claim if it 'substantially subsume[s] the subject matter' of that claim." (Citations omitted.) *Zimmerman v. Norfolk Southern Corp.,* 706 F.3d 170, 178 (3d Cir. 2013).

The plaintiff claims that the defendant was negligent in using a track adjacent to the platform for a through-train traveling in excess of 70 miles per hour. The defendant argues that this is actually an excessive speed claim in

disguise. The defendant's contention that the plaintiff's negligent track selection claim is inherently an excessive speed claim is persuasive. First, the speed of the train is an intrinsic part of the plaintiff's negligence allegation in her fifth amended complaint. Second, the plaintiff's railroad safety expert, George Gavalla, continuously references train speed and the specific speed of the train in question in his opinion for why the train should have been routed on an interior track. See Def.'s Mem. Summ. J., Ex. D. Gavalla discusses through trains versus trains making a scheduled stop and the different speeds in which they enter the station, to explain why faster moving and/or through trains should be placed on tracks that are not alongside platforms. *Id.*

It is therefore apparent that the track choice, by itself, is not the sole basis for negligence. Such a claim would of course be illogical, as trains *must* stop alongside a platform to discharge and pick up passengers. Rather, it is the fact that a track adjacent to a platform was used for a train traveling at a high *speed* that is objected to. The speed of the train is a necessary corollary to the plaintiff's claim. Accordingly, to the extent that the plaintiff's claim can be characterized as an excessive speed claim, it is expressly preempted because the train was traveling between 69–73 miles per hour, which is below the speed limit set forth for a Class 4 track, which is 80 miles per hour for a passenger train. See 49 C.F.R. § 213.9(a). There are clearly regulations that "cover the subject matter of train speed with respect to track conditions"; *CSX Transportation, Inc. v. Easterwood,* 507 U.S. 658, 675, 113 S.Ct. 1732, 123 L.Ed.2d 387 (1993); and the defendant

did not violate a federal standard of care, because the train was not traveling above the speed limit. See *Zimmerman v. Norfolk Southern Corp., supra*, 706 F.3d 179.

To the extent, however, that the plaintiff's claim cannot be characterized as an excessive speed claim, it would still be subject to express preemption under the FRSA. As both parties have conceded, there is no federal rule or regulation that specifically governs track selection. Accordingly, there is no federal standard of care for the defendant to have violated. Although the plaintiff alleges that the defendant "violated practices and customs" and argues in its objection to the defendant's motion that the defendant violated its "general practice" to operate through trains on interior tracks that does not equate to "an internal rule created pursuant to a federal regulation." See 49 U.S.C. § 20106(b)(1); see also *Middle River Tract, LLC v. Central of Georgia Railroad Co.,* 339 Ga.App. 546, 549 (2016) ("[t]he flaw in this reasoning ... is that [the plaintiff's] claims are preempted unless Standard 425 was 'created pursuant to a regulation or order issued by [the Secretary of Transportation]' ... and the record fails to establish that it was" [citation omitted]; *Zimmerman v. Norfolk Southern Corp., supra*, 706 F.3d 192 n.17 ("Zimmerman also identifies a number of internal rules that Norfolk Southern supposedly violated. These supposed violations do not help Zimmerman avoid preemption because he fails to show the internal rules were 'created pursuant to a regulation or order' ").

Finally, even though there is not a federal regulation that specifically covers track selection, the federal

regulations in regards to tracks is extensive and, therefore, subsume the subject matter of the plaintiff's claim. See *Zimmerman v. Norfolk Southern Corp., supra*, 706 F.3d 187. In the absence of a federal standard of care, a plaintiff may still avoid preemption if their claim falls outside the scope of the first section of the FRSA preemption provision. See 49 U.S.C. § 20106(a)(2); see also *Zimmerman v. Norfolk Southern Corp., supra*, 187. Claims fall within the scope of this section "if federal regulations 'cover' or 'substantially subsume' the subject matter of the claims." *Zimmerman v. Norfolk Southern Corp., supra*, 187. In *Zimmerman,* the court found that the plaintiff's claim that the track at issue had been misclassified because of the limited sight distance was preempted because although there was no federal standard of care, the regulations of 49 C.F.R. § 213 *et seq.*, subsumed his claim. *Id.* "The regulations are part of a broad scheme to standardize railroad tracks. Admittedly, there is no regulation that classifies tracks based on sight distance. But the breadth of the scheme implies a decision not to classify on that basis. At the very least, it implies that the federal government did not want states to decide how tracks would be classified." *Id.*

