NO. 21-_____

In the Supreme Court of the United States

CITY OF EDMOND, ET AL.,

Petitioners,

v.

BNSF RAILWAY COMPANY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

When trains block traffic at road intersections, they impose numerous safety risks. Oklahoma enacted a statute prohibiting trains from stopping where rails cross streets or highways for more than ten minutes, subject to certain exceptions. Despite the safety concerns caused by blocked crossings, over which state authority is preserved by the Federal Railroad Safety Act ("FRSA"), 49 U.S.C. § 20106(a)(2), the Tenth Circuit found Oklahoma's statute preempted under the Interstate Commerce Commission Termination Act, 49 U.S.C. § 10501(b) ("ICCTA").

The questions presented are:

1. In determining whether a state law affecting railroads is preempted, may a court look only to the ICCTA, as the Fifth and Tenth Circuits have held, or must courts also consider all other relevant federal railroad statutes (such as the FRSA), as the Second, Sixth, Eighth, Ninth and D.C. Circuits have held?

2. Does state authority over rail safety, expressly preserved by the FRSA, include public safety at rail crossings, as the Eighth Circuit holds with agreement from the relevant federal agency, or is it limited to state regulation of the safety of participants in the railroad system, as the Tenth Circuit held?

PARTIES TO THE PROCEEDINGS

Petitioners

City of Edmond; City of Davis; Commissioners Todd Hiett, Bob Anthony, and Dana Murphy, in their respective official capacities at the Oklahoma Corporation Commission; and John M. O'Connor,* in his official capacity as Oklahoma Attorney General, are petitioners here and were defendants-appellants below.

Respondent

BNSF Railway Company is respondent here and was plaintiff-appellee below.

* General O'Connor is substituted for his predecessor in the same public office. *See* S. Ct. R. 35.3.

LIST OF PROCEEDINGS

U.S. Circuit Court of Appeals for the Tenth Circuit
Nos. 21-6000, 21-6005
BNSF Railway Co. v. City of Edmond, et al.
Date of Final Opinion: January 11, 2022

U.S. District Court for the Western District of Oklahoma
No. CIV-19-769
BNSF Railway Co. v. City of Edmond, et al.
Date of Judgment and Sentencing: November 30, 2020

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OPINIONS BELOW

The Tenth Circuit opinion dated January 11, 2022 is reproduced in the Appendix at App.1a-13a and published at 22 F.4th 1190. The district court opinion dated November 30, 2020, is reproduced in the Appendix at App.14a-39a and published at 504 F.Supp.3d 1249.

JURISDICTION

The judgment of the Tenth Circuit was entered on January 11, 2022. App.1a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

STATUTORY PROVISIONS INVOLVED

Okla. Stat. tit. 66, § 190 (in relevant part)

> A. As it is immediately necessary for the safety and welfare of the people, no railcar shall be brought to rest in a position which blocks vehicular traffic at a railroad intersection with a public highway or street for longer than ten (10) minutes.
>
> [* * *]
>
> C.
>
> 1. Railroads or other persons, firms or corporations operating over tracks within the State of Oklahoma shall not block vehicle traffic at any railroad grade crossing for a period of time in excess of ten (10) minutes except if the train is moving in a continuous forward or backward direction, or if the train is stopped for an emergency condition, including an accident, derailment, critical mechanical failure, track or bridge washout, storm, flood or other emergency situation.

Interstate Commerce Commission Termination Act ("ICCTA")
49 U.S.C. § 10501(b) (in relevant part)

> The jurisdiction of the Board over . . .
>
> (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.

Federal Railroad Safety Act ("FRSA")
49 U.S.C. § 20106(a)(2) (in relevant part)

> A State may adopt or continue in force a law, regulation, or order related to railroad safety or security until the Secretary of Transportation (with respect to railroad safety matters), 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.

STATEMENT OF THE CASE

The FRSA confers jurisdiction over rail safety on the Federal Railroad Administration ("FRA") and the states, with state power reaching any subject within that jurisdiction that the FRA has not addressed in a regulation or order. Oklahoma adopted a blocked crossing statute after the FRA had acknowledged jurisdiction over blocked crossings but had not issued any regulations or orders regarding them despite years of study.

Notwithstanding the FRA's acknowledgment of jurisdiction, the Tenth Circuit concluded that a different federal agency has jurisdiction over blocked crossings and found Oklahoma's law preempted as a result. The Tenth Circuit held that Oklahoma's safety law is preempted because it fell within the Surface Transportation Board's ("STB's") jurisdiction over rail construction and operation under the ICCTA, without any need to look to the FRSA.

