No. 22-459

IN THE

Supreme Court of the United States

STATE OF OHIO,

Petitioner,

v.

CSX TRANSPORTATION, INC.,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Ohio

BRIEF IN OPPOSITION

TERRANCE K. DAVIS
NICHOLAS T. STACK
Shumaker, Loop & Kendrick LLP
1000 Jackson Street
Toledo, OH 43604-5573

ANDREW TAUBER
Counsel of Record
Winston & Strawn LLP
1901 L Street, NW
Washington, DC 20036
(202) 282-5288
atauber@winston.com

BRANDON DUKE
Winston & Strawn LLP
800 Capitol Street
Suite 2400
Houston, TX 77002

Counsel for Respondent

QUESTIONS PRESENTED

The Interstate Commerce Commission Termination Act vests the Surface Transportation Board with "exclusive" jurisdiction over rail transportation and expressly preempts state laws that intrude on that authority. 49 U.S.C. § 10501(b). Similarly, the Federal Railroad Safety Act expressly preempts state laws "related to railroad safety" if the Federal Railroad Administration has issued a regulation "covering the subject matter." 49 U.S.C. § 20106(a)(2).

Ohio's "Blocked Crossing Statute" regulates the operation of railroads by prohibiting stopped trains from occupying vehicular grade crossings "for longer than five minutes." Ohio Rev. Code § 5589.21(A). Consistent with every other state high court and federal circuit court that has addressed blocked-crossing laws, the Ohio Supreme Court held that the Blocked Crossing Statute is preempted by federal law.

The questions presented are:

1. Does 49 U.S.C. § 10501(b) preempt state laws that regulate the amount of time a stopped train may block a grade crossing?
2. Does 49 U.S.C. §20106(a)(2) preempt state laws that regulate the amount of time a stopped train may block a grade crossing?

RULE 29.6 STATEMENT

Pursuant to Rule 29.6, undersigned counsel states that respondent CSX Transportation, Inc. is a wholly owned subsidiary of CSX Corporation, a publicly traded company. No other publicly held company owns 10% or more of the company's stock.

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BRIEF IN OPPOSITION

Respondent CSX Transportation, Inc. (CSX) submits this brief in opposition to the petition for a writ of certiorari.

INTRODUCTION

Petitioner, the State of Ohio, concedes that the decision below "accords with the consensus view of courts around the country," which have uniformly "held that federal law preempts state and local laws that regulate blocked grade crossings." Pet. 1. Indeed, for "over two decades" (*id.* at 16), every appellate system to have addressed the issue has concluded that anti-blocking statutes such as the Ohio statute at issue in this case are preempted by federal law.

Despite the lower courts' conceded unanimity, Ohio asks this Court to intervene. It says that there are two reasons for the Court to do so. First, says Ohio, the "general consensus" that anti-blocking statutes are preempted "masks significant disagreement" over why that is so. Pet. 23. According to Ohio, although "the lower courts are reaching consistent outcomes, they are doing so via inconsistent reasoning." *Id.* Second, says Ohio, the lower courts' agreement that federal law preempts state and local anti-blocking statutes "poses 'a significant danger to the public.'" *Id.* at 15 (quoting Pet.App.15a).

Neither reason justifies granting certiorari. There is no inconsistency in the lower courts' interpretation of federal law, and there is no public-safety crisis.

Even if there were inconsistency in the lower courts' reasoning as to why anti-blocking statutes are preempted, this Court does not generally grant certiorari to address differences in reasoning when those differences do not affect the ultimate conclusion.

Regardless, the supposed inconsistency in reasoning as to why anti-blocking statutes are preempted is illusory. Some courts have held anti-blocking laws preempted under the Interstate Commerce Commission Termination Act (ICCTA), 49 U.S.C. § 10501(b); others have held such laws preempted under the Federal Railroad Safety Act (FRSA), 49 U.S.C. § 20106(a)(2). That does not make their reasoning inconsistent. It would be inconsistent had one court held that anti-blocking laws are preempted by ICCTA but not preempted by the FRSA while another court held that anti-blocking laws are preempted by the FRSA but not by ICCTA. But no court has so held.

Because each lower court to reach the issue has concluded that anti-blocking laws are preempted under at least ICCTA or the FRSA, they have generally refrained from analyzing such laws under both statutes. The Tenth Circuit, for example, explained that "[b]ecause … ICCTA preempts" anti-blocking laws, it "need not consider whether the FRSA does too." *BNSF Ry. v. Hiett*, 22 F.4th 1190, 1194 (10th Cir.), *cert. denied sub nom. City of Edmond, Oklahoma v. BNSF Ry.*, 142 S. Ct. 2835 (2022). Conversely, having held that anti-blocking laws are "preempted by the FRSA," the Sixth Circuit "decline[d] to address the question of whether" anti-blocking laws are "also preempted by … ICCTA." *CSX Transp., Inc. v. City of Plymouth*, 283 F.3d 812, 817 (6th Cir. 2002).

There is simply no direct conflict—or outcome-determinative difference in reasoning—among the lower courts.

Although the Court will sometimes grant certiorari without waiting for a lower-court conflict to emerge—for example, when a legal dispute implicates a soon-to-be-held election—there is no pressing need for the

Court to address the questions presented here.

Ohio's suggestion that blocked crossings caused by stopped trains constitute a dire public-safety crisis is simply wrong. Despite devoting more than 85 pages of briefing to the issue, Ohio and its amici identify only twenty incidents involving blocked crossings. Of those twenty incidents, five are reported to have resulted in death and two in property damage. While not diminishing the impact of the events on the individuals and families involved, those numbers are vanishingly small when compared to the number of trains traversing grade crossings daily. Moreover, to the extent action needs to be taken regarding blocked crossings, Congress, the Federal Railroad Administration (FRA), and the railroads would be the appropriate parties to do so and, in fact are already taking steps to reduce their frequency and duration.

There is, in short, no policy-driven reason for this Court to address blocked crossings.

Even if it were important for this Court to someday decide whether state anti-blocking laws are best characterized as public-safety laws or railroad-safety laws, this is not the case in which to do so. There are two distinct vehicle problems.

First, to prevail, Ohio would have to persuade this Court that anti-blocking laws are railroad-safety laws and might therefore be saved from ICCTA preemption by the FRSA. But Ohio took the contrary position below, insisting that its anti-blocking law "touches upon" railroad safety "merely indirectly," that "[t]he chief purpose of the statute is to ensure the flow of traffic and emergency personnel," and that the "FRSA is not directly related to Ohio's regulation of blocked roadways and grade crossings." Appellee's Br. at 18, 20, *Ohio v. CSX Transp., Inc.*, 200 N.E.3d 215 (Ohio 2022)

(No. 2020-0608), 2020 WL 7663520, at *18, *20. Ohio cannot now argue that its "rules regulating stoppage times at grade crossings are 'related to railroad safety'" within the meaning of the FRSA. Pet. 1.