The regulations in this part establish requirements for each class of tracks, governing everything from speed limits, gage, alignment, and elevation to crossties, curve speed, and rail joints, as well as how tracks should be inspected. See 49 C.F.R. § 213.9 (establishing operating speed limits for each class of track); § 213.53 (explaining proper method for measuring gage); § 213.55 (creating alignment standards); § 213.57 (establishing maximum

speed based on track elevation and curvature); § 213.109 (requiring more crossties for higher track classes); § 213.121 (noting rail joints must "be of a structurally sound design"); § 213.231 (subpart prescribing requirements for frequency and manner of track inspections). As in *Zimmerman,* the plaintiff's track selection claim is subsumed by this regulatory scheme. Although there is no regulation that classifies tracks on the basis of track selection, such as the choice of using an exterior or interior track, "the breadth of the scheme implies a decision not to classify on that basis." *Zimmerman v. Norfolk Southern Corp., supra*, 706 F.3d 187. As part of an overall scheme to standardize railroad transportation and specifically as a scheme that expansively covers railroad track safety; see 49 U.S.C. § 213.1 ("[t]his part prescribes minimum safety requirements for railroad track that is part of the general railroad system of transportation"); the subject matter of the plaintiff's claim is clearly "covered" *and* "substantially subsumed" by these federal regulations. See *Zimmerman v. Norfolk Southern Corp., supra*, 187. The plaintiff's track selection claim is therefore preempted by this regulatory scheme.

CONCLUSION

For the foregoing reasons, the defendant's motion for summary judgment is granted.

APPENDIX C — RELEVANT STATUTORY AND REGULATORY PROVISIONS

49 U.S.C. § 20101

Purpose

The purpose of this chapter is to promote safety in every area of railroad operations and reduce railroad-related accidents and incidents.

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49 U.S.C. § 20106

Preemption

(a) National uniformity of regulation.--

(1) 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.

(2) 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), or the Secretary of Homeland Security (with respect to railroad security matters), prescribes a regulation or issues an order covering the subject matter of the State requirement. A State may adopt or continue in force an additional or more stringent law, regulation, or order related to railroad safety or security when the law, regulation, or order--

(A) is necessary to eliminate or reduce an essentially local safety or security hazard;

(B) is not incompatible with a law, regulation, or order of the United States Government; and

(C) does not unreasonably burden interstate commerce.

(b) Clarification regarding State law causes of action.--

(1) Nothing in this section shall be construed to preempt an action under State law seeking damages for personal injury, death, or property damage alleging that a party--

(A) has failed to comply with the Federal standard of care established by a regulation or order issued by the Secretary of Transportation (with respect to railroad safety matters), or the Secretary of Homeland Security (with respect to railroad security matters), covering the subject matter as provided in subsection (a) of this section;

(B) has failed to comply with its own plan, rule, or standard that it created pursuant to a regulation or order issued by either of the Secretaries; or

(C) has failed to comply with a State law, regulation, or order that is not incompatible with subsection (a)(2).

(2) This subsection shall apply to all pending State law causes of action arising from events or activities occurring on or after January 18, 2002.

(c) Jurisdiction.--Nothing in this section creates a Federal cause of action on behalf of an injured party or confers Federal question jurisdiction for such State law causes of action.

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49 C.F.R. § 213.9

Classes of track: operating speed limits

(a) Except as provided in paragraph (b) of this section and §§ 213.57(b), 213.59(a), 213.113(a), and 213.137(b) and (c), the following maximum allowable operating speeds apply—

[In miles per hour]

Over track that meets all of the requirements prescribed in this part for—	**The maximum allowable operating speed for freight trains is—**	**The maximum allowable operating speed for passenger trains is—**
Excepted track	10	N/A
Class 1 track	10	15
Class 2 track	25	30
Class 3 track	40	60
Class 4 track	60	80
Class 5 track	80	90

(b) If a segment of track does not meet all of the requirements for its intended class, it is reclassified to the next lowest class of track for which it does meet all of the requirements of this part. However, if the segment of track does not at least meet the requirements for

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Class 1 track, operations may continue at Class 1 speeds for a period of not more than 30 days without bringing the track into compliance, under the authority of a person designated under § 213.7(a), who has at least one year of supervisory experience in railroad track maintenance, after that person determines that operations may safely continue and subject to any limiting conditions specified by such person.