No. 21-1296

IN THE

Supreme Court of the United States

CITY OF EDMOND, OKLAHOMA, 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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

An Oklahoma statute directly regulates the operation of railroads by limiting how long trains may block street-level railroad crossings. *See* Okla. Stat. tit. 66, § 190 ("Oklahoma Statute"). The question presented is whether the Tenth Circuit correctly held that the Interstate Commerce Commission Termination Act ("ICCTA") preempts the Oklahoma Statute, in agreement with the only other federal appellate court to have considered a similar blocked-crossing law.

RULE 29.6 STATEMENT

Pursuant to this Court's Rule 29.6, undersigned counsel states that respondent BNSF Railway Company's parent company is Burlington Northern Santa Fe, LLC. Burlington Northern Santa Fe, LLC's sole member is National Indemnity Company. The following publicly traded company owns 10% or more of National Indemnity Company: Berkshire Hathaway Inc.

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BRIEF IN OPPOSITION

Respondent BNSF Railway Company respectfully submits this brief in opposition to the petition for a writ of certiorari.

INTRODUCTION

The ICCTA vests the Surface Transportation Board ("STB") with exclusive jurisdiction to regulate railroad operations and expressly preempts state laws that would intrude on that authority. 49 U.S.C. § 10501(b). In the decision below, the Tenth Circuit correctly applied the ICCTA to preempt a recently enacted Oklahoma law that would prohibit trains from blocking street-level (or "grade") crossings for longer than ten minutes. The court also held that the Federal Railroad Safety Act ("FRSA") did not save the Oklahoma Statute from ICCTA preemption.

Petitioners do not deny that the Tenth Circuit's decision agrees with the only other federal appellate court to consider whether the ICCTA preempts a blocked-crossing statute, *see Friberg v. Kan. City S. Ry. Co.*, 267 F.3d 439 (5th Cir. 2001), or that every state appellate court to consider the issue is in alignment as well, *see infra* at 11-12. Petitioners nevertheless seek review of two purported components of the Tenth Circuit's reasoning—both of which, they claim, are the subject of a circuit split.

These alleged splits are contrived and nonexistent. As to petitioners' first question presented, neither the decision below nor any other cited case holds that when "determining whether a state law affecting railroads is preempted," a court may "look only to the ICCTA" without considering "all other relevant federal railroad statutes (such as the

FRSA)." Pet. i. Nor, for that matter, do the cases on the other side of this fictitious split employ a different mode of preemption analysis than the decision below. As to the second question, no cited case holds that the term "rail safety" in the FRSA encompasses matters of *public* safety that pose no hazard to the railroad system or its participants. The sole case that petitioners cite to support their manufactured split involved readily distinguishable facts that implicated "a complex array of statutes and regulations" that the court did not "presume to construe . . . definitively." *Iowa, Chi. & E. R.R. v. Washington Cty.* ("*IC&E*"), 384 F.3d 557, 561 (8th Cir. 2004).

This case is also a very poor vehicle for reviewing the questions presented. The first question is not even implicated here: Far from ignoring the FRSA, the Tenth Circuit explicitly discussed it and rejected petitioners' FRSA arguments. *See* Pet. App. 9a-13a & n.4. The second question is not cleanly presented either; even if "rail safety" under the FRSA could include public safety in some instances, the Oklahoma Statute would still be preempted here because—as the Tenth Circuit emphasized, *see* Pet. App. 7a-8a, 10a, 13a—it directly regulates railroad operations and thus implicates the core of ICCTA preemption.

There is no other compelling reason for review. The decision below was well reasoned and leaves petitioners with a range of options to avoid delays at rail crossings. The STB is also available to receive complaints and take action if necessary. And if petitioners are dissatisfied with federal policy, their solution lies with Congress, not this Court.

The Court should deny the petition.

STATEMENT

1. Congress and the courts have long deemed rail transportation an "intrinsically interstate form of transportation" subject to federal regulation. *Fayus Enters. v. BNSF Ry. Co.*, 602 F.3d 444, 452 (D.C. Cir. 2010) (quoting H.R. Rep. No. 104-311, at 96 (1995), *as reprinted in* 1995 U.S.C.C.A.N. 793, 808); *see*, *e.g.*, *Wabash, St. Louis & Pac. Ry. Co. v. Illinois*, 118 U.S. 557 (1886). Two complementary federal laws implemented by two federal agencies are relevant here.