Second, the Court might not be able to answer the second question presented, which asks whether 49 U.S.C. § 20106(a)(2), the FRSA's preemption provision, saves state anti-blocking statutes from preemption. The Court cannot answer that question in this case if it—like every other court to have considered the issue—concludes that federal regulations cover the subject of how long stopped trains may occupy grade crossings. If federal regulations cover the same subject matter, then a state law is not saved by the FRSA unless the law satisfies the three criteria set forth in 49 U.S.C. § 20106(a)(2)(A)–(C). Below, Ohio never argued that Ohio's anti-blocking statute satisfies these conditions. Its only argument under the FRSA was that federal regulations do not cover the subject of how long trains may occupy grade crossings. Given that Ohio did not preserve the question whether its anti-blocking statute satisfies the requisite conditions, this Court cannot resolve the second question presented if the Court agrees with the lower courts' unanimous view that federal regulations do in fact cover the subject.

Because the characterization of anti-blocking statutes is neither outcome-determinative nor properly presented, and because the Court might be unable to reach the second question in light of Ohio's waiver below, there is no reason to grant certiorari simply to address the purported inconsistency in the lower courts' reasoning as to why anti-blocking statutes are preempted, as every court agrees they are.

There is, moreover, no legal error for the Court to correct. The national "consensus among lower courts"

(Pet. 16) that federal law preempts state anti-blocking statutes is right.

ICCTA vests the Surface Transportation Board (STB) with "exclusive" jurisdiction over rail "routes" and "services," as well as the "operation … or discontinuance of spur, industrial, … [and] switching … tracks[.]" 49 U.S.C. § 10501(b). As the circumstances of this case show and courts have held, anti-blocking laws directly affect railroad operations and the servicing of railroad customers.

Viewed as railroad-safety laws, anti-blocking statutes are also preempted by the FRSA. Unless a state law satisfies criteria that Ohio has never argued are satisfied here, the FRSA prohibits states from enforcing laws "related to railroad safety" if the FRA has issued a regulation "covering the subject matter of the State requirement." 49 U.S.C. § 20106(a). By definition, anti-blocking laws such as the Ohio statute at issue regulate how long stopped trains may occupy a grade crossing. The FRA, however, has issued at least two regulations governing the same subject matter—regulations requiring railroads to conduct certain brake tests after picking up or dropping off cars at an industrial site and speed-limit regulations prohibiting trains from traveling faster than the prescribed speeds. 49 C.F.R. §§ 213.9(a), 232.209. Those regulations directly govern how long trains will occupy grade crossings. The mandated brake tests must be performed and the speed limits must be adhered to even if doing so means that a train will occupy a grade crossing longer than permitted by a state anti-blocking law. Thus, as recognized by every lower court to examine the issue, the FRA has issued regulations governing how long stopped trains may occupy grade crossings, and state anti-blocking laws are therefore preempted by the FRSA.

Last year, Oklahoma asked this Court to address the preemption of anti-blocking statutes under ICCTA and the FRSA. Cert. Pet. at i, *City of Edmond, Oklahoma v. BNSF Ry.*, 142 S. Ct. 2835 (2022) (No. 21-1296), 2022 WL 903495 (U.S.), at *i. The Court denied the petition. *City of Edmond, Oklahoma v. BNSF Ry.*, 142 S. Ct. 2835 (2022). Nothing relevant has changed since then. Indeed, with the decision below, the unanimous consensus that federal law preempts state anti-blocking laws has only deepened.

The petition should be denied.

STATEMENT

A. Federal regulation of railroads.

"Historically, federal regulation of railroads has been extensive[.]" *Fayard v. Ne. Vehicle Servs., LLC*, 533 F.3d 42, 46 (1st Cir. 2008). More than 40 years ago, this Court noted that "[r]ailroads have been subject to comprehensive federal regulation for nearly a century." *United Transp. Union v. Long Island R.R.*, 455 U.S. 678, 687 (1982), *overruled on other grounds by Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985). By now, the federal government has extensively regulated rail transportation for more than 135 years, beginning in 1887 when "Congress enacted the Interstate Commerce Act …, which established the Interstate Commerce Commission (ICC) to comprehensively regulate rail shipping in interstate commerce." *R.J. Corman R.R. v. Palmore*, 999 F.2d 149, 151 (6th Cir. 1993). During the late-nineteenth and early-twentieth centuries, Congress enacted a series of statutes governing rail operations, including the Safety Appliance Act, the Boiler Inspection Act, the Federal Employers' Liability Act, and the Railroad Labor Act. *Id.* at 151–52. "Indeed," it has been said that "'[p]erhaps no industry has a longer history of pervasive federal

regulation than the railroad industry.'" *Id.* at 151 (quoting *Consol. Rail Corp. v. Metro-North Commuter R.R.,* 638 F. Supp. 350, 357 (Regional Rail Reorg. Ct. 1986) (Wisdom, J.)).

To be sure, states continued to exercise certain limited powers over railroads even after enactment of the Interstate Commerce Act in 1887. But "[t]he regulation of railroad operations has long been a traditionally federal endeavor, to better establish uniformity in such operations and expediency in commerce[.]" *Friberg v. Kan. City S. Ry.*, 267 F.3d 439, 443 (5th Cir. 2001). Consistent with those principles, Congress enacted two major pieces of legislation in the second half of the twentieth century, ICCTA and the FRSA, each of which expressly preempted wide swaths of state regulation.

Enacted by Congress in 1995, ICCTA "removed the authority of the States" to regulate core railroad operations, thereby eliminating the "patchwork of regulation" that previously existed under state law. *Fla. E. Coast Ry. v. City of W. Palm Beach*, 266 F.3d 1324, 1337, 1338–39 (11th Cir. 2001). ICCTA replaced that patchwork with "uniform[] … Federal standards" "for an "intrinsically interstate form of transportation." H.R. Rep. No. 104-311, at 95–96 (1995), *as reprinted in* 1995 U.S.C.C.A.N. 793, 807–08. To achieve such uniformity and deregulation, ICCTA vests the STB with "exclusive" jurisdiction over rail "routes" and "services," as well as the "operation … or discontinuance of spur, industrial, … [and] switching … tracks." 49 U.S.C. § 10501(b). Under ICCTA's express-preemption provision, which meant to protect the STB's exclusive jurisdiction over the operation of rail lines, "the remedies provided" by ICCTA "with respect to regulation of rail transportation are exclusive and preempt the remedies provided under … State law." 49 U.S.C.

§ 10501(b). As numerous courts have recognized, "[i]t is difficult to imagine a broader statement of Congress's intent to preempt state regulatory authority over railroad operations." *City of Auburn v. United States*, 154 F.3d 1025, 1030 (9th Cir. 1998) (quoting *CSX Transp., Inc. v. Ga. Pub. Serv. Comm'n*, 944 F. Supp. 1573, 1581 (N.D. Ga. 1996)).

