No. 22-459

# In the Supreme Court of the United States

STATE OF OHIO, PETITIONER

*v.*

CSX TRANSPORTATION, INC.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO*

**BRIEF FOR THE UNITED STATES AS AMICUS CURIAE**

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## QUESTION PRESENTED

Whether a state law regulating the maximum time a stopped train may block a grade crossing is preempted by the ICC Termination Act of 1995, 49 U.S.C. 10501(b), or the Federal Railroad Safety Act of 1970, 49 U.S.C. 20106(a)(2).

## TABLE OF CONTENTS



## TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Case—Continued: Page



Statutes and regulations:

Statutes and regulations—Continued: Page

Miscellaneous—Continued: Page

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## INTEREST OF THE UNITED STATES

This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be denied.

## STATEMENT

Petitioner, the State of Ohio, charged respondent in the Marysville Municipal Court on five misdemeanor counts of violating Ohio Rev. Code § 5589.21, which generally prohibits a stopped train from blocking an intersection with a roadway for more than five minutes. The trial court dismissed all five counts on the ground that the state statute is preempted by federal law. Pet. App. 68a-74a. The Court of Appeals of Ohio, Third Appellate District, reversed. *Id.* at 44a-67a. The Supreme Court of Ohio in turn reversed and reinstated the trial court's dismissal. *Id.* at 1a-43a.

1. Respondent is an interstate railroad company that regularly delivers goods and supplies by rail to an automobile plant near Marysville, Ohio. See Pet. App. 3a. Its trains "occasionally block grade crossings while loading and unloading at the plant and while entering and exiting it." *Ibid.* Highway-rail grade crossings are "intersections where a highway crosses a railroad at-grade," as distinguished from intersections where the railroad passes over or under the highway (for example, via bridge or tunnel). Federal Railroad Administration, United States Department of Transportation, *Highway-Rail Grade Crossings Overview*, railroads.dot.gov/program-areas/highway-rail-grade-crossing/highway-rail-grade-crossings-overview.

Ohio regulates by statute the maximum amount of time a stopped train may block a grade crossing. Section 5589.21 of the Ohio Revised Code provides that "[n]o railroad company shall obstruct * * * a public street, road, or highway, by permitting a railroad car, locomotive, or other obstruction to remain upon or across it for longer than five minutes." Ohio Rev. Code § 5589.21(A). The statute requires the grade crossing to be cleared "for sufficient time, not less than three minutes," following "each five minute period of obstruction." § 5589.21(B). The statute "does not apply" to any obstruction caused by "a continuously moving through train" or by "circumstances wholly beyond the control of the railroad company." § 5589.21(C). Each violation of the statute is a first-degree misdemeanor. § 5589.99(D).

In 2018, Ohio charged respondent with five counts of violating Section 5589.21. See Pet. App. 3a. Respondent argued that Section 5589.21 is preempted by the ICC Termination Act of 1995 (ICCTA), Pub. L. No.

104-88, 109 Stat. 803 (49 U.S.C. 10101 *et seq.*), and the Federal Railroad Safety Act of 1970 (FRSA), Pub. L. No. 91-458, 84 Stat. 971 (49 U.S.C. 20101 *et seq.*).

As its title implies, the ICCTA abolished the Interstate Commerce Commission (ICC) and, among other things, vested regulatory authority over rail transportation in the newly created Surface Transportation Board (STB or Board). See ICCTA §§ 101, 102(a), 201(a), 109 Stat. 804, 807, 932-934.* As relevant here, the ICCTA provides that the "jurisdiction of the Board over * * * transportation by rail carriers, and the remedies provided in this part with respect to rates, classifications, rules (including car service, interchange, and other operating rules), practices, routes, services, and facilities of such carriers," is "exclusive." 49 U.S.C. 10501(b). The ICCTA also grants "exclusive" jurisdiction to the Board over "the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities." *Ibid.* And the ICCTA provides that, with exceptions not relevant here, "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." *Ibid.* The provisions specifying that the STB's jurisdiction and the remedies provided in the ICCTA are "exclusive" thus preempt state laws on the covered subjects.