First is the ICCTA, a 1995 statute that replaced the Interstate Commerce Commission with the STB and granted the STB broad authority over railroad operations. *See* 49 U.S.C. §§ 1301(a), 1302 & note; Pub. L. No. 104-88, 109 Stat. 803 (1995). The ICCTA was a deregulatory statute, expressly adopting a federal policy to "minimize the need for Federal regulatory control over the rail transportation system." 49 U.S.C. § 10101(2). Congress also "recognized that enforcement of state law outside the contract realm could easily lead to balkanization, with [rail] shipments subject to fluctuating rules as they crossed state lines." *Fayus Enters.*, 602 F.3d at 452. Congress therefore provided the STB with broad and exclusive jurisdiction over the regulation of railroad operations and expressly preempted federal or state laws that might interfere. 49 U.S.C. § 10501(b).

The STB's exclusive jurisdiction broadly encompasses "transportation by rail carriers," 49 U.S.C. § 10501(b)(1), with "transportation" defined to include "a locomotive, car, vehicle, vessel, warehouse, wharf, pier, dock, yard, property, facility, instrumentality, or equipment of any kind related to the movement of passengers or property, or both, by

rail," as well as all "services related to that movement," *id.* § 10102(9). The ICCTA also gives the STB exclusive jurisdiction over the ICCTA's remedies respecting the "rates, classifications, rules (including car service, interchange, and other operating rules), practices, routes, services, and facilities of such carriers." *Id.* § 10501(b)(1). And the STB likewise has exclusive jurisdiction over the construction and operation of "switching" and "side tracks," along with other types of tracks. *Id.* § 10501(b)(2). The ICCTA further reinforces the STB's authority with an express-preemption provision stating that unless otherwise provided, "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." *Id.* § 10501(b). While some decisions have summarized the scope of these provisions as encompassing all "economic" aspects of railroad transportation, *see*, *e.g.*, *Friberg*, 267 F.3d at 443, the language of § 10501(b) "plainly does not *limit* preemption to economic regulations," *State v. Norfolk S. Ry. Co.*, 107 N.E.3d 468, 477 (Ind. 2018) (emphasis added).

The other federal statute relevant here is the FRSA. Enacted in 1970 for the purpose of "promot[ing] safety in every area of railroad operations and reduc[ing] railroad-related accidents and incidents," 49 U.S.C. § 20101, the FRSA directs the Secretary of Transportation to "prescribe regulations and issue orders for every area of railroad safety," supplementing preexisting laws and regulations, *id.* § 20103(a). The Secretary of Transportation has delegated this railroad-safety function to the Administrator of the Federal Railroad Administration ("FRA"). 49 C.F.R. § 1.89(a).

In a section titled "Preemption," Congress expressly provided that all "[l]aws, regulations, and orders related to railroad safety . . . shall be nationally uniform to the extent practicable." 49 U.S.C. § 20106(a)(1). State laws "related to railroad safety" may remain in force only "until the Secretary of Transportation . . . prescribes a regulation or issues an order covering the subject matter of the State requirement." *Id.* § 20106(a)(2). After FRA has acted, a State may "adopt or continue in force an additional or more stringent law, regulation, or order related to railroad safety" only if it is "necessary to eliminate or reduce an essentially local safety or security hazard" and satisfies other listed requirements. *Ibid.* As relevant here, FRA has adopted regulations governing the maximum operating speeds for different classes of track, 49 C.F.R. § 213.9(a), air-brake testing, *id.* §§ 232.201-.219, and grade-crossing safety, *id.* §§ 234.105-.107, though petitioners mischaracterize a 2019 Paperwork Reduction Act notice in claiming that FRA has "explained" that its "rail safety jurisdiction reaches blocked crossings because of the resulting harmful interactions between car and rail traffic." Pet. 21 (citing CA10 J.A. 155).[1]

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[1] In the Notice of Information Collection at issue, 84 Fed. Reg. 27,832 (June 14, 2019) (available at CA10 J.A. 155), FRA simply proposed to "add new dedicated links to its existing website and its existing phone application (app) for users to report blocked crossings." CA10 J.A. 155. It noted that blocked crossings implicate "potential safety concerns," "potential economic impacts," and "societal nuisances." *Ibid.* It did not address whether it could regulate blocked crossings using its own regulatory authority, *ibid.*, much less claim that blocked crossings fell within its *exclusive* purview and outside the STB's authority. Recently, FRA clarified that it uses blocked-crossing information simply to "gain a more complete picture" of blocked

2. Despite these federal laws and regulations, in May 2019 the Oklahoma legislature adopted a bill that it described as "prohibiting certain acts by operators of trains." H.B. 2472, 57th Leg., 2019 1st Reg. Sess., 2019 Okla. Sess. Law Serv. Ch. 439. The Oklahoma Statute generally prohibits "[r]ailroads" and other persons "operating over tracks within the State of Oklahoma" from "block[ing] vehicle traffic at any railroad grade crossing for a period of time in excess of ten (10) minutes." Okla. Stat. tit. 66, § 190(C)(1). A "one-time exception" of up to "ten (10) additional minutes" is offered to "complete a switching maneuver while setting out or picking up railcars," to "allow the passage of a second train," or to accommodate a "red train signal." *Id.* § 190(C)(2)(a)-(c). Otherwise, the Oklahoma Statute permits exceptions only if the train is "moving in a continuous forward or backward direction" or is "stopped for an emergency condition." *Id.* § 190(C)(1).

