NO. 21-1296

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

REPLY BRIEF OF PETITIONERS

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The Federal Railroad Administration and the states agree that their shared rail safety jurisdiction includes the power to regulate blocked railroad crossings, with states empowered to act when the FRA has not. Five circuits agree that the preemption language in ICCTA, a statute governing a different federal agency, did not limit FRA's safety authority over railroad construction and operation. Two circuits brush aside the FRA's jurisdiction when they believe the ICCTA is implicated.

In seeking to avoid a split on the preemptive scope of ICCTA, respondent noticeably refuses to defend the Tenth Circuit's reasoning. The Tenth Circuit tried to deny a split by arguing ICCTA stripped the FRA and the states of authority over operation, but

not construction, of railroads. Abandoning that analysis, respondent creates a brand new theory: that the ICCTA only stripped the FRA and states of jurisdiction over "direct" regulation of operation but not "direct" regulation of safety. This theory is found nowhere in the decision below, much less the relevant statutes. Respondent avoids the Tenth Circuit's actual reasoning because it cannot defend it nor deny the split on the proper reading of the ICCTA.

Respondent is also wrong to deny a new split on rail safety. As the FRA and the Eighth Circuit explain, the term "rail safety" encompasses harms caused by railroads, not just harms caused to railroads. The Tenth Circuit split by adopting the latter, atextual view.

The decision below improperly deepened one split, created another, and eviscerated the jurisdiction of the states and, by extension, the FRA. The Court should grant certiorari to resolve these questions over the correct understanding of state and federal authority over rails.

A. Review Is Warranted on the Deep Split Over ICCTA Preemption.

The Tenth and Fifth Circuits adopt a markedly different approach than those of five of their sister circuits to analyzing how the ICCTA interacts with other statutes, including the FRSA. Pet.12-16. Respondent's attempts to minimize that split are unavailing.

To start, respondent is wrong to deny that the Tenth Circuit "allows courts to read the ICCTA in isolation," Opp.13. To the contrary, the Tenth Circuit holds that "[t]he plain language [of § 10501] is clear: the STB has exclusive jurisdiction over the operation" of railroads and "[b]ecause the ICCTA is unambiguous,

we need not look outside it to divine Congress's intent." App.7a (emphasis added). Respondent admits as much when it argues, echoing the decision below, that the ICCTA would control even if the blocked crossing issue was properly within the scope of the FRSA, effectively deeming the FRSA irrelevant. Opp.19.

The Fifth Circuit's analysis is no different. *Contra* Opp.13. It concluded that the ICCTA grants STB exclusive jurisdiction over "the way a railroad operates its trains." *Friberg v. Kansas City S. Ry. Co.*, 267 F.3d 439, 443 (5th Cir. 2001). When applying *Friberg* in subsequent cases, the Fifth Circuit added that the ICCTA implicitly repeals the FRSA, assuming without any attempt at harmonization that the FRSA and ICCTA are incompatible. *See Elam v. Kansas City S. Ry. Co.*, 635 F.3d 796, 807 (5th Cir. 2011). Thus, while it suggests in dicta that the FRSA applies in some ICCTA cases, *Ezell v. Kansas City S. Ry. Co.*, 866 F.3d 294, 300 n.6 (5th Cir. 2017), it holds that the ICCTA applies, to the exclusion of all else, to "regulation of . . . train operations," *id.* at 298 (quoting *Friberg*, 267 F.3d at 443).

Respondent tries to wave away this split from five other circuits on the ground that other cases involved different "facts," Opp.14, without admitting what those facts were—railroad construction cases, *see* Pet.16. But § 10501(b) of the ICCTA makes no distinction between construction and operations. And unlike the court below and the Fifth Circuit, all five of those circuits interpret the preemptive scope of § 10501(b) as limited by other statutes affecting railroads, not covering all regulation of railroad construction or operations. They do not simply see that an issue affects construction

or operations and decide they "need not look outside" the ICCTA. *Contra* App.7a.