Congress enacted the FRSA "to promote safety in every area of railroad operations and reduce railroad-

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* The ICCTA initially placed the Board within the Department of Transportation. § 201(a), 109 Stat. 932 (49 U.S.C. 701(a) (Supp. I 1995)). The Board is now an independent agency. See Surface Transportation Board Reauthorization Act of 2015, Pub. L. No. 114-110, § 3(b), 129 Stat. 2229 (49 U.S.C. 1301(a)).

related accidents and incidents." 49 U.S.C. 20101. As relevant here, the FRSA provides that "[l]aws, regulations, and orders related to railroad safety * * * shall be nationally uniform to the extent practicable." 49 U.S.C. 20106(a)(1). The FRSA includes two exceptions to that uniformity mandate. First, a "State may adopt or continue in force a law, regulation, or order related to railroad safety * * * until the Secretary of Transportation * * * prescribes a regulation or issues an order covering the subject matter of the State requirement." 49 U.S.C. 20106(a)(2). (The Secretary has delegated his railroad-safety functions to the Administrator of the Federal Railroad Administration (FRA). See 49 C.F.R. 1.89.) Second, a "State may adopt or continue in force an additional or more stringent law, regulation, or order related to railroad safety" if the law, regulation, or order "(A) is necessary to eliminate or reduce an essentially local safety or security hazard; (B) is not incompatible with a law, regulation, or order of the United States Government; and (C) does not unreasonably burden interstate commerce." 49 U.S.C. 20106(a)(2).

2. The trial court dismissed all five counts on the ground that Section 5589.21 is preempted by the ICCTA. Pet. App. 68a-74a. The court found that "Congress unambiguously and explicitly chose to preempt" Ohio's blocked-crossing statute in the ICCTA, observing that "[n]umerous courts have reached the conclusion that similar blocked crossing statutes of other states and local ordinances of municipalities are preempted." *Id.* at 72a, 74a.

3. A divided panel of the intermediate state appellate court reversed and remanded. Pet. App. 44a-67a. The majority held that the ICCTA does not preempt

Section 5589.21, reasoning that "the effect of [Section] 5589.21 on rail transportation is merely incidental or remote." *Id.* at 60a. The dissenting judge would have held the opposite because Section 5589.21 "is a state remedy that directly *regulates rail transportation*." *Id.* at 65a.

4. The state supreme court reversed by a 5-2 vote and "reinstate[d] the trial court's dismissal of all charges." Pet. App. 15a; see *id.* at 1a-43a. No rationale garnered a majority: two justices found Section 5589.21 preempted by the ICCTA, two found it preempted by the FRSA, and one concurred in the judgment without explanation.

a. Justice (now Chief Justice) Kennedy announced the judgment of the state supreme court. Pet. App. 1a-15a. Writing for herself and Justice DeWine, she explained that Section 5589.21 is preempted by the ICCTA because it "regulates how long a train may remain stopped across a railroad crossing for switching, loading, or unloading operations * * * or to let another train pass," and thus "directly regulates rail transportation." *Id.* at 8a. Justice Kennedy further observed that because "[c]ompliance with the state statute in any practical way would force [respondent] to move its railroad lines and facilities so that a train may load, unload, or switch cars without blocking a crossing," Section 5589.21 also improperly regulates "the 'construction, acquisition, operation, abandonment, or discontinuance' of railroad facilities." *Id.* at 8a-9a.

b. Justice Fischer, joined by then-Chief Justice O'Connor, concurred in the judgment. Pet. App. 16a-21a. He explained that because Section 5589.21 "is designed to protect citizens from railroad-related accidents or incidents," it is a law related to railroad safety

and thus preempted by the FRSA. *Id.* at 18a. Justice Fischer concluded that Section 5589.21 was not saved from preemption by either of the FRSA's two exceptions. He reasoned that the "FRSA and regulations implemented by the [FRA] specifically refer to matters related to safety at grade crossings," and "trains that are blocking an intersection for a length of time are necessarily included in the broad subject matter of grade-crossing safety." *Id.* at 18a-19a. He also reasoned that Section 5589.21 is "incompatible with," not merely more stringent than, "federal law" because a "restriction on how long a train may be stopped on tracks * * * interferes with the regulations in place involving switching, operations, and routes" under the ICCTA. *Id.* at 20a.

c. Justice Stewart concurred in the judgment only, but neither wrote nor joined an opinion explaining her reasons. See Pet. App. 15a.

d. Justice Brunner, joined by Justice Donnelly, dissented. Pet. App. 21a-42a. Like Justice Fischer, she viewed Section 5589.21 as being a law related to railroad safety, but she would have found that the FRSA did not preempt it because there is "no federal regulation or order directly covering the topic of blocked crossings." *Id.* at 38a.