The Oklahoma Statute directly regulates train operations. As the district court explained in recounting the undisputed facts, trains may make "temporary stops" en route to their destinations. Pet. App. 21a. "Various factors affect the occurrence and duration of a stoppage," including "conditions elsewhere on the interstate railroad system; federal statutory and regulatory requirements (*i.e.*, limitations on crew working hours or mandatory testing); operational, safety, and economic considerations; and infrastructure limitations." *Id.* at 21a-22a.

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crossings, to "respond to congressional inquiries," and to "facilitate meetings, outreach, and other solutions for *stakeholders* to reduce or eliminate blocked crossing concerns." 87 Fed. Reg. 19,176, 19,176 (Apr. 1, 2022) (emphasis added).

One "common" reason for trains to stop is to "allow an approaching train traveling in the opposite direction to pass, which is called a Meet and Pass maneuver." Pet. App. 22a. The location of these maneuvers depends on train schedules and timetables, the speed of each train (*i.e.*, where they will ultimately "meet"), and the location and availability of a side track "on which the stopped train can be held while the other train passes." *Ibid.* The selection of *which* train should stop is dictated by the size and location of the side track, by train speed and schedule, and sometimes by the type of freight being carried—some trains receive "priority" when they are carrying hazardous materials or other freight that, under federal requirements, must be "forwarded to their destinations without delay." *Id.* at 22a-23a. Finally, the duration of a meet-and-pass maneuver is affected by factors such as the speed and length of the passing train(s), the time required to perform federally and internally mandated tests and procedures, and conditions elsewhere on the railroad system (such as whether the tracks are clear ahead of the stopped train). *Id.* at 23a.

In July 2019, BNSF received three citations under the Oklahoma Statute for blocking grade crossings in Oklahoma towns while occupying a side track for meet-and-pass maneuvers. Pet. App. 21a, 23a-24a. In two of these instances, the BNSF train was stopped to "allow passage of *two* other trains on the main line." *Id.* at 23a-24a (emphasis added). Petitioners do not claim that these blockages delayed firefighters, paramedics, or other emergency personnel in reaching the location of an emergency, and do not claim that

the trains were stopped so that a train employee could grab a cup of coffee.[2]

3. On August 22, 2019, BNSF challenged the Oklahoma Statute in the U.S. District Court for the Western District of Oklahoma, arguing that both the ICCTA and the FRSA preempted it. Pet. App. 14a, 20a-21a; CA10 J.A. 11-14. BNSF sought declaratory and injunctive relief and also moved for a preliminary injunction, which the district court granted on October 30, 2019. *See* CA10 J.A. 4 (ECF No. 39).

On November 30, 2020 the district court granted summary judgment for BNSF and permanently enjoined enforcement of the Oklahoma Statute, holding that the ICCTA preempted it. *See* Pet. App. 14a. The court noted that "the federal and state courts to consider ICCTA preemption" of blocked-crossing statutes "have uniformly found those restrictions to fall within the scope of the exclusive jurisdiction and exclusive remedies dictated by § 10501(b) and, therefore, to be preempted by federal law." *Id.* at 27a; *see id.* at 27a-29a (collecting cases). The court agreed with those decisions, holding that the Oklahoma Statute, "by its terms, purports to manage or govern

[2] Petitioners make an egregious "misstatement of fact," Sup. Ct. R. 15.2, in asserting that a BNSF regional vice president "admitted that BNSF has blocked traffic at a highway-rail crossing so that an employee could grab a cup of coffee," Pet. 9, and that BNSF "stops its trains both for employee coffee stops and for meet-and-pass maneuvers," *id.* at 22 (citation omitted). In reality, the BNSF regional vice president, who was testifying at a 2007 congressional hearing, was asked to respond to *another* witness's claim that there have been blockages "when train engineers have slipped into the local 7-11 for a cup of coffee." CA10 J.A. 200-201. He responded: "*I don't know about the particular instance.* I also read it in [that witness's] testimony. *But I assure you we don't condone that*." *Id.* at 201 (emphasis added).

the railroad's operating choices." *Id.* at 29a. The court considered and rejected petitioners' argument that preemption should be "determined only by reference to the FRSA," *id.* at 34a, explaining that "a statute that tells railroad companies how long they may stop their trains—for whatever ends—intrudes on the territory reserved to the ICCTA," *id.* at 36a.