In reaching this conclusion, the Tenth Circuit not only joined one circuit split and created another, but it also eviscerated the FRA's jurisdiction. The Tenth Circuit joined the wrong side of a deep and pervasive circuit split on whether the FRSA limits ICCTA preemption over state rail operation and construction laws. The Tenth Circuit then created a second circuit split by holding that the FRSA applies only to safety of those participating in the railroad industry, to the exclusion of others interacting with the rail system, such as motorists at rail-street intersections. The Tenth Circuit's position in both splits

is directly contrary to the FRA's acknowledgment of its jurisdiction over blocked crossings.

Whether the FRSA gives the FRA and the states rail safety authority that affects construction and operation of rails is a critical question to all states, including Oklahoma. This court should address this important issue and resolve both circuit splits.

A. Statutory Background.

Federal railroad law consists of a series of statutes, each defining different agencies and each with different standards delineating when federal regulation preempts state law. Identifying which agency has jurisdiction over a particular issue, like the safety concerns from blocked crossings, is thus key to knowing which statute applies and which preemption clause applies.

This case asks which of two federal agencies has jurisdiction over the safety issues posed by stopped trains at railroad crossings with public streets. The first agency, the Federal Railroad Administration ("FRA"), is governed by the Federal Railroad Safety Act ("FRSA"), which explicitly preserves state authority except in certain circumstances where the FRA has issued a regulation. *See* 49 U.S.C. § 20106(a)(2). The second agency, the Surface Transportation Board ("STB"), is governed by the Interstate Commerce Commission Termination Act ("ICCTA") and its broad preemption clause. *See* 49 U.S.C. § 10501(b). The first of these statutes to be enacted was the FRSA.

Prior to the FRSA, the Interstate Commerce Commission had jurisdiction over much of railroad law, but no federal agency had jurisdiction over safety

at highway-rail grade crossings.[1] In 1965, a three-judge court concluded the then-extant Interstate Commerce Commission lacked jurisdiction over crossings. *Am. Trucking Ass'ns, Inc. v. United States*, 242 F.Supp. 597, 599 (D.D.C. 1965). It held that "jurisdiction to establish safety regulations with respect to rail-highway grade-crossing matters resides exclusively in the states." *Id.* at 601. This Court affirmed. *See Am. Trucking Ass'ns, Inc. v. United States*, 382 U.S. 373, 373 (1966). In other words, as the three-judge court stated, "[a]uthority over public safety at rail-highway grade-crossings has been ruled by the Supreme Court of the United States as peculiarly within the police power of the states." *Am. Trucking Ass'ns, Inc.*, 242 F.Supp. at 599.[2]

Congress never enacted any statute giving regulatory power over rail safety to the Interstate Commerce Commission. Instead, four years after the *American Trucking* decisions, Congress enacted the FRSA, which created the FRA and gave the new agency jurisdiction over crossings. The statute gave the FRA a rail safety jurisdiction that includes "every area of railroad operations," including crossings. 49 U.S.C. § 20101. Such jurisdiction makes sense because safety is inevit-

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[1] The term "highway-rail grade crossing" refers to an intersection where a road crosses a railroad at the same level as the railroad as opposed to crossing over or under it. *See Highway-Rail Grade Crossings Overview*, Fed. Railroad Admin., https://railroads.dot.gov/program-areas/highway-rail-grade-crossing/highway-rail-grade-crossings-overview.

[2] To be sure, the Interstate Commerce Commission sometimes included crossing provisions in merger and acquisition ("M&A") orders under its plenary M&A power, but it never asserted power to regulate crossings more generally, leaving that power to the States.

ably about the manner in which a railroad company builds and operates. This statute also permitted states to "adopt or continue in force" laws "related to railroad safety" unless and until the FRA "prescribes a regulation or issues and order covering the subject matter of the State requirement." *Id.* § 20106(a)(2).

Twenty years later, Congress terminated the Interstate Commerce Commission by enacting the aptly named Interstate Commerce Commission Termination Act (ICCTA), transferring the Commission's regulatory power over railroads to the STB. It defined the STB's jurisdiction as encompassing "all functions that, immediately before January 1, 1996, were functions of the Interstate Commerce Commission or were performed by any officer or employee of the Interstate Commerce Commission in the capacity as such officer or employee." 49 U.S.C. § 1302. It then addressed whether that jurisdiction was exclusive depending on the topic area. In relevant part, the ICCTA states that "[t]he jurisdiction of the Board over" such topics as "construction" or "operation" of rails "is exclusive." 49 U.S.C. § 10501(b).