The FRSA was enacted in 1970 to "promote safety in every area of railroad operations and reduce railroad-related accidents and incidents." 49 U.S.C. § 20101. Recognizing that the railroad industry has "a truly interstate character calling for a uniform body of regulation and enforcement" (H.R. Rep. No. 91-1194, at 13 (1970), *as reprinted in* 1970 U.S.C.C.A.N. 4104, 4110), Congress "declare[d] that laws, rules, regulations, orders, and standards relating to railroad safety shall be nationally uniform to the extent practicable." Pub. L. No. 91-458, § 205, 84 Stat. 971, 972 (1970).[1]

Although amended since its initial passage, the FRSA continues to provide that "[l]aws, regulations, and orders related to railroad safety … shall be nationally uniform to the extent practicable." 49 U.S.C. § 20106(a)(1). To achieve Congress's goal of national uniformity in railroad-safety regulation, the FRSA's preemption provision allows a state to "adopt or continue in force a law, regulation, or order related to

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[1] As the House Report accompanying the Safety Act explains, Congress did "not believe that safety in the nation's railroads would be advanced sufficiently by subjecting the national rail system to a variety of enforcement in 50 different judicial and administrative systems." H.R. Rep. No. 91-1194, at 5, *as reprinted in* 1970 U.S.C.C.A.N. 4104, 4109. As the report noted, "[t]o subject a carrier to enforcement before a number of different state administrative and judicial systems in several areas of operation could well result in an undue burden on interstate commerce." *Id.* at 7, 1970 U.S.C.C.A.N. at 4110–11.

railroad safety," but 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); *see also Norfolk S. Ry. v. Shanklin*, 529 U.S. 344, 348 (2000).

Exercising its authority under the FRSA, the FRA has adopted two regulations relevant here. First, under 49 C.F.R. Part 232, railroads must "perform[]" specified brake tests when cars are added to or removed from a train, as typically occurs when railroads deliver or receive goods at an industrial site, such as the Honda plant CSX was servicing when it received the citations that triggered this case. 49 C.F.R. § 232.211(a); *see also* 49 C.F.R. § 232.209(a). Second, trains may not exceed the "maximum allowable operating speeds" that the FRA has established for various classes of track, such as the track outside the Honda plant. 49 C.F.R. § 213.9(a). As every court to reach the issue has held, these regulations—both separately and in combination—dictate how long a train might have to occupy a grade crossing.

B. Ohio's anti-blocking statute.

Notwithstanding ICCTA and the FRSA, Ohio has adopted a statute that prohibits stopped trains from obstructing grade crossings "for longer than five minutes." Ohio Rev. Code § 5589.21(A). Although obstructions by "continuously moving" trains or those "caused by circumstances wholly beyond the control of the railroad company" are excluded, the prohibition includes all "other obstructions, including without limitation those caused by stopped trains and trains engaged in switching, loading, or unloading operations." *Id.* § 5589.21(C). Violation of the statute is "a misdemeanor of the first degree." *Id.* § 5589.99(D). If convicted under the provision, a railroad "shall be fined"

$1,000. *Id.*

When it adopted the anti-blocking statute, the Ohio General Assembly explained, in a codified statement of "statutory intent," that the law's purpose is to address "local safety problems" by ensuring "the timely movement of ambulances, the vehicles of law enforcement officers and firefighters, and official and unofficial vehicles transporting health care officials and professionals." *Id.* § 5589.20.

C. Proceedings below.

1. In 2018, CSX was cited five times for allegedly violating Ohio's anti-blocking statute. Pet.App.3a. Three of those citations were for occupying crossings outside the Marysville Honda plant in Union County, Ohio. Pet.App.3a. CSX regularly serves the Honda plant but occasionally must block crossings while (i) loading and unloading supplies at the plant and (ii) entering or exiting the plant. Pet.App.3a. Those tasks could not be accomplished without blocking nearby crossings for more than five minutes. Pet.App.70a. The other two citations were issued when CSX trains were forced to block crossings to coordinate movements with other trains—one to allow another train using the same track to pass and the other because a train ahead was stopped with mechanical issues. Pet.App.3a, 70a.

Ohio did not claim that these alleged violations delayed any law enforcement officers, firefighters, paramedics, or other emergency or health care professionals. Rather, it claimed that the alleged conduct "hindered traffic and caused inconvenience to motorists." Pet.App.47a.

2. CSX moved to dismiss the citations, arguing that both ICCTA and the FRSA expressly preempted Ohio's anti-blocking statute. Pet.App.71a. Focusing on

the ICCTA, the trial court held that the act "asserts what amounts to an express preemption of Ohio's blocked crossing statute." Pet.App.71a. The court added that "[n]umerous courts have reached the conclusion that similar blocked crossing statutes of other states and local ordinances of municipalities are preempted by Federal statutory law and regulation either under … ICCTA or the FRSA or both." Pet.App.72a–73a. (collecting cases). The trial court also noted six cases "specifically finding that Ohio's blocked crossing statute is preempted." Pet.App.73a (citing cases). The court granted CSX's motion and dismissed the charges. Pet.App.74a.

3. The state appealed, and a divided panel of Ohio's Third District Court of Appeals reversed, addressing only preemption under ICCTA. Pet.App.62a. Although the majority "acknowledged" that "federal and state courts from around the country" have held that ICCTA preempts blocked crossing statutes like Ohio's, it "decline[d] to accept or adopt" that consensus view. Pet.App.62a. In dissent, Judge Zimmerman wrote that "state and federal case authority supports an affirmance" and that he "would affirm the trial court's dismissal" because "dismissal was the correct legal solution here." Pet.App.67a.

4. CSX petitioned the Ohio Supreme Court for review. After granting the petition, receiving merits briefing, and hearing oral argument, the court reversed the decision of the intermediate appellate court and "reinstate[d] the trial court's dismissal of all the charges brought against CSX for violating R.C. 5589.21," holding the anti-blocking statute "preempted by federal law." Pet.App.3a.

Although five of the court's seven justices agreed with that conclusion, the court did not produce a

majority opinion. Pet.App.15a–16a.

Justice Kennedy authored the lead opinion announcing the court's judgment. Writing on behalf of herself and one other justice, she concluded that because O.R.C. § 5589.21, the anti-blocking statute, "regulates, manages, and governs rail traffic in [Ohio] by prescribing how long a train may stay stopped while blocking a crossing, it conflicts with and is expressly preempted by [ICCTA]." Pet.App.2a. She explained that "[c]ompliance with the state statute in any practical way would force CSX to move its railroad lines and facilities so that a train may load, unload, or switch cars without blocking a crossing." Pet.App.8a–9a. Such a requirement, she said, "usurp[s]" the STB's "exclusive jurisdiction" over the "construction, acquisition, operation, abandonment, or discontinuance" of rail lines and is therefore preempted by 49 U.S.C. § 10501(b)(2). Pet.App.8a–9a. That conclusion, she noted, "accords with the overwhelming weight of authority from other jurisdictions." Pet.App.9a (citing cases).