4. A Tenth Circuit panel unanimously affirmed. Following "the only other circuit to address whether the ICCTA preempts a state's blocked-crossing statute," the court explained that "'regulating the time a train can occupy a rail crossing impacts the way a railroad operates its trains, with concomitant economic ramifications.'" Pet. App. 7a (quoting *Friberg*, 267 F.3d at 443) (alterations omitted). By "effectively regulat[ing] rail operations," the Oklahoma Statute intruded on "a task the ICCTA reserves for the STB." *Id.* at 8a. Accordingly, the court concluded that "the ICCTA, by its plain language, preempts Oklahoma's Blocked Crossing Statute," *ibid.*—an issue as to which "no split exists," *id.* at 9a n.4.

Having held that the ICCTA preempted the Oklahoma Statute, the court noted that it did not need to consider BNSF's argument that "the FRSA does too." Pet. App. 9a. The court did, however, address petitioners' arguments that "courts must construe the STB's jurisdiction under the ICCTA *in pari materia*—meaning, construed together—with the FRA's." *Ibid.* The court considered the purpose and scope of the FRSA, and agreed with petitioners that "the FRSA applies to rail-safety issues" and "provides the appropriate basis for analyzing whether a state law, regulation or order affecting rail safety is pre-empted by federal law." *Id.* at 9a-11a (quotation marks

omitted). But in this case the court saw no need to fully "'reconcile the ICCTA's interaction with the FRSA,'" because the Oklahoma Statute "concerns *public* safety, not rail safety, and regulates railroad operations." *Id.* at 10a (alteration omitted). The court reached this conclusion because the blocked crossings targeted by the Oklahoma Statute do not pose "hazard[s] to the railroad system or its participants," as opposed to delaying *non*-railroad users from reaching their destinations. *Id.* at 11a-12a (quoting *People v. Burlington N. Santa Fe R.R.*, 209 Cal. App. 4th 1513, 1526 (2012)). Finally, the court rejected petitioners' argument that this outcome would create a conflict with *IC&E*, an Eighth Circuit decision holding that the ICCTA did not preempt a state proceeding to compel a railroad to pay for repairs to four antiquated railroad-highway bridges. *Id.* at 12a-13a (distinguishing *IC&E*).

REASONS FOR DENYING THE PETITION

The federal courts of appeals are unanimous on the actual question presented by this case—namely, whether the ICCTA preempts blocked-crossing statutes like the one here. The sub-issues on which petitioners focus are not the subject of a circuit split, and to the extent they are implicated by this case at all, they are not cleanly presented. There is no other compelling reason for review—the decision below was correct, and petitioners have alternatives for addressing the inconveniences and public-safety issues associated with blocked crossings. The Court should deny the petition.

I. THE DECISION BELOW DOES NOT CONFLICT WITH THE DECISION OF ANY OTHER COURT.

A. The Fifth Circuit is "the only other circuit to address whether the ICCTA preempts a state's

blocked crossing statute." Pet. App. 7a. The Tenth Circuit's decision below agrees with and follows this Fifth Circuit case law.

In *Friberg*, the Fifth Circuit held that the ICCTA preempted Texas's blocked-crossing statute based on essentially the same reasoning as the decision below. 267 F.3d at 444. Later Fifth Circuit cases have reaffirmed that holding. In *Elam v. Kansas City Southern Railway Co.*, for example, the Fifth Circuit applied *Friberg* to hold that the ICCTA likewise preempted Mississippi's blocked-crossing statute as well as a negligence claim that was based on it. 635 F.3d 796, 807 (5th Cir. 2011); *see also Ezell v. Kan. City S. Ry. Co.*, 866 F.3d 294, 299 (5th Cir. 2017) (same).

Every state court to consider ICCTA preemption of blocked-crossing statutes and regulations is in alignment with the Fifth Circuit and the Tenth Circuit. *E.g.*, *Norfolk S. Ry. Co.*, 107 N.E.3d at 478 ("[T]he ICCTA's preemption provision unambiguously preempts Indiana's blocked-crossing statute."); *State v. BNSF Ry. Co.*, 56 Kan. App. 2d 503, 517-18 (2018) (Kansas blocked-crossing statute "infringes on the exclusive jurisdiction of the STB to regulate the rail transportation system in the United States"); *Burlington N. Santa Fe R.R.*, 209 Cal. App. 4th at 1531 ("The State of California, by regulating the time a stopped train can occupy a public rail crossing, has necessarily and directly attempted to manage railroad operations. Accordingly, we conclude that [the order at issue] is preempted by the ICCTA."); *Burlington N. & Santa Fe Ry. Co. v. Dep't of Transp.*, 227 Or. App. 468, 475 (2009) ("[B]ecause [the regulation] specifically targets rail transportation, it is preempted by the ICCTA."); *see also State v. CSX Transp., Inc.*,

149 N.E.3d 532, 532-33 (Ohio 2020) (table) (promptly staying decision of intermediate appellate-court that had declined to find ICCTA preemption).