In enacting the ICCTA, Congress altered some but not all the powers reserved to states. For example, it repealed a savings clause about state regulation of intrastate rates, and it repealed a clause denying the Commission authority over certain intrastate tracks. *Compare* Pub. L. 96-448, at 19-20, 94 Stat. 1913-14 (Oct. 14, 1980) (former 49 U.S.C. § 11501), *and* Pub. L. 95-473, at 71, 92 Stat. 1407 (Oct. 17, 1978) (former 49 U.S.C. § 10907), *with* Pub. L. 104-88, at 2, 109 Stat. 804 (Dec. 29, 1995) (repealing and replacing that subchapter of title 49).

Nevertheless, Congress did not modify or repeal the FRSA and its savings clause or otherwise address the FRSA's relationship to the ICCTA. Both the

ICCTA's preemption clause and the FRSA's savings clause remain in Title 49 of the U.S. Code. And, critically, while the ICCTA transferred the ICC's authority to the STB, it did not expand that authority to include safety at highway-rail grade crossings.

B. Facts and Procedural History.

1. Blocked crossings are a safety issue. A paramedic in Davis, Oklahoma, for example, has been forced to jump between rail cars of a stopped train to reach a patient in time to save them from a life-or-death anaphylactic shock. *See* J.A.1 160, J.A.2 401-403.[3] Firefighters in Marietta, Oklahoma have arrived late to structure fires due to blocked crossings. *See* J.A.1 163; J.A.2 405-406. Paramedics in Marietta are also frequently delayed from reaching patients due to blocked crossings. *See* J.A.1 166-167, J.A.2 408-409. Emergency service vehicles in Davis, Oklahoma, can take almost 37 minutes to reach sites two-and-a-half blocks away because of a blocked crossing forcing them onto alternative routes. *See* J.A.1 171; J.A.2 411-412.

Persistent blocked crossings have also caused residents to take more risks with crossings, increasing the chances for collisions with trains and jeopardizing the safety of both the motorist and those on the rail. For example, a resident of Davis told the police department that she drove around cones at a coned-off crossing because the Main Street crossing was blocked. *See* J.A.1 174.

The FRA has explained that blocked crossings are a rail safety issue based on similar facts. J.A.1 155. It has cited pedestrians crawling under or through trains,

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[3] All fact citations are to the record in the Tenth Circuit, which is available below and cited herein as "J.A." *See* Sup. Ct. R. 12.7.

emergency vehicles being delayed, and drivers driving around closed gates or racing to beat trains to avoid lengthy delays. *Id.*

Despite these safety issues, respondent BNSF has refused to take any meaningful action to address blocked crossings. It has not even tracked when its trains block crossings, let alone investigated the causes of such blockages. *See* J.A.1 187. In fact, it blocks crossings so routinely that it complains about the cost of tracking the blockages. J.A.2 423. Nor are these blockages necessitated by federal regulations or emergency concerns. One of respondent's regional vice presidents admitted that BNSF has blocked traffic at a highway-rail crossing so that an employee could grab a cup of coffee. *See* J.A.1 201; *see also* J.A.1 200 (testimony referenced by the Regional VP).

2. In 2019, the Oklahoma Legislature passed a law to address the safety issues resulting from blocked crossings in Oklahoma. *See* Okla. Stat. tit. 66, § 190 (the "Blocked Crossing Statute"). The statute prohibits trains from stopping in a manner that blocks vehicle traffic at any railroad crossing for more than 10 minutes, subject to certain exceptions. *See id.* This statute became effective on July 1, 2019. *See id.*

3. On July 16, 2019, BNSF stopped a train in three intersections in Davis, Oklahoma, for 38 minutes. On July 17, 2019, BNSF stopped a train in an intersection in Edmond, Oklahoma, for 80 minutes. On July 29, 2019, BNSF again stopped a train again in an intersection in Edmond, this time for 37 minutes.

The cities of Edmond and Davis issued citations to BNSF under the Blocked Crossing Statute and initiated proceedings before the administrative law judges of the Oklahoma Corporation Commission. J.A.1

15-27. No adjudication of the citations occurred before BNSF sued the cities and the Commissioners in the district court, alleging that the Blocked Crossing Statute was facially preempted by federal law.