Concurring in the judgment, Justice Fischer, writing on behalf of himself and another justice, concluded that O.R.C. § 5589.21 "is federally preempted by the [FRSA]." Pet.App.16a. According to Justice Fisher, the anti-blocking law is "related to railroad safety" and therefore "falls under the FRSA." Pet.App.18a. The law is preempted by the FRSA, Justice Fischer reasoned, because the FRA has issued two regulations covering the same matter as O.R.C. § 5589.21. First, the FRA requires Ohio and other states to develop "'State highway-rail grade crossing action plan[s]'" to "'reduce accident/incidents at highway-rail and pathway grade crossings.'" Pet.App.19a (quoting 49 C.F.R. § 234.11). Second, "the FRA has dictated maximum operating speed limits for trains," a regulation that this

Court has held "'should be understood as covering the subject matter of train speed with respect to track conditions, including the conditions imposed by grade crossings.'" Pet.App.19a (citing 49 C.F.R. § 213.9(a) and quoting *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 675 (1993)). That "the primary purpose of R.C. 5589.21 is more specific" than that of either federal regulation is "irrelevant," said Justice Fischer, because the only question under 49 U.S.C. § 20106 is whether the FRA has adopted regulations that "cover the subject matter." Pet.App.19a–20a (citing *Easterwood*, 507 U.S. at 675). Justice Fischer concluded that O.R.C. § 5589.21 covers the same subject matter as the federal regulations because "trains that are blocking an intersection for a length of time are necessarily included in the broad subject matter of grade-crossing safety," and because "the time limitation" in the anti-blocking statute "will necessarily affect train speed." Pet.App.19a.[2]

Justice Stewart concurred in the court's judgment but did not join either Justice Kennedy's or Justice Fischer's opinion. Pet.App.15a.

Justice Brunner, writing for herself and one other justice, dissented. She concluded that "neither … ICCTA nor the FRSA preempts" O.R.C. § 5589.21. Pet.App.41a. While agreeing with Justice Fischer that the anti-blocking law "is about railroad safety" and thus "properly analyzed" under the FRSA, she would have held that it is not preempted by the FRSA because there is no federal regulation "directly covering the topic of blocked crossings." Pet.App.22a, 38a.

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[2] Justice Fischer further concluded that O.R.C. § 5589.21 is not saved by 49 U.S.C. § 20106(a)(2) because, as held in Justice Kennedy's lead opinion, the anti-blocking law is "incompatible" with ICCTA inasmuch as it "usurps the exclusive jurisdiction" of the STB over "switching, operations, and routes." Pet.App.20a.

REASONS FOR DENYING THE PETITION

There is no conflict for this Court to resolve. The courts of appeals and state high courts are unanimous that state anti-blocking laws are expressly preempted by federal statute.

That unbroken consensus is correct. ICCTA preempts state anti-blocking laws because they intrude on the STB's exclusive authority over the operation of and provision of services on rail lines. And the FRSA preempts state anti-blocking laws, even if they are railroad-safety laws, because the FRA has issued regulations covering how long trains may occupy grade crossings and the state laws do not satisfy the statutory conditions to escape preemption.

There is also no public-safety crisis requiring this Court's intervention. The number of events supposedly attributable to blocked crossings is very low when compared to the large number of grade crossings in the country and the frequency with which they are used. And to the extent that any steps need to be taken to reduce the number and duration of blocked crossings, Congress, the FRA, and the railroads would be the appropriate parties to do so and, indeed, are already taking such steps.

Lack of conflict, error, and urgency aside, this case is a poor vehicle for addressing the questions presented. To reach the second question at all, this Court must decide whether anti-blocking statutes are railroad-safety rather than public-safety laws. And to hold in Ohio's favor, this Court must determine that they are railroad-safety laws. Ohio, however, waived the contention that they are. And because Ohio did not raise the issue below, the lower courts did not address whether Ohio's anti-blocking statute satisfies the three statutory prerequisites to escape preemption.

There is simply no compelling reason to grant certiorari in this case. The petition should be denied.

I. There is no conflict that warrants this Court's intervention.

The lower courts are unanimous. Every appellate system to have reached the issue has concluded that federal law preempts state anti-blocking statutes. *See BNSF Ry. v. Hiett*, 22 F.4th 1190, 1192 (10th Cir.), *cert. denied sub nom. City of Edmond, Oklahoma v. BNSF Ry.*, 142 S. Ct. 2835 (2022); *Elam v. Kan. City S. Ry.*, 635 F.3d 796, 807 (5th Cir. 2011); *CSX Transp., Inc. v. City of Plymouth*, 283 F.3d 812, 817 (6th Cir. 2002); *Friberg v. Kan. City S. Ry.*, 267 F.3d 439, 444 (5th Cir. 2001); *People v. Burlington N. Santa Fe R.R.*, 209 Cal. App. 4th 1513, 1529 (2012) ("*California*"); *State v. BNSF Ry.*, 432 P.3d 77, 87 (Kan. Ct. App. 2018) ("*Kansas*"); *Vill. of Mundelein v. Wis. Cent. R.R.*, 882 N.E.2d 544, 556 (Ill. 2008); *Canadian Nat'l Ry. v. City of Des Plaines*, 2006 WL 345095, at *3 (Ill. App. Ct. 2006); *State v. Norfolk S. Ry.*, 107 N.E.3d 468, 478 (Ind. 2018) ("*Indiana*"); *Burlington N. & Santa Fe Ry. v. Dep't of Transp.*, 206 P.3d 261, 265 (Or. Ct. App. 2009) ("*Oregon*"); *Krentz v. Consol. Rail Corp.*, 910 A.2d 20, 26 (Pa. 2005); *City of Seattle v. Burlington N. R.R.*, 41 P.3d 1169, 1175 (Wash. 2002); *City of Weyauwega v. Wis. Cent. Ltd.*, 919 N.W.2d 609, 612 (Wisc. Ct. App. 2018); *see also Ass'n of Am. R.Rs. v. Hatfield*, 435 F. Supp. 3d 769, 781 (E.D. Ky. 2020); *CSX Transp., Inc. v. Williams*, 2017 WL 1544958, at *2 (N.D. Ohio 2017); *Driesen v. Iowa, Chicago & E. R.R.*, 777 F. Supp. 2d 1143, 1154 (N.D. Iowa 2011).

Ohio does not contend otherwise. It admits that "the consensus view of courts around the country" is "that federal law preempts state and local laws that regulate blocked grade crossings." Pet. 1. But, it says,

"that general consensus masks significant disagreement." Pet. 23.

Not so. Although some courts have held that anti-blocking statutes are preempted by ICCTA, some have held that they are preempted by the FRSA, and one has held that they are preempted by both ICCTA and the FRSA, no court has held that they are preempted by neither.[3] Thus, whatever the variation in their approaches to the issue, "the lower courts are reaching consistent outcomes" (Pet. 23), whether they view anti-blocking statutes as "railroad safety" laws or not. In fact, Ohio concedes that the differences in approach "have not yet proved outcome-determinative." Pet. 2. Thus, whatever disagreement there might be is not significant.