Petitioners do not cite any case reaching a contrary conclusion. Instead, petitioners attempt to manufacture a circuit split on two peripheral issues. Both alleged splits are illusory.

B. Petitioners first claim that a 5-2 split has developed among federal courts on a question they variously characterize as whether courts considering ICCTA preemption must "also consider all other relevant federal railroad statutes (such as the FRSA)," Pet. i, whether courts may adopt a "mode of analysis" that reads "the language of the ICCTA . . . in isolation," *id.* at 11, or whether the ICCTA should be "harmoniz[ed]" with the "FRSA's savings clause," *id.* at 13. In essence, petitioners contend that the Fifth Circuit and the Tenth Circuit hold that courts may ignore the FRSA when evaluating railroad preemption questions, whereas five other courts of appeals have rejected that proposition. This characterization of the cases is plainly incorrect.

Both the Fifth Circuit in *Friberg* and the Tenth Circuit in the decision below held that, in light of their ICCTA preemption holdings, it was unnecessary to decide whether the FRSA *also* preempted the blocked-crossing statute (as the railroads argued and other courts have held).[3] *Friberg*, 267 F.3d at 444 n.18;

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[3] Courts finding FRSA preemption have focused on FRA regulations governing train speed, air-brake testing, and grade-crossing safety. *E.g.*, *Vill. of Mundelein v. Wis. Cent. R.R.*, 882 N.E.2d 544, 556 (Ill. 2008); *Krentz v. Consol. Rail Corp.*, 910 A.2d 20, 36 (Pa. 2006). Petitioners do not cite or distinguish these decisions in asserting that FRA "has not issued a regulation

Pet. App. 9a. But neither court adopted a "mode of analysis" that allows courts to read the ICCTA in isolation. Pet. 11. To the contrary, the Fifth Circuit in *Ezell* expressly acknowledged that "the FRSA may inform ICCTA preemption analysis in some circumstances" and that the two statutes have a "complicated relationship" with each other. 866 F.3d at 300 n.6; *see also Elam*, 635 F.3d at 807-08 (FRSA "expressly provides that states may enact (and citizens may enforce) rail safety laws in certain circumstances"). Similarly, the decision below extensively engaged with—and rejected—each of the FRSA arguments that petitioners raise here. *See* Pet. App. 9a-14a; *infra*, at 17-19.

Petitioners likewise mischaracterize the decisions on the other side of the phony split. These cases from the Second, Sixth, Eighth, Ninth, and D.C. Circuits did not take a fundamentally different approach to ICCTA preemption questions. To the extent their analysis differed from this case, it is because the state requirements at issue differed significantly from the Oklahoma Statute. *See* Pet. App. 9a n.4 (distinguishing these cases).

Most of petitioners' cases simply held that the ICCTA did not preempt a state law or order that, according to the court, directly implicated the safety of rail transportation. *See Island Park, LLC v. CSX Transp.*, 559 F.3d 96, 99 (2d Cir. 2009) (administrative order requiring that a privately owned rail crossing be shut down "for safety reasons"); *IC&E*, 384 F.3d at 558 (administrative proceeding to compel railroad to pay to keep railroad-highway bridges in good repair); *Tyrrell v. Norfolk S. Ry. Co.*,

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'covering the subject matter' of blocked crossings." Pet. 23 (quoting 49 U.S.C. § 20106(a)(2)).

248 F.3d 517, 520 (6th Cir. 2001) (negligence-per-se claim and underlying track-clearance regulation). The other cases are even further afield, simply mentioning the FRSA in passing to support a conclusion that the plaintiff lacked statutory standing, *Bos. & Me. Corp. v. STB*, 364 F.3d 318, 321 (D.C. Cir. 2004), or that the ICCTA did not repeal the Indian Right of Way Act or other statutes, *Swinomish Indian Tribal Cmty. v. BNSF Ry. Co.*, 951 F.3d 1142, 1157 (9th Cir. 2020).