The Ninth Circuit chain cites numerous cases denying that § 10501(b) vests exclusive jurisdiction over all regulation of construction or operation of railroads. *See Swinomish Indian Tribal Cmty. v. BNSF Ry. Co.*, 951 F.3d 1142, 1157 (9th Cir. 2020). The Sixth Circuit denounces any "skewed application" that "would arbitrarily pigeon-hole preemption analysis of state rail law under the ICCTA." *Tyrrell v. Norfolk S. Ry. Co.*, 248 F.3d 517, 523 (6th Cir. 2001). The Eighth Circuit labels the argument that the ICCTA preempts all construction-and operation-related laws as "deceptively simple." *Iowa, Chicago & E. R.R. Corp. v. Washington Cnty., Iowa*, 384 F.3d 557, 559 (8th Cir. 2004). The Second Circuit and D.C. Circuit likewise deny that the ICCTA gives the STB exclusive jurisdiction over construction and operation of railroads. Pet.15.

Respondent likely does not admit those are construction cases because it does not defend the Tenth Circuit's view that the jurisdiction of the Board varies depending on whether construction or operation is at issue. Pet.20 (citing App.13a). Instead, respondent tries to recast this case away from the text of the statutes and case law, arguing the cases are reconcilable because ICCTA only covers a law that "directly regulates" operations, while the FRSA covers regulations that "directly implicate[]" safety. Opp.2, 6, 13, 19. That test is invented anew by respondent, present nowhere in the decision below, much less the relevant statutes.

Nothing in the text of ICCTA or FRSA says that states can "directly" regulate safety, but not "directly" regulate construction or operations. To the contrary, the text of the FRSA says that states can regulate "every area of railroad operations" within the FRA's safety

jurisdiction when the FRA has not acted, 49 U.S.C. §§ 20101, 20106(a)(2), while the ICCTA says that states cannot regulate construction or operations when they are within the STB's historic jurisdiction, which does not cover safety, *id.* §§ 1302, 10501(b); Pet.5-7, 12. Meanwhile, respondent's fabricated test is wholly unadministrable, since almost *every* safety regulation under the FRSA will involve direct regulation of construction or operation. Asking whether a rule is "directly" regulating safety or operations is "like judging whether a particular line is longer than a particular rock is heavy." *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.*, 486 U.S. 888, 897 (1988) (Scalia, J., concurring).

Indeed, to the extent the question is about whether highway-rail grade crossing is more of a safety issue or an operations issue, this Court already affirmed it is the former. Pet.5-6. Respondent, tellingly, omits any discussion of this. Relatedly, respondent fails to discuss a key section of the ICCTA—the provision that vests the Surface Transportation Board with jurisdiction. *See* 49 U.S.C. § 1302. Under this provision, the scope of the ICCTA is defined primarily by the historic jurisdiction of the Interstate Commerce Commission, which did not include crossing issues. Pet.6-7. Accordingly, although the Board's jurisdiction within that scope is exclusive for preemption purposes, 49 U.S.C. § 10501(b), that jurisdiction does not include the issues here.

The ICCTA's Board itself has openly denied respondent's theory that the Board has exclusive jurisdiction over all direct regulation of the operation of railroads, having issued joint rulemakings agreeing with the FRA that "FRA has authority to adopt rules or standards governing the safety of all facets of

railroad operations" while the STB is limited to "non-safety aspects of railroad operations." *Tyrrell v. Norfolk S. Ry. Co.*, Brief of Surface Transportation Board as Amicus Curiae, 2000 WL 35595210, at *3. That is a clear rejection of the decision below that "the STB has exclusive jurisdiction over the operation" of railroads. App.7a.

Left without a good textual argument on ICCTA to reconcile the split, respondent articulates its new "direct regulation" test to encourage courts to second-guess the policy judgments embodied in state regulations. Respondent pretends that blocked crossings are inevitable, but the truth is that respondent has caused this problem through its decision to run more trains than its infrastructure can support. J.A.1 190-91. As the GAO has confirmed, the volume of freight rail traffic—the sheer number of trains—is causing crossing issues. *See id.* Whether these trains stop for a meet-and-pass because respondent scheduled three trains for the same track, Opp.7, or because of a coffee stop,[1] the primary issue is still that the number of trains exceeds the capacity of the infrastructure. Respondent acknowledges this in veiled references, arguing that "economic considerations" and "infrastructure limitations" cause blocked crossings. Opp.6.