That some courts have held anti-blocking laws preempted under ICCTA while others have held them preempted under the FRSA is unremarkable. The STB, which was established by ICCTA, recognizes that there are situations in which "both FRSA and ICCTA preemption may apply." *In re Waneck*, 2018 WL 5723286, at *5 n.6 (S.T.B. 2018). Indeed, in the precise context at issue here, the Washington Supreme Court and the Appellate Court of Illinois have held that state anti-blocking laws are "subject to preemption under"

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[3] Anti-blocking statutes were held preempted by ICCTA in *Hiett*, 22 F.4th at 1192; *Elam*, 635 F.3d at 807; *Friberg*, 267 F.3d at 444; *Williams*, 2017 WL 1544958, at *2; *California*, 209 Cal. App. 4th at 1529; *Kansas*, 432 P.3d at 87; *Indiana*, 107 N.E.3d at 478; and *Oregon*, 206 P.3d at 265. Anti-blocking statutes were held preempted by the FRSA in *City of Plymouth*, 283 F.3d at 817; *Hatfield*, 435 F. Supp. 3d at 781); *Driesen*, 777 F. Supp. 2d at 1154; *Village of Mundelein*, 882 N.E.2d at 556; *Krentz*, 910 A.2d at 26; and *City of Weyauwega*, 919 N.W.2d at 612. In two of these cases, *Village of Mundelein* and *Hatfield*, ICCTA was not even raised. Anti-blocking statutes were held preempted by both ICCTA and the FRSA in *City of Des Plaines*, 2006 WL 345095, at *3, and *City of Seattle*, 41 P.3d at 1175.

both "ICCTA *and* the FRSA." *City of Seattle v. Burlington N. R.R.*, 41 P.3d 1169, 1175 (Wash. 2002) (emphasis added); *Canadian Nat'l Ry. v. City of Des Plaines*, 2006 WL 345095, at *3, *5 (Ill. App. Ct. 2006).

1. Ohio suggests that review is necessary because "[s]everal lower courts … have embraced [a] broad reading" of ICCTA that "would," says Ohio, "effectively repeal those portions of the [FRSA] empowering" the FRA and, under narrowly circumscribed circumstances, the States "to enact regulations pertaining to railroad safety." Pet. 25. Ohio points to the decisions in *Indiana*, *Kansas*, and *Oregon*. But if those decisions, which are between five and fourteen years old, had the sweeping effect that Ohio ascribes to them, one would expect to see subsequent decisions in those jurisdictions refusing to enforce regulations issued pursuant to the FRSA. Ohio does not—and cannot—identify any such case.

Decisions holding anti-blocking statutes preempted by ICCTA offer an explanation why there are no such cases. Recognizing that "the FRSA may inform ICCTA preemption analysis in some circumstances" given "the complicated relationship between the two statutes," the Fifth Circuit has repeatedly stated that "'not every state law targeting rail operations is completely preempted by the ICCTA.'" *Ezell*, 866 F.3d at 300 n.6 (quoting *Elam*, 635 F.3d at 808). Similarly, in *Oregon*, the court rejected the contention that "reading" 49 U.S.C. § 10501(b) to preempt Oregon's anti-blocking law "would render" 49 U.S.C. § 20106 "meaningless." 206 P.3d at 263 n.2. Rather than construing ICCTA to have impliedly repealed the FRSA, the court said that the two statutes could coexist because "[n]ot all regulations pertaining to railroad safety" as that term is used in § 20106 "constitute regulation of rail transportation" within the meaning of

§ 10501(b). *Id.*

Ohio's conjures a specter of implied repeal where none exists.

2. Next, Ohio argues that this Court's intervention is warranted because some courts have read the term "railroad safety" (49 U.S.C. § 20106) "broadly" while others have read it "narrowly." Pet. 26–29. Those that have read the term "broadly" analyze anti-blocking statutes under the FRSA; those that read it "narrowly" analyze them under ICCTA. But whether they read the term "broadly" or "narrowly," all courts agree that anti-blocking statutes are preempted. The difference in approach does not affect the result.

Although Ohio acknowledges that how "railroad safety" is read has not been "outcome-determinative," it argues that certiorari should nonetheless be granted to "resolv[e] th[e] dispute" over the term's breadth to "restore uniformity across the country regarding the States' power to regulate rail-related issues." Pet. 2, 29. But there is no lack of uniformity. Whether a court reads "railroad safety" "broadly" and holds anti-blocking statutes preempted under the FRSA or reads the term "narrowly" and holds such statutes preempted under ICCTA, a state's power is the same: it may not regulate how long stopped trains occupy grade crossings.

Ohio also says that this Court should review the issue to provide the FRA guidance on the scope of its authority. Pet. 29. In support, Ohio points to the FRA's statement that it has "'no regulatory authority'" to regulate blocked crossings. Pet. 29 (quoting FRA, Blocked Crossings Fast Facts (Nov. 2021), https://perma.cc/AJ9B-FBR3). Made in a one-page fact sheet without accompanying analysis, the basis for the FRA's statement is unclear. It could be that the FRA, like the

Tenth Circuit and other appellate courts, has concluded that anti-blocking statutes address "local public safety issues—not rail safety issues." *Hiett*, 22 F.4th at 1196; *accord, e.g.*, *California*, 209 Cal. App. 4th at 1526; *cf.* O.R.C. § 5589.20 ("statutory intent" of O.R.C. § 5589.21 is to address "local safety problems").

Regardless, the outcome of this case does not depend on whether the FRA has statutory authority under the FRSA to regulate blocked crossings. If it lacks authority to regulate blocked crossings because they do not implicate "railroad safety," then there is nothing to Ohio's argument that the FRSA limits ICCTA preemption in this case. And even if the FRA has authority to regulate blocked crossings because the term "railroad safety" as used in the FRSA is to be read "broadly" (Pet. 27), it leaves open the question whether the FRSA preempts anti-blocking statutes. As explained below, the mere fact that the FRA has not issued a regulation explicitly regulating blocked crossings as such does not mean that the FRA has not issued regulations that govern how long trains may occupy grade crossings. *See infra* at 5. Indeed, every court to consider the issue has concluded that the FRA has issued regulations that cover how long trains may occupy grade crossings and that those regulations preempt state anti-blocking laws. Thus, whether the FRA has statutory authority under the FRSA to regulate blocked crossings as such is not outcome-determinative.

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There is, in sum, no conflict in the lower courts warranting the Court's intervention in this case.