Far from disagreeing with the reasoning of the decision below or the Fifth Circuit, these cases turned on their unique facts, such as the "limited sight distance due to track curvature" at a rail crossing, *Island Park*, 559 F.3d at 99; the longstanding "federal-state regulatory partnership to deal with . . . the repair and replacement of deteriorated or obsolete railway-highway bridges," *IC&E*, 384 F.3d at 561; and the "safety benefits" of complying with track-clearance requirements, *Tyrrell*, 248 F.3d at 524. Indeed, *Island Park* expressly distinguished *Friberg* and other cases on the ground that they regulated train operations, 559 F.3d at 104 & n.12, emphasizing that "the limited state action in this case does not burden or interfere with rail transportation," *id.* at 104 n.11. None of these cases disagrees with or even casts doubt on the holding of *Friberg* or the decision below.

C. Petitioners also contend that the decision below "created a new split" with the Eighth Circuit "over the meaning of 'rail safety' for purposes of the FRSA," Pet. 18, by holding that the Oklahoma Statute "does not concern rail safety" because blocked crossings "are local public safety issues" that "do not concern any 'hazard to the railroad system or its

participants.'" Pet. App. 11a-12a (quoting *Burlington N. Santa Fe R.R.*, 209 Cal. App. 4th at 1526); *see id.* at 10a (Oklahoma Statute "concerns *public* safety, not rail safety"). That holding does not conflict with *IC&E* or any other cited decision.

IC&E involved a state administrative proceeding to compel a railroad to pay for repairs to four "antiquated" railway-highway bridges. 384 F.3d at 558. The court held that the ICCTA did not preempt that proceeding because the ICCTA is "silen[t]" on the matter of rail and highway safety and bridge repairs, whereas a "complex array of statutes and regulations" touching on these subjects reveals that "Congress for many decades has forged a federal-state regulatory partnership to deal with problems of rail and highway safety and highway improvement in general, and the repair and replacement of deteriorated or obsolete railway-highway bridges in particular." *Id.* at 561. In fact, as petitioners admit, *IC&E* was not based solely on the ICCTA and the FRSA at all—"additional statutes [were] at issue beyond these two statutes." Pet. 22 (citing *IC&E*, 384 F.3d at 560-61).

Petitioners note that *IC&E* includes a sentence dismissing the argument "that 'rail safety' for purposes of FRSA preemption does not include the highway safety risks created at rail crossings." 384 F.3d at 560; *see ibid.* (characterizing this argument as a "cramped reading of the FRSA"). But this sentence does not conflict with the decision below. The decision below concluded that the Oklahoma Statute does not govern "rail safety" because blocked crossings pose no hazard to the railroad system or its participants. Pet. App. 12a (citing *Burlington N. Santa Fe R.R.*, 209 Cal.

App. 4th at 1526).[4] *IC&E* did not purport to disagree with that holding—it did not say, for example, that the FRSA *encompasses* issues that pose no hazard to the railroad system or its participants, much less that blocked-crossing statutes implicate rail-safety concerns. Pet. App. 12a.

Contrary to petitioners' claim, it is not "difficult to see any genuine distinction" between the bridge-related "'highway' safety concerns" the Eighth Circuit addressed and the "'public' safety concerns" at issue here. Pet. 20. The "highway safety issues" in *IC&E* were "deteriorated or obsolete railway-highway bridges," 384 F.3d at 560-61, that had "severely deficient vertical clearances for highway traffic," were "too narrow," had been "destroyed by fire," or had a "sharp crest," *id.* at 558. As the decision below recognized, these risks "may create potential hazards to the railroad system or its participants, implicating rail safety," Pet. App. 13a—for example, a truck crashing into a bridge could compromise its integrity for trains, farm equipment that bottoms out on a sharp crest could damage a passing train, and pieces of a burned overpass could fall on a track. By contrast, when a train prevents vehicles from crossing a track to reach their intended destination, any risks created by the delay would affect non-railroad users, not the railroad system or its participants. *Id.* at 12a.[5]

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[4] The decision below did not turn on a supposed "distinction between construction and operation of rails found nowhere in the relevant statutes," as petitioners claim. Pet. 20. The Tenth Circuit distinguished between *rail safety* and operation, not *construction* and operation. Pet. App. 9a-13a.

[5] Petitioners suggest that the Oklahoma Statute could indirectly lead to rail-safety issues because blocked crossings might prompt drivers to "attemp[t] to beat trains before a

Further, and in any event, *IC&E*'s statement about the scope of the FRSA did not purport to be a definitive interpretation of the FRSA. The court acknowledged that "neither the appellate briefs nor the district court's opinion discussed the FRSA," and it expressly stated that it was not "presum[ing] to construe definitively" the FRSA (or the other laws and regulations it discussed) "in the abstract." *IC&E*, 364 F.3d at 560-61. Thus, if the Eighth Circuit addresses a blocked-crossing statute in the future, it will not be bound by *IC&E*'s dicta and is free to agree with the Fifth Circuit and the Tenth Circuit that the FRSA does not save the statute from ICCTA preemption. There is accordingly no split of authority for this Court to resolve.