Once respondent's policy argument is set aside, it is clear respondent has no statutory argument to justify the decision below or reconcile the split on the ICCTA. Either § 10501(b)'s preemptive scope does not include issues within the purview of other statutes and not

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[1] The regional vice president admitted that he has employees who stop trains for impermissible reasons, like coffee stops. J.A.1 201. His lack of knowledge of particular details is consistent with BNSF's policy of not tracking blocked crossings. J.A.1 187.

within the jurisdiction of the Board vested by § 1302, as five circuits have held, or § 10501(b) preempts anything regulating railroad operations or construction. This Court should grant certiorari to resolve the split.

B. Review Is Warranted on the Split Over the Definition of Rail Safety in the FRSA.

The second question presented is worth review on its own because the Tenth Circuit split from the Eighth Circuit, as well as from the relevant federal agency and the text and history of the statute. Pet.18-21. Respondent only denies the existence of a split by disregarding the Eighth Circuit's actual reasoning and sidestepping the agency's views and the statute.

Respondent contends that courts agree that the FRSA's coverage of rail safety includes solely the safety of the railroad system, not the safety risks imposed by that system on others interacting with it, such as risks imposed on those on the roads at railroad crossings. Opp.15. But the Eighth Circuit's view was that rail safety includes harms from the interactions of rail and cars—the harms caused to *and by* railroads, as opposed to solely harms to railroads. *See Iowa, Chicago & E. R.R. Corp.*, 384 F.3d at 560. That is why the Eighth Circuit found harms solely caused by railroads to the public—to "school buses and emergency vehicles" alone—were within the FRA's rail safety jurisdiction. *Id.* Meanwhile, the court below concluded contrarily that the FRSA's provisions on rail safety do not cover such risks. *See* App.12a. Respondent unsuccessfully attempts to manufacture a distinction between the Eighth Circuit's and Tenth Circuit's cases to avoid the conclusion that their legal reasoning conflicts. But there is no principled legal rule that would find "a truck crashing into a bridge," Opp.16, is a rail safety issue, but a car crashing into a train, Pet.20, is not.

The text and history also conflict with the Tenth Circuit's view. Respondent certainly points to nothing in the FRSA's text that draws a distinction between rail safety risks to rail participants and rail safety risks to others interacting with the rails. Indeed, respondent admits the text of the FRSA broadly addresses risks that are "railroad-related." Opp.4 (quoting 49 U.S.C. § 20101). Meanwhile, as a matter of history, respondent does not dispute Congress enacted the FRSA in response to court decisions on issues liked blocked crossings. Pet.6-7. And respondent does not contend that the ICCTA changed the FRSA's coverage of this issue. It is thus difficult to reconcile respondent's view with this textual and historical reality.

The Tenth Circuit's and respondent's view of rail safety is also contrary to longstanding federal-state regulatory partnerships on safety. *Contra* Opp.23. As the Eighth Circuit explained, this partnership has for decades addressed problems affecting the interaction of rails and highways *in general* as well as the issue of bridges in particular. *Iowa, Chicago & E. R.R. Corp.*, 384 F.3d at 561. Meanwhile, the "ICCTA did not address these problems." *Id.* Indeed, petitioners agree with respondent that the process "relies on the Secretary of Transportation's authority," Opp.23, but that authority does not include ICCTA, *see* 49 U.S.C. § 1301—an implicit concession by respondent that the issue is not within the purview of the ICCTA.

In fact, respondent mostly ignores that the FRA agrees with the Eighth Circuit regarding the scope of the agency's own safety jurisdiction. Pet.21. Respondent suggests in a footnote that the FRA has recently walked back its acknowledgement of jurisdiction over blocked crossings, Opp.5-6 n.1, but the cited source

does not support that conclusion. The latest FRA statement not only reaffirms the safety concerns from 2019 nearly verbatim, 87 Fed. Reg. 19176, 19176-77 (Apr. 1, 2022), but also states that the recent Bipartisan Infrastructure Law committed blocked crossing complaints solely to the FRA, *id.* at 19176; *contra* Opp.22 (suggesting complaining to the STB).[2] This latest notice only confirms that both Congress and the FRA view this issue as exclusively committed to the FRA.