II. There is no public-policy reason to grant certiorari.

Because there is no meaningful conflict among the lower courts, Ohio places heavy emphasis on public policy, arguing that, conflict or not, the case is cert-worthy given its supposedly "important implications for public safety." Pet. 2. According to Ohio, "the stakes are life and death" because blocked crossings can "delay first responders from reaching emergencies in situations where every second counts." *Id.*

There is no safety crisis. And to the extent any action needs to be taken regarding blocked crossings, Congress, the FRA, and the railroads would be the appropriate parties to do so and, in fact, are already taking steps to reduce their frequency and minimize their duration.

There is, in short, no compelling policy reason for the Court to intervene in this case despite the lower courts' unanimity.

1. Ohio and its amici have submitted 85 pages of briefing, much of which focuses on the risks purportedly associated with blocked crossings. Despite devoting so much attention to the issue, Ohio and its amici identify only twenty distinct incidents involving blocked crossings in the last fifty years. *See* Pet. 18–19; Amicus Br. of Indiana 5–8, 20; Amicus Br. of Ohio Prosecuting Att'ys Ass'n 6; Amicus Br. of Various Unions 13–14. Of those twenty incidents, seven are said to have had negative consequences; five are reported to have resulted in death and two in property damage.[4]

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[4] Notably, neither Ohio nor its amici provide any context for the precipitating blockages. They do not specify whether the trains involved were stopped or merely slow-moving and thus not

Those seven incidents undoubtedly impacted the individuals involved but they are isolated events, not indications of a public-safety crisis.

There are approximately 140,000 miles of railroad track and approximately 200,000 grade crossings in the United States. FRA, Freight Rail Overview, https://railroads.dot.gov/rail-network-development/freight-rail-overview (last updated July 8, 2020); FRA, Crossing Inventory by State, https://railroads.dot.gov/crossing-and-inventory-data/grade-crossing-inventory/805-crossing-inventory-state; Am. Ass'n of R.Rs. (Oct. 2022), https://www.aar.org/wp-content/uploads/2020/02/AAR-Occupied-Crossings-Fact-Sheet.pdf. Thus, there is more than one grade crossing for every mile of track in the country. Approximately 12,000,000 railcars travel those tracks and traverse those crossings annually. Bureau of Trans. Stat., Transportation as an Economic Indicator, https://data.bts.gov/stories/s/Transportation-as-an-Economic-Indicator-Seasonally/j32x-7fku. Thus, the number of incidents that Ohio and its amici attribute to blocked crossings is exceedingly small when compared to the number of trains traversing grade crossings annually.

Apparently recognizing that the number of injurious incidents plausibly attributable to blocked crossings is small, Ohio points to an FRA online portal that "received over 25,000 reports of blocked grade crossings" between December 2019 and September 2021. Pet. 19 (citing FRA, Blocked Crossings Fast Facts

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subject to blocked-crossing statutes such as O.R.C. § 5589.21. Nor do they explain why any stopped trains were stopped—whether they were stopped because they were performing federally mandated brake tests, because they or trains ahead of them on the tracks had mechanical issues, or because a trespasser on the tracks had forced them to stop.

(Nov. 2021), https://railroads.dot.gov/elibrary/blocked-crossings-fast-facts).

But even the FRA acknowledges that the data are unreliable. The "FRA does not confirm the accuracy of the blocked crossing reports submitted to th[e] portal." FRA, Blocked Crossing Incident Report, https://www.fra.dot.gov/blockedcrossings/. And even if every report submitted by the public and law enforcement were accurate, they do "not … provide a representative sample or create generalizable statistics." *Id.* For these reasons, the FRA emphasizes that "[t]he data gathered" from the reports are "not suitable for use in budgetary requests, nor regulatory proposals." *Id.*

Fundamental unreliability aside, the data do not suggest a safety crisis caused by stopped trains blocking grade crossings. To start, the data published by the FRA based on information gathered through the portal do not distinguish between crossings that were blocked by stopped trains versus those that were blocked by slow-moving trains (which are not covered by O.R.C. § 5589.21 or other anti-blocking statutes). *See* O.R.C. § 5589.21(C). Thus, the data shed little light on the frequency with which crossings are blocked by stopped trains. And they shed no light at all on the reasons for the blockages. As the FRA notes on the portal's home page, "There may be legitimate operating and/or safety-related reasons for a crossing to be occupied by a slow or idling train." Blocked Crossing Incident Reporter. The reason for a stoppage matters because anti-blocking statutes typically do not apply to blockages "caused by circumstances wholly beyond the control of the railroad company." O.R.C. § 5589.21(C). Thus, the data derived from the FRA portal give no indication of how many of the reported blockages would have been covered by exceptions to

anti-blocking laws—and therefore no information about the effect that such laws might have on the number of blocked crossings.

Furthermore, although the FRA reported that it had received "over 25,000 reports of blocked grade crossings" through the portal through September 2021 (Pet. 19), the FRA did not attribute any deaths, injuries, or property damage to those blockages. *See* Blocked Crossings Fast Facts.

In short, neither the anecdotes nor the data presented by Ohio and its amici suggest that blocked crossings caused by stopped trains constitute a public-safety crisis demanding this Court's attention.[5]

2. Congress, federal regulators, and the railroads are the appropriate parties to address any issues related to blocked crossings. Indeed, in recent years Congress, the FRA, and railroads such as CSX have all taken steps to reduce the impact of blocked crossings.

While Ohio might not be satisfied with the steps taken by Congress and federal regulators, its depiction of "federal inaction" (Pet. 16) is not accurate.

In 2021, Congress enacted the Infrastructure Investment and Jobs Act, which established the Railroad Crossing Elimination Program. 49 U.S.C. § 22909. The program is designed "to enhance rail safety" by "eliminat[ing] highway-rail … grade crossings that are frequently blocked by trains." FRA, Notice of Funding Opportunity for the Railroad Crossing Elimination Program, 87 Fed. Reg. 40335,

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[5] Moreover, looking only at the impact of blocked crossings on the movement of emergency vehicles ignores the other part of the safety equation, namely, the safety benefits of the FRA's brake-testing and speed-limit regulations, i.e., the federal railroad safety regulations that can compel trains to block crossings. *See infra* at 27–30.

40336 (July 6, 2022). The program is substantial: Congress appropriated $600 million annually for five years and authorized an additional $500 million annually over the same period, for a total of $3 billion in appropriated funds and an additional $2.5 billion in authorized funds. *Id.* at 40337 & n.3; FRA, FRA Grant Opportunities Under [the Bipartisan Infrastructure Bill], https://railroads.dot.gov/sites/fra.dot.gov/files/2022-03/RRCrossing-Elim_GradeCrossingSafety_March2022_PDFa.pdf (March 16, 2022); FRA, Fully Authorized Funding Under the Bipartisan Infrastructure Law, https://railroads.dot.gov/sites/fra.dot.gov/files/2022-02/Bipartisan Infrastructure Law Funding Table Jan2022.pdf (January 2022). For its part, the FRA established the blocked-crossing portal in 2019. Blocked Crossing Fast Facts. The portal's purpose is to gather information on "where, when, for how long" grade crossings are blocked and to help the FRA assess the resulting "impacts." Blocked Crossing Incident Reporter. The FRA "will share the information" it receives through the portal with local officials, railroads, and other "stakeholders, using it to help facilitate local solutions to blocked crossing issues." FRA, Federal Railroad Administration Launches Web Portal for Public to Report Blocked Railroad Crossings, https://railroads.dot.gov/newsroom/press-releases/federal-railroad-administration-launches-web-portal-public-report-blocked-0.