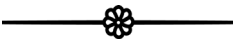
The Oklahoma Attorney General intervened in defense of the state law. On cross-motions for summary judgment, the district court held that the state statute is facially preempted by the ICCTA, 49 U.S.C. §§ 10101 *et seq.*, and permanently enjoined enforcement of the state statute. App.38a-39a.

4. Defendants appealed to the Tenth Circuit. The Tenth Circuit believed that "[t]he plain language is clear" that "the STB has exclusive jurisdiction over the operation of side tracks in Oklahoma" and stated that it need not look at other federal statutes "[b]ecause the ICCTA is unambiguous." App.7a (citing 49 U.S.C. § 10501(b)). It expressly approved of the Fifth Circuit's analysis applying the ICCTA to preempt a state blocked-crossing statute in *Friberg v. Kan. City S. Ry. Co.*, 267 F.3d 439, 443-44 (5th Cir. 2001). App.7a-8a. Because, in its view, "the ICCTA preempts the Blocked Crossing Statute," the Tenth Circuit stated it "need not consider whether the FRSA does too." App.9a.

Nonetheless, addressing petitioners' argument that the ICCTA must be analyzed *in pari materia* with the FRSA, the Tenth Circuit held that the FRSA was wholly inapplicable because the Blocked Crossing Statute "concerns *public* safety, not rail safety." App. 10a. It acknowledged that the STB and FRA agree that these agencies have separate jurisdictions with separate preemptive scope. App.11a. It also acknowledged the Eighth Circuit's view that the FRSA's purview over rail safety "include[s] the highway safety risks created at rail crossings." App.13a. But it then tried to distinguish the Eighth Circuit's holding on the ground that its

sister circuit only considered facts relating to rail construction, not facts relating to rail operation, when defining the scope of the FRSA's preservation of state authority over rail safety. App.13a.

Thus, the Tenth Circuit affirmed the district court, stating that "the district court properly analyzed whether the ICCTA, and not the FRSA, preempts the Blocked Crossing Statute." App.13a.



REASONS FOR GRANTING THE PETITION

The decision below rested on two holdings, each of which is the subject of a circuit split. First, the Tenth Circuit held that because the language of the ICCTA read in isolation preempted the Blocked Crossing Statute, it need not consider whether the ICCTA's scope is informed by the FRSA. This mode of analysis aligned with the Fifth Circuit, but departed from the Second, Sixth, Eighth, Ninth, and D.C. Circuits. Second, the Tenth Circuit held that the FRSA, in any event, is not implicated because blocked crossings are not a "rail safety" issue since they (in the Tenth Circuit's view) only jeopardize the safety of the public's interactions with the railroads, not the safety of the railroad system or its participants. That holding conflicts with a prior decision of the Eight Circuit on the scope of the FRSA's purview over rail safety. Certiorari is warranted to resolve this division among lower courts and address the frequently recurring and important issue of safety at the intersection between public roads and railroads.

I. CERTIORARI IS WARRANTED TO RESOLVE A 5-2 SPLIT AMONG FEDERAL COURTS OF APPEALS ON THE SCOPE OF ICCTA PREEMPTION.

A brief recap of the statutory history and scheme is warranted. *First*, the basis of the STB's jurisdiction conferred by the ICCTA is that which was transferred from the now-defunct Interstate Commerce Commission ("ICC"). 49 U.S.C. § 1302. That transferred jurisdiction did *not* include jurisdiction over safety issues at highway-rail grade crossings. *Am. Trucking Ass'ns, Inc. v. United States*, 242 F.Supp. 597, 599 (D.D.C 1965), *aff'd* 382 U.S. 373 (1966). *Second*, the jurisdiction granted to the STB, to the extent such jurisdiction is over rail "construction" or "operations," is "exclusive." 49 U.S.C. § 10501(b). *Third*, the FRSA vests the FRA with jurisdiction over "every area of railroad safety" so as "to promote safety in every area of railroad operations." 49 U.S.C. §§ 20101, 20103; 49 C.F.R. § 1.89(a). But this jurisdiction is not exclusive—the FRA preserves traditional state authority "related to railroad safety" until the FRA "prescribes a regulation or issues an order covering the subject matter of the State requirement." 49 U.S.C. § 20106(a)(2).