II. THIS CASE IS A POOR VEHICLE FOR ADDRESSING THE QUESTIONS PRESENTED.

Review is also unwarranted because resolving the questions presented would not make any difference to the outcome of this case.

A. Petitioners ask the Court to hold that when "determining whether a state law affecting railroads is preempted," courts must consider not only the ICCTA but also "all other relevant federal railroad statutes (such as the FRSA)." Pet. i. That issue is not raised by the decision below, and a holding to that effect could not possibly affect the outcome of this case.

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blockage occurs," thereby "increasing incidents of accidents between cars and trains." Pet. 20. But the decision below rejected that argument, explaining that "risky road-blockage-induced behaviors" by members of the public are "local public safety issues—not rail safety issues." Pet. App. 12a. Petitioners' disagreement with that conclusion does not furnish a basis for review.

The decision below did not read the "language of the ICCTA . . . in isolation," Pet. 11, or fail to "harmoniz[e] it" with the FRSA, *id.* at 13. To the contrary, the decision below considered at length petitioners' arguments that the FRSA saves the Oklahoma Statute—and expressly rejected them. The Tenth Circuit *agreed* with petitioners that "the FRSA applies to rail-safety issues," stating that petitioners were "correc[t]" on this point. Pet. App. 9a-10a. The court further discussed the FRSA's text and purposes and agreed with petitioners that the "relationship between the ICCTA and FRSA" was such that the "'FRSA provides the appropriate basis for analyzing whether a state law, regulation or order affecting rail safety is pre-empted by federal law.'" *Id.* at 10a-11a (quoting *Island Park*, 559 F.3d at 107).

It was on this basis that the court concluded that petitioners were "mistake[n]" in insisting that the relevant legal question in this case is whether "the ICCTA implicitly repeals the FRSA." Pet. App. 10a n.4 (quotation marks omitted). The threshold legal question, according to the court below, is instead whether the Oklahoma Statute concerned rail safety and thus implicated the FRSA at all:

> When approaching a railroad statutory-preemption issue, a court must first ask whether the statute at issue concerns rail safety. If the answer is no, that statute cannot fall under the FRSA's purview, and the court need not analyze whether the FRSA preempts it. Thus, the statute's subject-matter is important because it informs whether the statute concerns rail safety.

Ibid. Here, the Oklahoma Statute "concerns *public* safety, not rail safety, and regulates railroad

operations," so there was no need to "reconcile the ICCTA's interaction with the FRSA" in this particular case. *Id.* at 10a (alteration and quotation marks omitted).

It is impossible to read the decision below and conclude that the Tenth Circuit endorsed a method of analysis that ignores the FRSA or other "relevant federal railroad statutes." Pet. i. The Tenth Circuit expressly considered the FRSA and concluded that it did not save the Oklahoma Statute. While petitioners may disagree with that decision, they cannot deny that the Tenth Circuit fully considered their FRSA arguments.

B. The second question presented likewise would not affect the outcome of this case. Petitioners ask the Court to decide whether "state authority over rail safety," as used in the FRSA, "include[s] public safety at rail crossings." Pet. i. But the Tenth Circuit's reasoning did not turn solely on distinguishing between rail safety and public safety. The court primarily based its holding on the fact that the Oklahoma Statute falls within the core of ICCTA preemption by directly "regulat[ing] railroad operations." Pet. App. 10a. Thus, even if "rail safety" under the FRSA encompasses public-safety measures at rail crossings that do not regulate railroad operations, the Oklahoma Statute would still be preempted by the ICCTA.

The regulation of railroad operations lies at the heart of the ICCTA's express preemption provision. 49 U.S.C. § 10501(b)(1)-(2) (giving the STB exclusive, preemptive jurisdiction over rail transportation, operating rules, practices, and the operation of side tracks). For this reason, "[c]ourts are unanimous" that the ICCTA preempts a state railroad statute that

"has 'the effect of "managing" or "governing" rail transportation.'" *Norfolk S. Ry. Co.*, 107 N.E.3d at 475 (quoting *Delaware v. STB*, 859 F.3d 16, 19 (D.C. Cir. 2017)); *see also ibid.* (collecting cases).