These legislative and administrative initiatives are augmented by railroads' own infrastructural investments. Made in coordination with and often at the request of local officials, these investments reduce the frequency and duration of blocked crossings in various ways. CSX, for example, has made substantial investments since 2018 to reduce the frequency and duration

of blocked crossings in the vicinity of the Marysville Honda plant, whose servicing gave rise to the citations underlying this case. Those investments have included building additional tracks within the plant so that fewer rail cars extend beyond the plant's perimeter during switching operations, building an additional air station at a crossing near the plant so that federally mandated brake tests can be completed more quickly after switching, and improving the tracks outside the plant so that trains can travel faster and clear crossings sooner after the mandatory brake testing is done.

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There is simply no safety crisis that the Court need address.

III. The lower courts' unanimous view that federal law preempts state anti-blocking laws is correct.

Nor is there any error for this Court to correct. The lower courts are right that federal law preempts state anti-blocking statutes.

1. ICCTA expressly preempts anti-blocking statutes because such laws encroach on the STB's "exclusive" jurisdiction over rail "routes" and "services," as well as the "operation … or discontinuance of spur, industrial, … [and] switching … tracks." 49 U.S.C. § 10501(b). Under ICCTA's express-preemption provision, "the remedies provided" by ICCTA "with respect to regulation of rail transportation are exclusive and preempt the remedies provided under … State law." *Id.*[6] As various courts have noted, it is "'difficult to

[6] Although this case as litigated involves only express preemption under 49 U.S.C. § 10501(b) and 49 U.S.C. § 20106(a)), Ohio invokes inapposite implied-preemption cases (or the

imagine a broader statement of Congress's intent to preempt state regulatory authority over railroad operations.'" *City of Auburn*, 154 F.3d at 1030 (quoting *Ga. Pub. Serv. Comm'n*, 944 F. Supp. at 1581); *accord, e.g.*, *CSX Transp., Inc. v. City of Sebree*, 924 F.3d 276, 283 (6th Cir. 2019); *Green Mtn. R.R. v. Vermont*, 404 F.3d 638, 645 (2d Cir. 2005).

Following the STB's lead, courts have adopted a "'comprehensive test for determining the extent to which a particular state action or remedy is preempted by § 10501(b).'" *Adrian & Blissfield R.R. v. Vill. of Blissfield*, 550 F.3d 533, 539 (6th Cir. 2008) (quoting *New Orleans & Gulf Coast Ry. v. Barrois*, 533 F.3d 321, 332 (5th Cir. 2008)). Under that test, ICCTA categorically preempts any "state or local regulation of matters directly regulated by the Board—such as the construction, operation, and abandonment of rail lines," including "industrial" and "switching" tracks, as well as "railroad rates and services." *Id.* (quoting *In re CSX Transp., Inc.*, 2005 WL 1024490, at *2 (S.T.B. 2005)); *see* 49 U.S.C. § 10501(b).

Applying this test, every court to consider the issue has concluded that ICCTA preempts state anti-blocking statutes because they have "the effect of managing or governing rail transportation." *Indiana*, 107 N.E.3d at 477 n.4 (quoting *Delaware v. Surface Transp. Bd.*, 859 F.3d 16, 19 (D.C. Cir. 2017)). Anti-blocking laws "dictate[] key operational choices" because railroads subject to such laws "cannot schedule trains or operate trainyards in a way that forces them to stop trains for more than" the allotted time "at a crossing to repair

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implied-preemption portions of cases addressing both express and implied preemption). *See, e.g.*, Pet. 23–24 (relying on *Va. Uranium, Inc. v. Warren*, 139 S. Ct. 1894, 1901 (2019); *Chamber of Com. v. Whiting*, 563 U.S. 582, 607 (2011); *Williamson v. Mazda Motor of Am., Inc.*, 562 U.S. 323, 339 (2011)).

problems, perform safety checks, or wait for tracks to clear." *Id.* at 476; *see also, e.g.*, *California*, 209 Cal. App. 4th at 1525 ("enforcement of" an anti-blocking provision "will necessarily impact both scheduling and the length of … trains").

Anti-blocking statutes also invade the STB's exclusive jurisdiction by usurping its authority over rail "routes" and "services" as well as the "operation … or discontinuance of spur, industrial, … [and] switching … tracks." 49 U.S.C. § 10501(b). Because there are so many grade crossings on the nation's rail system (*see supra* at 21) and so many of those crossings—like the crossings involved in this case (Pet.App.3a)—are close to industrial sites, it is sometimes impossible to switch (i.e., pick up and drop off) railcars without blocking a crossing. The enforcement of state anti-blocking laws could therefore force railroads to discontinue servicing certain customers on some routes even though ICCTA requires that a railroad "first obtain authorization from the [STB]" before it "discontinue[s] service over a railroad line." *Mfrs. Ry.*, 676 F.3d at 1095 (citing 49 U.S.C. § 10903). For this reason, too, anti-blocking statutes are expressly preempted by ICCTA.

2. The FRSA, which was enacted to achieve "national uniform[ity]" in railroad regulation "to the extent practicable," preempts state anti-blocking statutes (insofar as they are deemed to be railroad safety laws) because the FRA has issued regulations "covering the subject matter" of how long stopped trains may block crossings. 49 U.S.C. § 20106(a).

By design, anti-blocking statutes regulate how long stopped trains may occupy a grade crossing. Two FRA regulations govern the same subject matter.

First, FRA regulations require railroads to conduct

certain brake tests in specified situations—for example, when a rail car is "added to a train" under certain conditions. 49 C.F.R. § 232.209(a). Those conditions include when a rail car "that has not previously received a Class I brake test or … has been off-air for more than 24 hours" is added to a train. *Id.* § 232.209(a)(1). Any rail car that is switched at an industrial site (such as the Marysville Honda plant at the heart of this case) meets either or both of these criteria. Rail cars may not be "used or hauled" on a rail line if they are "not in compliance" with the brake-testing rules. *Id.* § 232.9(a). Thus, the specified brake tests must be performed on a stopped train that has engaged in switching at an industrial site before FRA regulations allow it to move. *Driesen*, 777 F. Supp. 2d at 1151. This is true whether or not the train is blocking a grade crossing.