The question thus facing courts is: when a safety regulation affects railroad "operations" or "construction," is it within the jurisdiction of the STB pursuant to the ICCTA? If so, because the STB's jurisdiction is exclusive, it would oust not only state authority over that safety issue, but also the FRA's authority, thereby implicitly repealing the FRSA's coverage of safety over "every area of railroad operations." And it would expand the scope of the STB's exclusive jurisdiction over railroad operations and construction to include railroad safety issues, which was not within the ICC's former jurisdiction transferred to the STB.

This is how the Tenth Circuit ruled. It joined the Fifth Circuit in interpreting the scope of the ICCTA as covering all aspects of railroad operations, regardless of whether the operational issue is also a safety issue that would be covered by the FRSA. App.8a-9a. In contrast, the Second, Sixth, Eighth, Ninth, and D.C. Circuits have all limited the scope of ICCTA in part by harmonizing it with the FRSA's savings clause that preserves traditional state authority over railroad safety. App.9a. Resolving this circuit split will have significant consequences for states' ability to protect against railroad hazards and warrants this Court's review.

Contrasting the Tenth Circuit's holding with the Eighth Circuit's rule illuminates the disagreement. The Tenth Circuit below held that the Blocked Crossing Statute is preempted because it affects railroad "operations," and is thus within the purview of the ICCTA, so it need not look any further. *See* App.9a. The Eighth Circuit, in contrast, denounced that mode of analyzing the ICCTA as "deceptively simple" because it reads the ICCTA out of context of the rest of federal railroad law. *Iowa, Chicago & E. R.R. Corp. v. Washington Cty., Iowa*, 384 F.3d 557, 559 (8th Cir. 2004). That court concluded that the better reading of the ICCTA is that the STB has exclusive jurisdiction over rail operations issues passed from the Interstate Commerce Commission's jurisdiction, not that the STB's jurisdiction encompasses all operational choices including those within the jurisdiction of preexisting federal agencies. *See id.* at 559-60. As it explained, reading the ICCTA to commit all railroad operational choices to the STB—like the Tenth Circuit did below—"ignores relevant federal statutes that were enacted before ICCTA, that are administered by one or more

agencies other than the [Interstate Commerce Commission] or the STB, and that Congress left intact in enacting ICCTA." *Id.* at 559.

The Ninth Circuit similarly read the ICCTA as only addressing the exclusivity of the STB's jurisdiction, not as defining the STB's jurisdiction to encompass all regulations related to rail construction and operations. "Despite the broad 'preemption' language of § 10501(b) of the ICCTA, and consistent with the jurisprudence on 'implicit repeals,' courts and the STB have routinely held that the ICCTA does not repeal particular federal statutes and the remedies provided thereunder." *Swinomish Indian Tribal Cmty. v. BNSF Ry. Co.*, 951 F.3d 1142, 1157 (9th Cir. 2020). This conclusion is unsurprising because the ICCTA "generally does not attempt to substantively redesign rail regulation." S. Rep. 104-176, 1st Sess. (1995), 1995 WL 701522, at *6. The Ninth Circuit cited with approval eight different cases, all of which held that the ICCTA does *not* confer railroad operational decisions to the STB that were previously conferred to other federal agencies under different statutes. *Swinomish*, 951 F.3d at 1157. As it observes, concluding that the ICCTA gave the STB jurisdiction over all railroad operations conferred to other federal agencies would repeal not only the FRSA but also portions of the Clean Air Act, Coal Industry Health Benefits Act, and Hazardous Materials Transportation Act, among other statutes. *See id.*

The Sixth Circuit reached a similar conclusion. *See Tyrrell v. Norfolk S. Ry. Co.*, 248 F.3d 517, 523 (6th Cir. 2001). The court held in *Tyrrell* that any state law that has a "connection with" rail safety is governed by the FRSA, even if it does not mention safety, and even if it does not have a safety-related

purpose. *See id.* Based on that rule, the court criticized the district court on review for converting everything involving railroads into an ICCTA issue. *See id.* at 522. The Sixth Circuit concluded that a law affecting rail operations is *not* an ICCTA issue if the law has a connection with rail safety. *See id.*

The D.C. Circuit agreed with that description of the relationship between the FRSA and the ICCTA. *See Bos. & Maine Corp. v. Surface Transp. Bd.*, 364 F.3d 318, 320-21 (D.C. Cir. 2004). It held that the rehabilitation of rail lines—rail construction, a topic listed in the ICCTA—was committed to the FRA and not the STB because of the FRA's jurisdiction over "matters relating to safety." *See id.*

The Second Circuit made explicit that it was joining the growing chorus among the circuits of not applying the ICCTA to rail safety issues. *Island Park, LLC v. CSX Transp.*, 559 F.3d 96, 107 (2d Cir. 2009). "Several circuits that have examined the interplay between ICCTA and FRSA have concluded that the federal statutory scheme places principal federal regulatory authority for rail safety with the Federal Railroad Administration ("FRA"), not the STB. We agree." *Id.* It then declined to apply the ICCTA, concluding that "FRSA provides the appropriate basis for analyzing whether a state law, regulation or order affecting rail safety is pre-empted by federal law." *Id.*; *see also id.* at 108 ("the [order on review] sufficiently implicates rail safety concerns such that FRSA and not ICCTA is the principal governing statute in determining whether state authority is pre-empted").