**DISCUSSION**

The petition for a writ of certiorari should be denied. As petitioner acknowledges, every federal court of appeals and state court of last resort to have addressed the issue has concluded that blocked-crossing laws like Section 5589.21 are preempted by federal law. Some have relied on the ICCTA, others on the FRSA, and some on both. But that variation in the choice of alternative rationales is purely academic; it

has no real-world impact because the ultimate conclusion—that state blocked-crossing laws are preempted—remains the same. This Court recently denied review in *City of Edmond* v. *BNSF Railway Co.*, 142 S. Ct. 2835 (2022) (No. 21-1296), which presented the same preemption questions with respect to Oklahoma's blocked-crossing statute. The Court should follow the same course here.

1. The two-justice lead opinion below correctly concluded that the ICCTA preempts Section 5589.21. Pet. App. 1a-15a.

a. "Railroads have been subject to comprehensive federal regulation for [more than] a century." *United Transportation Union* v. *Long Island Rail Road Co.*, 455 U.S. 678, 687 (1982); see Interstate Commerce Act, ch. 104, 24 Stat. 379 (1887). In 1887, Congress created the ICC to oversee a "comprehensive regulatory regime over the rail industry." Paul Stephen Dempsey, *The Rise and Fall of the Interstate Commerce Commission*, 95 Marq. L. Rev. 1151, 1161 (2012); see Interstate Commerce Act § 11, 24 Stat. 383. Among other things, the 1887 statute included "requirements that rates be just and reasonable and that unjust discrimination, preference, and prejudice be abolished," as well as "prohibitions against pooling and against charging more for a short haul than a longer haul over the same line in the same direction." Dempsey 1161.

Congress expanded the ICC's jurisdiction over the years to encompass virtually every area of railway (and eventually motor-carrier) operations, including safety, routes, rates, rebates, tariffs, entry and exit from markets, issuance of securities, and mergers. Dempsey 1163-1166; see *United Transportation Union*, 455 U.S. at 687-688. And the ICC's authority was

"not bounded by the powers expressly enumerated in" the Interstate Commerce Act, but also encompassed "actions that are 'legitimate, reasonable, and directly adjunct to the Commission's explicit statutory power.'" *ICC* v. *American Trucking Associations, Inc.*, 467 U.S. 354, 365 (1984) (brackets, citation, and internal quotation marks omitted); see *American Trucking Associations* v. *Atchison, Topeka & Santa Fe Railway Co.*, 387 U.S. 397, 421 (1967). Although the ICC's successor, the STB, is "smaller in size and more limited in regulatory reach" than was the ICC, Ben Goldman, Cong. Research Serv., R47013, *The Surface Transportation Board (STB): Background and Current Issues* 1 (Jan. 19, 2022), petitioner provides no reason to doubt that the Board, like the ICC before it, has authority to take actions that are "legitimate, reasonable, and directly adjunct to the [Board's] explicit statutory power," *American Trucking*, 467 U.S. at 365 (brackets and citation omitted); see 49 U.S.C. 1321(a) ("Enumeration of a power of the Board in this chapter or subtitle IV does not exclude another power the Board may have in carrying out this chapter or subtitle IV.").

The broad authority conferred on those agencies has reflected a federal "determin[ation] that a uniform regulatory scheme is necessary to the operation of the national rail system." *United Transportation Union*, 455 U.S. at 688. Even before Congress enacted the Interstate Commerce Act, this Court had held that a State's regulation of railroad rates, including rates on intrastate segments, unconstitutionally interferes with interstate commerce. *Wabash, St. Louis & Pacific Railway Co.* v. *Illinois*, 118 U.S. 557, 577 (1886). Congress's desire for national uniformity has remained steadfast even as its regulatory goals have evolved.

For example, by the 1970s, "there was a strong bipartisan political movement to free industry from the shackles of regulation." Dempsey 1179. Congress enacted several statutes aimed at deregulation in the transportation industry, and "the ICC moved resolutely toward deregulation" as well. Dempsey 1184; see Dempsey 1179-1184 (listing deregulatory statutes). And when Congress abolished the ICC in 1995 and transferred jurisdiction over rail transportation to the STB, it expressly declared a "policy" to "minimize the need for Federal regulatory control over the rail transportation system." 49 U.S.C. 10101(2); see H.R. Rep. No. 311, 104th Cong., 1st Sess. 93 (1995) (House Report) (explaining that the ICCTA "builds on the deregulatory policies that have promoted growth and stability" and "keeps bureaucracy and regulatory costs at the lowest possible level").