The Tenth Circuit repeatedly tied its preemption holding to the fact that the "STB has exclusive jurisdiction over the operation of side tracks in Oklahoma," Pet. App. 7a, and that the Oklahoma Statute "effectively regulates rail operations—a task the ICCTA reserves for the STB," *id.* at 8a. As the court explained, "many factors determine the time that a train will block a grade crossing, including the train's speed and length, whether the side track intersects the grade crossing, when a railroad schedules a train to pass, and the time required to comply with federally mandated tests and procedures." *Id.* at 7a. By "regulating the time a train can occupy a rail crossing," then, the Oklahoma Statute necessarily regulates "the way a railroad operates its trains, with concomitant economic ramifications." *Ibid.* (quoting *Friberg*, 267 F.3d at 443) (alteration omitted). The Oklahoma Statute's regulation of railroad operations was not merely incidental to an otherwise valid rail-safety regulation—the "primary directive" of the Oklahoma Statute is to govern "the time a train can block a grade crossing," and in fact the statute's *only* application is to regulate "'the operation of railroads at rail crossings.'" *Id.* at 13a (quoting *Elam*, 635 F.3d at 807).

The Oklahoma Statute's regulation of railroad operations makes this case a poor vehicle for addressing the scope of "rail safety" for purposes of the FRSA. Even if "rail safety" includes public-safety matters at rail crossings, the Oklahoma Statute still

would be preempted because it regulates railroad operations. The court's discussion of "rail safety" would thus be pure dicta. Indeed, the scope of "rail safety" could not make a difference to this case unless the Court were to conclude—contrary to the text of the ICCTA and the unanimous judgment of the lower courts—that state blocked-crossing laws are *not* preempted by the ICCTA even though they directly regulate railroad operations. If the Court is inclined to address the scope of "rail safety," it should await a case in which its decision will make a difference.

III. THERE IS NO OTHER COMPELLING REASON FOR REVIEW.

This Court typically does not grant certiorari to review alleged errors in the application of properly stated legal principles, and there is no occasion for it to do so here. The Tenth Circuit's decision was well reasoned and correct. It aligns with the decisions of numerous other courts holding that the ICCTA preempts blocked-crossing statutes, and it therefore does not change the legal landscape for railroads or state or local governments.

Petitioners are free to pursue alternative means of resolving the public-safety issues that the Oklahoma Statute was designed to address. For example, notification systems can alert emergency-response personnel when a crossing is or may be blocked, and "construct[ing] grade-separated over/underpasses"—which may be eligible for federal funding—can ensure that "rail traffic does not interfere with road traffic." Ben Goldman, Cong. Rsch. Serv., IF10978, *Locomotive Idling, Air Quality, and Blocked Crossings* at 2 (updated Mar. 4, 2022), https://crsreports.congress.gov/product/pdf/IF/IF10978.

If petitioners believe that additional federal involvement is desirable, the STB has established a Rail Customer and Public Assistance Program to receive railroad-related complaints, including complaints about blocked crossings. *See* CA10 J.A. 293, 300. The STB has also addressed blocked-crossing issues in formal decisions and environmental reviews related to, for example, railroad acquisitions and operating easements. *E.g.*, *Norfolk S. Ry. Co.*, 107 N.E.3d at 477 (citing examples); *Canadian Pac. Ry. Ltd.*, No. FD 36500, 2022 WL 509708, at *7 (STB Feb. 15, 2022) (environmental review "will address grade crossing safety and delay impacts and will consider potential appropriate mitigation measures to address impacts related to grade crossing safety and delay"); *Canadian Nat'l Ry. Co.*, No. FD 35087 (Sub-No. 8), 2018 WL 6727080 (STB Dec. 20, 2018) (denying petition to require railroad to fund a grade-separated crossing based in part on prior mitigation measures available to emergency personnel); *CSX Transp., Inc.*, No. FD 35522, 2018 WL 3764162, at *2 (STB July 27, 2018) (STB "requests that CSXT establish and provide to the Board a plan detailing additional actions that CSXT will take to improve fluidity of operations and reduce the number and duration of blocked crossings on the Line" and will "consider whether additional action is required" based on that response).

If petitioners are dissatisfied with federal policy in this area, they may also raise the issue with Congress. But regulation in this area comes with tradeoffs—as FRA has explained, "[a] federal law or regulation limiting the amount of time a grade crossing may be blocked could have the undesirable effect of causing a railroad to violate other federal safety rules." CA10 J.A. 303. Indeed, *Friberg* was decided more than 20 years ago, and yet Congress has

not amended either the ICCTA or the FRSA to authorize state regulation of blocked crossings or to direct the STB or FRA to impose a federal blocked-crossing requirement. Instead—and consistent with the STB's exclusive jurisdiction over railroad operations, 49 U.S.C. § 10501(b)(1)-(2)—Congress's focus has been on "improving the *safety* of highway-rail crossings" through a "coordinated effort" that relies on the Secretary of Transportation's authority over railroad safety, "highway, traffic, and motor vehicle safety," and "highway construction." *Id.* § 20134(a) (emphasis added). If petitioners prefer a different federal policy, their remedy lies in Congress, not this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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