In contrast to these five circuits, the Fifth Circuit held the ICCTA impliedly repealed the FRSA. It concluded that the ICCTA conferred all issues affecting railroad operations to the STB, reading the ICCTA's

preemption clause without any reference to the rest of the ICCTA or federal railroad law. *See Friberg*, 267 F.3d at 443. The Fifth Circuit assumed that because it believed the ICCTA's preemption clause was clear, it did not need to look at any other federal statutes. *See id.*

The Tenth Circuit agreed. It repeatedly quoted from *Friberg* and other related Fifth Circuit cases to emphasize that blocked railroad crossing laws "impose operating limitations on a railroad" and that "[b]ecause the ICCTA preempts the Blocked Crossing Statute, we need not consider whether the FRSA does too." App.9a. Neither the Fifth Circuit nor the Tenth Circuit ever explain how they decided which federal statute to look at first when using this statutory interpretation method.

To be sure, as the Tenth Circuit observed, only the Fifth Circuit was addressing railroad operation, while the other circuits were addressing railroad construction. App.9a n.4. But contrary to the Tenth Circuit's implication, no reasonable interpretation of those two statutes would hold that the FRSA reaches construction but not operation issues. The ICCTA broadly states that "[t]he jurisdiction of the Board over" such topics as "construction" or "operation" of railroads "is exclusive"—without distinguishing between construction and operation. 49 U.S.C. § 10501(b). And the FRSA states that it reaches "every area of railroad operations." 49 U.S.C. § 20101. If the ICCTA implicitly repeals the FRSA, then it does so for both "construction" and "operation." On the other hand, if it co-exists with the FRSA for "construction," then it likewise co-exists with the FRSA for "operation."

The Tenth Circuit is also correct—and respondent is sure to point out—that courts have largely shown

distaste for state blocked-crossing statutes and favored the Fifth Circuit's legal interpretation when presented with similar facts. There are around two dozen cases from state courts and federal district courts adopting the Fifth Circuit's rationale when presented with a blocked crossing statute. But it simply cannot be ignored that, in a variety of other factual contexts most federal circuits have embraced a contrary legal interpretation to that of the Fifth and Tenth Circuits. Both lines of jurisprudence cannot be correct because, unlike common law rules, the meaning of these federal statutes does not vary with the underlying factual application. *See United States v. Santos*, 553 U.S. 507, 522 (2008). "To hold otherwise 'would render every statute a chameleon,' and 'would establish within our jurisprudence . . . the dangerous principle that judges can give the same statutory text different meanings in different cases." *Id.* at 522-23 (quoting *Clark v. Martinez*, 543 U.S. 371, 382, 386 (2005)) (internal citations omitted). This case, in short, presents a clear circuit split on an important legal issue.

Saying there is "no split" regarding blocked crossings, App.9a n.4, ignores that there is a split in statutory interpretation. In other words, while the courts that have adopted the minority legal rule are unanimous on how that rule applies to state blocked-crossing statutes, the majority of courts reject the minority's view of the law. The majority view would lead to a different result when applied to blocked crossings. The Tenth Circuit's legal position is not reconcilable with the prevailing legal rule in its sister circuits—published decisions that apply in any fact pattern, whether operation or construction of rails. Statutory interpretation is an exercise in reading statutes, not in counting heads for judgments on the same facts.

This Court's intervention is sorely needed to resolve the split. If the Fifth and Tenth Circuits are correct, then their sister circuits are giving the FRA and states far too much authority over rails. In contrast, if the Second, Sixth, Eighth, Ninth, and D.C. Circuits are correct, then the Fifth and Tenth Circuits are unreasonably legislating away important state power and the jurisdiction of the FRA. Only this Court can resolve the proper division of authority between the ICCTA and the FRSA.