Yet at the same time, Congress continued to emphasize national uniformity, granting the STB "exclusive" jurisdiction over virtually every area of rail transportation. 49 U.S.C. 10501(b) (listing "transportation by rail carriers," "rates, classifications, rules (including car service, interchange, and other operating rules), practices, routes, services, and facilities of such carriers," and "the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities"). In granting the STB exclusive jurisdiction over those matters, Congress even eliminated the limited concurrent jurisdiction that state authorities previously had enjoyed over certain aspects of rail transportation. See 49 U.S.C. 10501(d), 11501(b) (1994); House Report 95-96 (explaining that the ICCTA "reflect[s] the direct and complete pre-emption of State economic regula-

tion of railroads" and a "Federal policy of occupying the entire field" in order to avoid "the balkanization and subversion of the Federal scheme of minimal regulation for this intrinsically interstate form of transportation"). As the Supreme Court of Indiana has observed, when "Congress largely deregulated the railroad industry, it did not invite states to step in and fill the void." *Indiana* v. *Norfolk Southern Railway Co.*, 107 N.E.3d 468, 473 (2018). Indeed, reflecting Congress's dual focus on deregulation and uniformity, the ICCTA preempts state regulation even in certain areas where the STB itself lacks authority to regulate: the Board has "exclusive" jurisdiction over the "construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks," 49 U.S.C. 10501(b), yet at the same time "[t]he Board does not have authority" over the licensing of those activities, 49 U.S.C. 10906.

b. Those statutory provisions and their history demonstrate that the ICCTA preempts Section 5589.21. Indeed, petitioner does not seriously dispute that the blocked-crossing statute falls within the plain text of the ICCTA's broad preemption provisions. Section 5589.21 prescribes the maximum time a stopped train may block a grade crossing before it must begin to move and the minimum amount of time the crossing must be cleared before a train may again block it. Ohio Rev. Code § 5589.21(A) and (B). Those requirements self-evidently concern "transportation by rail carriers." 49 U.S.C. 10501(b); see 49 U.S.C. 10102(9)(A) (defining "transportation" to include "a locomotive, car, * * * or equipment of any kind related to the movement of passengers or property, or both, by rail"). Ohio law also imposes criminal penal-

ties for violations of Section 5598.21, see Ohio Rev. Code § 5589.99(D), which at a minimum constitute "remedies * * * with respect to" the "operating rules" or "practices" of a rail carrier, 49 U.S.C. 10501(b), to the extent the carrier's operating rules or practices do not require its trains to clear a crossing within the time limits specified by Section 5589.21.

Indeed, as lower courts have 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." *BNSF Railway Co.* v. *Hiett*, 22 F.4th 1190, 1194 (10th Cir.), cert. denied, 142 S. Ct. 2835 (2022) (No. 21-1296). As a result, "regulating the time a train can occupy a rail crossing impacts the way a railroad operates its trains, with concomitant economic ramifications." *Ibid.* (brackets, citation, and ellipsis omitted); see *Friberg* v. *Kansas City Southern Railway Co.*, 267 F.3d 439, 443 (5th Cir. 2001). That places Section 5589.21 and other blocked-crossing statutes squarely within the ICCTA's preemption provisions, whose scope "is broader than just direct economic regulation of railroads." *CSX Transportation, Inc.*, No. FD 34662, 2005 WL 584026, at *7 (S.T.B. Mar. 14, 2005).

Moreover, as Justice Kennedy observed below, "[c]ompliance with the state statute in any practical way would force [respondent] 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. As a practical matter, therefore, Section 5589.21 also regulates, albeit indirectly, the "construction, acquisition,

operation, abandonment, or discontinuance" of railroad tracks and facilities, at least with respect to respondent's violations of Section 5589.21 related to its operations servicing the Marysville plant. 49 U.S.C. 10501(b). That provides an independent basis for preemption under the ICCTA.

To be sure, the ICCTA's preemption provisions are not limitless. Lower courts have reasoned that "the ICCTA preempts 'all state laws that may reasonably be said to have the effect of managing or governing rail transportation, while permitting the continued application of laws having a more remote or incidental effect on rail transportation.'" *Delaware* v. *STB*, 859 F.3d 16, 18 (D.C. Cir. 2017) (citation omitted); see *New York Susquehanna & Western Railway Corp.* v. *Jackson*, 500 F.3d 238, 252 (3d Cir. 2007); *Florida East Coast Railway Co.* v. *City of West Palm Beach*, 266 F.3d 1324, 1331 (11th Cir. 2001).