Thus, in 2022 as in 2019, the FRA asserts rail safety jurisdiction includes blocked crossings because of the harms to pedestrians, to emergency vehicles, and to cars and trains from resulting crashes. J.A.1 155; 87 Fed. Reg. 19176, 19176-77. It also acknowledges that it is collecting information and not yet regulating at this point, but that paralysis on regulation is nothing new. Pet.23. The FRA consistently maintained across both the Obama and Trump administrations that while it is still studying the issue, the power to address blocked crossings "all resides at the state and municipal level." J.A.1 183; *see also id.* at 150-51. Congress had no reason to legislatively overrule *Friberg*, *contra* Opp.22-23, when the FRA has been telling it for years that states are not preempted from enacting these laws.

To be sure, the FRA has policy concerns with how many individual tickets would survive as-applied *conflict* preemption, Opp.22—a preemption claim that respondent did not raise in this case and left in separate state proceedings. *See* J.A.1 183; J.A.2 303-05; J.A.2 306-63. But the FRA has never said those policy

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[2] Respondent's citations to STB merger and acquisition orders, Opp.22, are both unsurprising, Pet.6 n.2, and unhelpful because petitioners have no plans to merge with or acquire a railroad.

concerns prevent states from acting. The FRA lacks data to know how often conflict preemption would arise or even what obstacles to federal compliance would arise—it is still studying the issue. *See* J.A.1 135-36; J.A.1 155-56. It has also pointed the states to the Uniform Vehicle Code's model blocked crossing rule for states. *See* J.A.2 303-04. Thus, its reluctance to adopt a federal rule has been paired with pointing states to regulate the issue themselves.[3]

In short, the Eighth Circuit and the FRA agree that all harms to *and by* railroads are within the FRA's jurisdiction and are thereby left to the states until the FRA acts. The court below thought otherwise, creating a circuit split. Respondent's reimagination of the Eighth Circuit opinion as only about harms caused to railroads, not by them, is belied by the text of the opinion as well as the views of the FRA. The Court should resolve this split on federal and state authority over crossings.

C. THIS CASE IS A GOOD VEHICLE TO RESOLVE THE CIRCUIT SPLITS.

Respondent tries to argue that the second question is the only question presented, Opp.17-18, but it ultimately admits that the Tenth Circuit's holding on the scope of ICCTA preemption is doing the real work, Opp.21. Petitioners agree with respondent that "[t]he

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[3] Ignoring both the FRA's statements and petitioners' citation to *Easterwood*, Pet.23, respondent accuses petitioners of failing to address FRA air-brake cases, Opp.12 n.3. As the Seventh Circuit explains, this Court's *Easterwood* decision forecloses the argument that a state law is facially preempted merely because "many federal regulations deal with railroad safety" and it is "bound to affect" one of them sometime. *See Norfolk S. Ry. Co. v. Box*, 556 F.3d 571, 573 (7th Cir. 2009). That is why the FRA itself believes blocked crossings are still a state issue.

Tenth Circuit repeatedly tied its preemption holding to the fact that the 'STB has exclusive jurisdiction,'" Opp.20 (quoting App.7a)—a conclusion that five circuits reject.

Respondent does not dispute that this facial preemption challenge is a cleaner vehicle than the typical case involving these statutes. Pet.22. In fact, respondent filed this facial challenge to avoid the as-applied proceeding in state administrative courts. Pet.10.

Without this Court's definitive statement on the meaning of the statutes at issue, states will be needlessly blocked from being the only entity doing anything to solve the chronic problem of stopped trains blocking public roads. Pet.23. The entire purpose of the FRSA is to ensure that states can regulate areas not addressed by the FRA to prevent dangerous gaps in regulation. *See* 49 U.S.C. § 20106(a)(2). Yet respondent wants to undermine that framework through a two-prong approach: (1) convince the FRA that the area is too difficult to handle federally, which has successfully paralyzed the agency with almost twenty years of studies, Pet.23, and then (2) tell courts that ICCTA addresses the area federally, quashing all state rules.

Either safety issues related to the construction and operation of rails are still within the FRA's jurisdiction, and thereby the states' jurisdiction where the FRA has not acted, or they are exclusively vested in the STB by ICCTA. Either five circuits inappropriately allow states to regulate railroad construction (and by necessary extension, operations) or the Fifth Circuit and Tenth Circuit inappropriately foreclose state authority over such regulation. This Court's definitive statutory interpretation is needed on state and federal authority over rails, and this facial preemption

challenge presenting a pure question of law is the ideal vehicle to provide that clarity.

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The Court should grant the petition for certiorari.

Respectfully submitted,

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