II. CERTIORARI IS ALSO WARRANTED TO RESOLVE THE CIRCUIT SPLIT CREATED BY THE DECISION BELOW REGARDING THE SCOPE OF RAIL SAFETY COVERED BY THE FRSA.

Perhaps seeking to avoid resting its decision solely on a legal ruling that is the subject of a profound circuit split, the Tenth Circuit further held that the FRSA need not be considered because threats to public safety at the rails—such as blocked crossings—do not implicate "rail safety" covered by the FRSA. But in so holding, the court below created a new split over the meaning of "rail safety" for purposes of the FRSA. The existence of two circuit splits over the same essential subject—what authority Congress conferred on various federal agencies and states over railroads—indicates a progressively fracturing problem in need of a unified solution from this Court.

In reconciling the ICCTA with the FRSA, the Eighth Circuit has held that the term "rail safety" in the FRSA includes the safety risks on both the highway and the rails wherever they cross. *Iowa, Chicago & E. R.R. Corp.*, 384 F.3d at 560. "If [the plaintiff railroad] is arguing that 'rail safety' for purposes of FRSA preemption does not include the highway safety risks created at rail crossings, that cramped reading of the

FRSA is inconsistent with 49 U.S.C. § 20134(a), with the federal rail crossing regulations discussed in [*CSX Transp., Inc. v. Easterwood*, 507 U.S. 658 (1993)], and with common sense." *Id.* By contrast, an intermediate California state court has decided that safety risks on the highway where it intersects with the rails only concern public safety and are *not* within the term "rail safety" in the FRSA. *See People v. Burlington N. Santa Fe R.R.*, 148 Cal. Rptr. 3d 243, 253 (2012).

The Tenth Circuit sided with the intermediate California court over its sister circuit, holding that the term rail safety does not include the public safety risks at highway-rail crossings. App.12a. After acknowledging that the Eighth Circuit held that "highway safety risks created at rail crossings" are within the scope of FRSA's "rail safety," and thus within state rail safety jurisdiction, the Tenth Circuit then tried to distinguish the Eighth Circuit opinion from the facts of this case to avoid a split. App.13a. Its attempts to sidestep the Eighth Circuit's decision are unavailing.

First, the Tenth Circuit tried to argue that the Eighth Circuit's comments on the FRSA are dicta. App.13a. That is not true: the Eighth Circuit raised the FRSA *sua sponte* to reject an argument about ICCTA preemption—the exact argument at issue here. *See Iowa, Chicago & E. R.R. Corp.*, 384 F.3d at 560-61. To be sure, the FRSA was not the *only* statute barring application of the ICCTA, *see id.*, but the FRSA's relevance in that case applies with equal force to this case. Indeed, the Eighth Circuit summarized the railroad's arguments as that highway safety issues were ICCTA and not FRSA issues. *See id.* at 560. The asserted problems were the risks to "school buses and emergency vehicles"—the same as Oklahoma's

problems. *Compare id.*, *with supra* p.8. It is difficult to see any genuine distinction between that opinion's "highway" safety concerns and the Tenth Circuit's "public" safety concerns.

Second, the Tenth Circuit tried to argue that the Eighth Circuit's facts were better suited for rail safety because deteriorating bridges "may create potential hazards to the railroad system or its participants." App.13a. The Eighth Circuit never made that conclusion, however, as it only discussed the risks to emergency vehicles and other similar harms. *Iowa, Chicago & E. R.R. Corp.*, 384 F.3d at 560-61. But even if it had stated that conclusion, such a standard would not justify the Tenth Circuit's holding here. As the FRA has explained, one of the major rail safety concerns from blocked crossings is that drivers take more risks in attempting to beat trains before a blockage occurs, increasing incidents of accidents between cars and trains. J.A.1. 155. Crashes between car and trains are surely potential hazards to the railroad system and its participants. The Tenth Circuit departed not only from the Eighth Circuit's actual reasoning but also from its own reinvention of the Eighth's reasoning, creating a split.

Again, in attempting to distinguish the Eighth Circuit rather than acknowledging the split, the Tenth Circuit drew a distinction between construction and operation of rails found nowhere in the relevant statutes. It stated outright that rail safety can affect "the condition of grade crossings"—construction—but not "the movement of trains"—operation. App.13a. The Eighth Circuit drew no such line. It held without distinction that risks to the public highway from highway-rail interactions are part of the state "rail safety" jurisdiction protected by the FRSA.