Section 5589.21 has the effect of managing or governing rail transportation because it directly and expressly regulates and imposes liability on "railroad compan[ies]" engaged in rail transportation. Ohio Rev. Code § 5589.21(A). That effect is neither remote nor incidental—it is the very point of the statute. That distinguishes Section 5589.21 from "generally applicable, non-discriminatory regulations," such as "electrical, plumbing and fire codes" or "direct environmental regulations," that only incidentally touch on railroad operations and thus might not be preempted under the ICCTA. *Delaware*, 859 F.3d at 18 (brackets and citation omitted); cf. *Hayfield Northern Railroad Co.* v. *Chicago & North Western Transportation Co.*, 467 U.S. 622, 635 (1984) (holding that the Interstate Commerce Act, as amended, did not preempt application of

general state condemnation law in the circumstances of that case).

c. Petitioner appears to agree (Pet. 24-25) that the ICCTA, standing alone, would preempt Ohio's blocked-crossing statute. Petitioner instead contends that ICCTA preemption is inapplicable on the ground that Section 5589.21 is a law "related to railroad safety," 49 U.S.C. 20106(a)(1), and thus would be subject to preemption, if at all, only under the FRSA. That contention lacks merit.

Petitioner observes that the ICCTA and the FRSA must be read "'as a harmonious whole'" because "if read in isolation, the [ICCTA] could be read to impliedly repeal the [FRSA]." Pet. 24 (quoting *Epic Systems Corp.* v. *Lewis*, 138 S. Ct. 1612, 1619 (2018)). That observation is correct as far as it goes; the STB has long recognized that the ICCTA "does not preempt valid safety regulation under the [FRSA]." *Green Mountain Railroad Corp.*, No. FD 34052, 2002 WL 1058001, at *4 n.8 (S.T.B. May 24, 2002); see *Tyrrell* v. *Norfolk Southern Railway Co.*, 248 F.3d 517, 523 (6th Cir. 2001) (explaining that "the ICCTA and its legislative history contain no evidence that Congress intended for the STB to supplant the FRA's authority over rail safety").

By the same token, however, the FRSA cannot be read to create a loophole in the ICCTA that would permit a patchwork of state and local regulation over rail transportation simply because the regulations also happen to touch on "safety-related" matters. See, *e.g.*, *Waneck & Waneck*, No. FD 36167, 2018 WL 5723286, at *7 (S.T.B. Oct. 31, 2018). As the Board has explained, "in rare cases, there can be overlap to such an extent that both FRSA and ICCTA preemption may

apply." *Ibid.* For example, although a regulation that "attempted to severely limit (or even halt) the rail shipment of hazardous materials * * * was primarily safety-related, and thus subject to FRSA preemption, it also implicated ICCTA preemption because, by prohibiting the railroad's carriage of certain commodities without local government approval, it directly conflicted with the Board's exclusive jurisdiction over interstate rail transportation." *Ibid.*; see *Riffin* v. *STB*, 733 F.3d 340, 344 (D.C. Cir. 2013) (holding that the STB has regulatory authority to compel rail carriage of hazardous materials).

It is debatable whether a blocked-crossing statute like Section 5589.21 is "related to *railroad* safety," 49 U.S.C. 20106(a)(1) (emphasis added), given that petitioner's safety-related concerns principally involve the safety of emergency-services users and other members of the public—not the safety of railroads and railroad operations. See Pet. 16-20; cf. Br. in Opp. 31. But even if Section 5589.21 is related to railroad safety, it also directly regulates rail transportation by specifying requirements for how trains must operate at grade crossings. And those requirements apply irrespective of any safety concerns; for instance, the five-minute rule applies even with respect to a grade crossing in a rural or uninhabited location, and even when a stopped train presents no safety concerns at all. See Ohio Rev. Code § 5589.21(A) and (C). Accordingly, the ICCTA preempts Section 5589.21 regardless of whether the FRSA might also preempt it.