The mandated brake tests take time, typically longer than anti-blocking statutes—which generally apply "without limitation" to "trains engaged in switching, loading, or unloading operations" (O.R.C. § 5589.21(C))—allow crossings to be occupied. Thus, "if a … train adds cars while stopped and blocking a crossing …, federal regulations require a brake test, but" the railroad "may be unable to comply with these federal regulations in the time allowed under" an anti-blocking statute. *City of Weyauwega*, 919 N.W.2d at 621. "Simply put, the FRSA brake system regulations direct trains to remain stationary, while [the anti-blocking statute] instructs them to keep moving." *Krentz*, 910 A.2d at 36. Because the federal air-brake regulations "substantially subsume whether and when a *stopped* train can move," they "indisputably cover the subject matter of" anti-blocking statutes. *City of Weyauwega*, 919 N.W.2d at 622; *accord City of Plymouth*, 283 F.3d at 817; *Driesen*, 777 F. Supp. 2d at 1151.

Second, FRA speed-limit regulations also cover the subject of how long a once-stopped train will occupy a crossing after resuming travel.

As under Ohio's anti-blocking statute, anti-blocking laws generally require a train that has stopped to clear any blocked crossing within a specified amount of time, typically five or ten minutes. *See, e.g.*, O.R.C. § 5589.21(B). Given the length of trains, the time it takes them to get up to speed, and the FRA speed limits, a train that has been stopped and occupying a crossing could well take more time "to clear the crossing" than allotted under state anti-blocking laws. *City of Weyauwega*, 919 N.W.2d at 621; *accord Vill. of Mundelein*, 882 N.E.2d at 555. Thus, as various courts have held, the "federal regulations governing train speed cover the subject matter of blocked-crossing laws because '[t]he amount of time a moving train spends at a grade crossing is mathematically a function of the length of the train and the speed at which the train is traveling.'" *Driesen*, 777 F. Supp. 2d at 1151 (quoting *City of Plymouth*, 283 F.3d at 817); *accord, e.g.*, *City of Seattle*, 41 P.3d at 1174.

The fact that the FRA has not issued a regulation explicitly governing blocked crossings is immaterial. The Court's decision in *Easterwood* makes clear that preemption under the FRSA does not depend on why the FRA has adopted a regulation. The plaintiff there "maintain[ed] that pre-emption" of an excessive-speed claim was "inappropriate because the [FRA's] primary purpose in enacting the speed limits was not to ensure safety at grade crossings, but rather to prevent derailments." *Easterwood*, 507 U.S. at 675. Rejecting the contention that preemption under the FRSA depends on the FRA's reason for issuing a regulation, the Court explained that 49 U.S.C. § 20106(a) "does not … call for an inquiry into the [FRA's] purposes, but instead

directs the courts to determine whether regulations have been adopted that in fact cover the [relevant] subject matter." *Id.* Here, the FRA's brake-test and speed-limit regulations do "in fact cover" the subject of how long trains occupy grade crossings. Although their purpose is to forestall derailments and other railroad accidents, they dictate how long trains that stopped to engage in switching (or other essential railroad tasks) will block grade crossings—namely, long enough to conduct the mandated brake tests and then clear the crossing while remaining within the prescribed speed limit.

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Because anti-blocking laws invade the STB's "exclusive" jurisdiction over rail operations and services, they are preempted by ICCTA. Because FRA brake-test and speed-limit regulations "in fact cover the … subject" of how long grade crossings may be occupied by trains, the FRSA likewise preempts state anti-blocking laws. The lower courts are therefore correct in their unanimous view that federal law preempts state anti-blocking laws.

IV. This case is a poor vehicle for addressing the questions presented.

Even if there were a conflict in the lower courts over the preemption of state anti-blocking statutes, and even if that conflict was contributing to a significant public-safety problem, which there is not, this case would be a poor vehicle for addressing the conflict.

Ohio contends that the lower courts are split over whether anti-blocking laws are "'related to railroad safety'" as that term is used in the FRSA. Pet. 26–29 (quoting 49 U.S.C. § 20106(a)(2)). It maintains that the lower courts have erred insofar as they have

concluded that anti-blocking laws are not "railroad safety" laws, arguing to this Court that anti-blocking laws "are 'related to railroad safety'" within the meaning of the FRSA "because they protect the public from the dangers that arise when trains block grade crossings." Pet. 1.

That argument has been waived. Citing the legislature's avowed intent, Ohio advanced the opposite position below, arguing that O.R.C. § 5589.21 "does not explicitly reference railroad safety" and "touches upon" railroad safety "merely indirectly" because its "chief purpose … is to ensure the flow of traffic and emergency personnel." Appellee's Br. at 20, *Ohio v. CSX Transp., Inc.*, 200 N.E.3d 215 (Ohio 2022) (No. 2020-0608), 2020 WL 7663520, at *20. Having taken the contrary position below (and having convinced the author of the lead opinion below of that contrary position (*see* Pet.App.2a)), Ohio cannot now argue in this Court that its "rules regulating stoppage times at grade crossings are 'related to railroad safety.'" Pet. 1.

Even if the case as litigated allowed the Court to reach the question whether anti-blocking laws are "railroad safety" laws, the case as litigated could prevent the Court from deciding the second question presented, namely, whether 49 U.S.C. § 20106(a)(2), the FRSA's preemption provision, saves state anti-blocking statutes from preemption. The Court could not answer that question in this case if it—like all other courts to consider the issue—concludes that federal regulations cover the subject of how long stopped trains may occupy grade crossings.

If federal regulations cover the same subject as state anti-blocking laws, then an anti-blocking statute cannot survive preemption under the FRSA unless it "is necessary to eliminate or reduce an essentially local

safety hazard," "is not incompatible with a federal law," and "does not unreasonably burden interstate commerce." 49 U.S.C. § 20106(a)(2)(A)–(C). Below, Ohio never argued that O.R.C. § 5589.21 satisfies any—let alone each—of these conditions. *Cf.* Appellee's Br., *Ohio v. CSX Transp., Inc.*, 200 N.E.3d 215 (Ohio 2022) (No. 2020-0608), 2020 WL 7663520. Its sole argument under the FRSA was that federal regulations do not cover the subject of how long trains may occupy grade crossings because the FRA "has not adopted any regulations concerning blocked crossings." *Id.* at *6. Because Ohio did not preserve the question whether its anti-blocking statute satisfies what it characterizes as the FRSA's "second safe harbor" (Pet. 30), the Court could not resolve the second question presented if it—like every other court to reach the issue—agrees that federal regulations do in fact cover the subject of how long trains occupy grade crossings.

This case is therefore a poor vehicle for considering the questions presented.

CONCLUSION

The petition should be denied.

Respectfully submitted,

TERRANCE K. DAVIS
NICHOLAS T. STACK
Shumaker, Loop &
Kendrick LLP
1000 Jackson Street
Toledo, OH 43604-5573

ANDREW TAUBER
Counsel of Record
Winston & Strawn LLP
1901 L Street, NW
Washington, DC 20036
(202) 282-5288
atauber@winston.com

BRANDON DUKE
Winston & Strawn LLP
800 Capitol Street
Suite 2400
Houston, TX 77002

Counsel for Respondent

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