The court below also failed to grapple with the reality that the Eighth Circuit's interpretation is more consistent with Congress and the FRA's interpretation of the term "rail safety." When Congress ordered a report on the impact of blocked crossings on emergency services in 2005, it committed that report solely to the FRA (within the Department of Transportation) and not the STB (outside the Department). *See* Pub. L. 109-59, 119 Stat. 1924, § 9004; J.A.2 306-363. As the FRA has further explained, its rail safety jurisdiction reaches blocked crossings because of the resulting harmful interactions between car and rail traffic, affecting both cars and railroads. *See* J.A.1 155. Thus, it asserted sole jurisdiction over blocked crossings without input from the STB. *See id.* The Tenth Circuit's holding that blocked crossings are not a rail safety issue under the FRSA conflicts with the interpretations of both the branch of government that wrote the FRSA (Congress) and the agency that administers the FRSA (the FRA). The Tenth Circuit's failure to address that contrary evidence when deepening its split from sister circuits is a strong sign that its side of the split is not well-reasoned.

The two circuit splits implicated by the decision below can and should be resolved together. If the FRSA was not implicitly repealed by the ICCTA, then it has independent force with respect to rail safety for both construction and operation of rails. The Tenth Circuit's decision to create a new split from the Eighth would be rendered obviously wrong. These multiplying splits only highlight the growing fracture over the scope of state rail safety power. This Court should take up both splits together to resolve them in one case, ending the division in lower courts.

III. This Is an Excellent Vehicle to Resolve an Important Issue.

The preemptive scope of these two statutes typically arises in cases that are not as clean as this case. Sometimes additional statutes are at issue beyond these two statutes. *See Iowa, Chicago & E. R.R. Corp.*, 384 F.3d at 560-61 (addressing other potential statutes at issue). Other times, the statutes arise in a negligence-per-se tort case with additional common law claims and other muddled facts. *See, e.g.*, *Elam v. Kansas City S. Ry. Co.*, 635 F.3d 796, 802 (5th Cir. 2011) (plaintiff drove into a train that was already stopped and argued the railroad was negligent).

In this case, the facts are undisputed, and the statutes are presented for facial preemption conclusions alone. Respondent stops its trains both for employee coffee stops, *see supra* p.9, and for meet-and-pass maneuvers, where scheduling two trains for the same track leads to one of them needing to stop on a side track. Likewise, Oklahoma experiences safety issues that match what the FRA has described as safety issues from blocked railroad crossings. *See supra* p.8-9. Any more nuanced as-applied issues can be left to separate proceedings over individual citations, while the facial preemption issue is cleanly presented in this case for this Court.

State legislatures need clarity from this Court on the scope of their authority. If the majority circuits are correct in their legal interpretation, then states can tailor their laws to fit the powers saved under the FRSA. But if the Tenth Circuit is correct in foreclosing state rail operations laws, then state legislatures need to know not to spend their time writing such laws, whether regarding blocked crossings or other operations issues. *See, e.g.*, *Transportation*

Div. of the Int'l Ass'n of Sheet Metal, Air, Rail, & Transportation Workers v. Fed. R.R. Admin., 988 F.3d 1170, 1174 (9th Cir. 2021) (states of Washington, California, and Nevada defending their two-person crew requirements for rail operations). The ambiguity left by a circuit split means that states generally assume they have safety authority over operations, while railroads generally assume complete preemption of state laws, making any legislative or negotiated solution needlessly difficult.

Moreover, clarity is needed because, aside from the states, no one is doing anything to solve the numerous safety issues arising from the chronic problem of stopped trains blocking public roads. Respondent does not attempt to address these issues, *see supra* p.9, choosing instead to jam as many trains onto its network as possible, *see* J.A.1 190-191, maximizing both its profits and the harm caused by perennial blocked crossings. Meanwhile, the FRA has been studying the issue for years and yet, despite acknowledging the safety hazards, it has not issued any regulation or order regarding the issue. *See* J.A.1 154-156, 182-83, 202-211. Indeed, it is precisely because the FRA has not issued a regulation "covering the subject matter" of blocked crossings that states are *not* preempted from addressing the issue themselves. 49 U.S.C. § 20106(a)(2); *cf. Easterwood*, 507 U.S. 658 (explaining the scope of FRSA preemption).

Clarity for both state legislatures and railroads can only arise from this Court's input in a clean vehicle like this case. This Court should grant certiorari to resolve the circuit splits over the scope of state authority regarding rail safety.

CONCLUSION

The Court should grant the petition for certiorari.

Respectfully submitted,

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