2. In any event, the two-justice concurrence below correctly determined that even if Section 5589.21 is a law "related to railroad safety," 49 U.S.C. 20106(a)(1), it is preempted by the FRSA because it does not fit

within either of the FRSA's exceptions. Pet. App. 16a-21a (Fischer, J., concurring in judgment only).

a. Under the FRSA's first exception, a "State may adopt or continue in force a law, regulation, or order related to railroad safety" until the FRA "prescribes a regulation or issues an order covering the subject matter of the State requirement." 49 U.S.C. 20106(a)(2). This Court has explained that "covering the subject matter" means that the federal regulations must "substantially subsume the subject matter of the relevant state law." *CSX Transportation, Inc.* v. *Easterwood*, 507 U.S. 658, 664 (1993).

In *Easterwood*, the Court held that "a series of regulations" implementing a federal aid program to assist States in developing "a 'highway safety improvement program' that establishes priorities for addressing all manner of highway hazards," including those present at grade crossings, "do not of themselves" preempt a state-law negligence action premised on allegedly inadequate warning devices at a grade crossing. 507 U.S. at 665, 667 (citation omitted). The Court found that such "general mandates" did not substantially subsume negligence liability; instead, "the scheme of negligence liability could just as easily complement these regulations by encouraging railroads—the entities arguably most familiar with crossing conditions—to provide current and complete information to the state agency responsible for determining priorities for improvement projects." *Id.* at 668.

In contrast, the Court explained that regulations addressing "requirements as to the installation of particular warning devices" using federal funds *would* preempt state negligence liability premised on inadequate warning devices, but found that the "facts d[id]

not establish that federal funds 'participated in the installation of the warning devices' at" the particular grade crossing involved in that case. *Easterwood*, 507 U.S. at 670, 672 (brackets omitted). The Court also held that regulations setting "maximum allowable operating speeds for all freight and passenger trains for each class of track on which they travel" preempted state tort claims premised on a "common-law duty to operate [a] train at a moderate and safe rate of speed." *Id.* at 673. Viewed "in the context of the overall structure of the regulations," the Court explained, "the speed limits must be read as not only establishing a ceiling, but also precluding additional state regulation" concerning a train's speed. *Id.* at 674.

Here, the FRA has issued several regulations covering—that is, substantially subsuming—the subject matter of blocked grade crossings. Railroad carriers may be required to stop (or keep stopped) their trains, including at grade crossings, in order to maintain compliance with a host of federal regulations, including those governing operating speed limits (49 C.F.R. 213.9, 213.57, 213.307, 213.329), railroad workplace and employee safety (49 C.F.R. 214.319, 214.321, 214.323, 214.325, 214.336, 214.337), air-brake testing (49 C.F.R. Pt. 232), grade-crossing safety (49 C.F.R. 234.105-234.107), and hours of service (49 C.F.R. Pt. 228). Individually or together, those regulations cover the same subject matter as Section 5589.21.

For example, as respondent observes, "[g]iven the length of trains, the time it takes them to get up to speed, and the [federal] 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" like Section 5589.21. Br. in

Opp. 29 (citation omitted); see *Easterwood*, 507 U.S. at 674 (explaining that federal speed-limit regulations cover speed-related laws); see also, *e.g.*, 49 C.F.R. 213.9. Likewise, regulations governing brake testing could effectively preclude stopped trains—especially those stopped to add rail cars, as is not infrequently the case with respondent's trains at the Marysville plant—from clearing a blocked grade crossing within the time limit specified by Section 5589.21 because "[t]he mandated brake tests take time." Br. in Opp. 28; see, *e.g.*, 49 C.F.R. 232.209. And regulations governing exclusive track occupancy sometimes require "restricted speed[s]" that might be incompatible with the short time limits contained in blocked-crossing statutes, such as the five-minute limit in Section 5589.21. 49 C.F.R. 214.321(d). Those examples demonstrate that "the overall structure of the regulations" substantially subsumes the subject matter of blocked-crossing statutes like Section 5589.21, *Easterwood*, 507 U.S. at 674, because that overall structure comprehensively addresses the conditions and speeds under which trains may safely move on the tracks—which is precisely what Section 5589.21 attempts to govern as well.

Petitioner observes (Pet. 31) that when the FRA recently requested information from the public "regarding the frequency, location, and impacts of highway-rail grade crossings blocked by slow-moving or idling trains," the agency observed that "there are no federal laws or regulations that specifically address how long a train may occupy a crossing, whether idling or operating at slow speeds." 84 Fed. Reg. 27,832, 27,832 (June 14, 2019) (notice of information collection). But that observation simply establishes that the agency has not

currently imposed a nationwide rule establishing a maximum amount of time that a stopped train may block a grade crossing—perhaps precisely because such a rule would be incompatible with the host of safety and operational regulations described above. That the agency has declined to make the same policy choice that petitioner and other States have attempted to make in their respective blocked-crossing statutes does not mean that the FRA's existing regulations do not "cover[]" the same subject matter as those statutes. 49 U.S.C. 20106(a)(2).

b. Under the FRSA's second exception, a "State may adopt or continue in force an additional or more stringent law, regulation, or order related to railroad safety" if the law, regulation, or order "(A) is necessary to eliminate or reduce an essentially local safety or security hazard; (B) is not incompatible with a law, regulation, or order of the United States Government; and (C) does not unreasonably burden interstate commerce." 49 U.S.C. 20106(a)(2). Section 5589.21 does not satisfy any of those requirements, much less all three.

Section 5589.21 does not regulate "an essentially local" safety hazard. 49 U.S.C. 20106(a)(2)(A). In *Easterwood*, this Court explained that a state tort action did not satisfy that condition because "[t]he common law of negligence provides a general rule to address all hazards caused by lack of due care, not just those owing to unique local conditions," and that negligence law "is concerned with local hazards only in the sense that its application turns on the facts of each case." 507 U.S. at 675. Here, Section 5589.21 imposes a statewide five-minute rule without regard to any unique local conditions.

Section 5589.21 also is "incompatible with a law, regulation, or order of the United States Government." 49 U.S.C. 20106(a)(2)(B). The statute contains no exceptions (other than for "circumstances wholly beyond the control of the railroad company," Ohio Rev. Code § 5589.21(C)), and as a result is incompatible with federal rail safety regulations governing operating speed limits, railroad workplace and employee safety, air-brake testing, and grade-crossing safety, as explained above. It also may conflict with hours-of-service laws applicable to certain railroad employees, see 49 U.S.C. 21101-21107, to the extent those laws effectively require trains to stop for longer than five minutes (*e.g.*, to swap personnel). And as Justice Fischer observed, Section 5589.21 is incompatible "with the regulations in place involving switching, operations, and routes" promulgated by the Board under the ICCTA itself. Pet. App. 20a; see pp. 10-12, *supra*.

Finally, Section 5589.21 "unreasonably burden[s] interstate commerce." 49 U.S.C. 20106(a)(2)(C). As the D.C. Circuit has explained, when "assessing the burden" on interstate commerce, "it is appropriate * * * to consider the practical and cumulative impact were other States to enact legislation similar to the" challenged provision. *CSX Transportation, Inc.* v. *Williams*, 406 F.3d 667, 673 (2005) (per curiam). The cumulative effect of disparate state laws regulating blocked grade crossings could require interstate railroads to substantially modify their operations to comply with a patchwork of varying state and local grade-crossing requirements, thereby impeding the flow of interstate commerce. See *Wabash, St. Louis & Pacific Railway*, 118 U.S. at 577; see also *Southern Pacific Co.* v. *Arizona ex rel. Sullivan*, 325 U.S. 761, 775

(1945) (noting the "serious impediment to the free flow of commerce by the local regulation of train lengths"); *Seaboard Air Line Railway Co.* v. *Blackwell*, 244 U.S. 310, 312, 316 (1917) (state law that effectively required trains to come to "practically a full stop" at every grade crossing was an "unlawful" "direct burden upon interstate commerce").

3. Petitioner errs in asserting (Pet. 23-34) a conflict among federal courts of appeals and state courts of last resort on whether state blocked-crossing laws are preempted. Every such court to have considered the issue has concluded that those laws are preempted. Some have relied on the ICCTA. See, *e.g.*, *Elam* v. *Kansas City Southern Railway Co.*, 635 F.3d 796, 807 (5th Cir. 2011); *BNSF*, 22 F.4th at 1192 (10th Cir.); *Indiana* v. *Norfolk Southern*, 107 N.E.3d at 478 (Ind.). Others have relied on the FRSA. See, *e.g.*, *CSX Transportation, Inc.* v. *City of Plymouth*, 283 F.3d 812, 817 (6th Cir. 2002); *Village of Mundelein* v. *Wisconsin Central Railroad*, 882 N.E.2d 544, 556 (Ill.), cert. denied, 555 U.S. 814 (2008); *Krentz* v. *Consolidated Rail Corp.*, 910 A.2d 20, 26 (Pa. 2005). And some have relied on both. See, *e.g.*, *City of Seattle* v. *Burlington Northern Railroad*, 41 P.3d 1169, 1175 (Wash. 2002) (en banc).

Moreover, petitioner identifies no published decision of a federal court of appeals or state court of last resort holding that the ICCTA or the FRSA does *not* preempt a state blocked-crossing statute. Indeed, petitioner acknowledges that "the lower courts are reaching consistent outcomes." Pet. 23. This Court "does not review lower courts' opinions, but their *judgments*," *Jennings* v. *Stephens*, 574 U.S. 271, 277 (2015), and petitioner identifies no sound reason why

this Court should treat a "general consensus" (Pet. 23) in bottom-line judgments in the lower courts as a conflict warranting further review.

4. Petitioner's other reasons for review lack merit. Citing an FRA fact sheet stating that the agency "has 'no regulatory authority' to address the problem of blocked grade crossings," petitioner suggests that a decision from this Court could "clarify the scope of *federal* power to address th[at] problem." Pet. 29 (citation omitted). But whether Section 5589.21 is preempted does not depend on the FRA's authority to promulgate the same requirements by regulation; what matters (under the FRSA's first exception) is that the FRA has already promulgated a host of regulations covering the subject matter addressed by Section 5589.21. See pp. 16-18, *supra*.

Similarly, although the government does not minimize the seriousness of petitioner's public-safety concerns, see Pet. 16-20, Congress is well aware of those concerns and has chosen to address them by providing funds to States to facilitate the elimination of grade crossings. Members of Congress have been aware of the problems caused by stopped trains that block grade crossings since at least the enactment of the FRSA in 1970. See, *e.g.*, 116 Cong. Rec. 27,615 (1970) (statement of Rep. Price) (lamenting the "outrageous traffic jams" resulting from blocked crossings "in densely populated areas in Illinois"). Congress also has considered and rejected various proposals to implement a uniform national blocked-crossing rule, including several in recent years. See, *e.g.*, Moving Forward Act, H.R. 2, 116th Cong., 2d Sess. § 9553(a) (as received in the Senate on July 20, 2020); Infrastructure Investment and Jobs Act, H.R. 3684, 117th

Cong., 1st Sess. § 9553(a) (as placed on the Senate Calendar on July 13, 2021); Blocked Rail Crossings Safety Improvement Act, H.R. 9690, 117th Cong., 2d Sess. § 4(a) (as introduced in the House on Dec. 23, 2022).

Rather than adopt such a mandate, Congress instead has over the years created grant programs to assist States in efforts to eliminate grade crossings. Shortly after enacting the FRSA, for example, Congress authorized to be appropriated $175 million "for projects for the elimination of hazards of railway-highway crossings." Federal-Aid Highway Act of 1973, Pub. L. No. 93-87, § 203(b), 87 Stat. 283. More recently, in 2021, Congress appropriated $3 billion over five years, and authorized to be appropriated an additional $500 million per year over that same period, to fund grants under a program to eliminate especially problematic grade crossings. See Passenger Rail Expansion and Rail Safety Act of 2021, Pub. L. No. 117-58, Div. B, Tit. II, § 22305(a), 135 Stat. 720 (establishing the program and explaining that one of the goals is "to eliminate highway-rail grade crossings that are frequently blocked by trains") (49 U.S.C. 22909(b)(1)); see also § 22104(a), 135 Stat. 695-696 (authorizing to be appropriated $500 million each fiscal year from 2022 through 2026 for the program); Infrastructure Investment and Jobs Act, Pub. L. No. 117-58, Div. J, Tit. VIII, 135 Stat. 1436 (appropriating $3 billion for the program). Earlier this year, the FRA announced the Fiscal Year 2022 grants under that program, which include two grants totaling more than $10 million to eliminate five grade crossings in Ohio. See FRA, *Railroad Crossing Elimination (RCE) Program, FY*

*2022 Selections*, railroads.dot.gov/sites/fra.dot.gov/files/2023-06/FY22-RCE-Selections_PDFa.pdf.

Congress's choice to provide funding to eliminate grade crossings rather than to specify its own blocked-crossing rule is consistent with its dual focus on deregulation and national uniformity. In considering whether to regulate the maximum time a stopped train may block a grade crossing, Congress might reasonably have concluded that neither a rigid national rule nor a patchwork of varying state and local rules would promote those dual values it sought to pursue in the ICCTA and FRSA, especially given that either approach would create needless conflicts with the myriad regulations that the STB and FRA have promulgated to implement those federal statutes.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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