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

SUPPLEMENTAL BRIEF OF PETITIONER OHIO

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ARGUMENT

This case asks whether federal law preempts States from regulating the amount of time stopped trains may block grade crossings. The answer is no. Congress has left the States authority to regulate areas "related to railroad safety" until the Secretary of Transportation "prescribes a regulation … covering the subject matter." 49 U.S.C. §20106(a)(2). Blocked grade crossings are "related to railroad safety," *id.*, as they involve unique dangers that arise in an "area of railroad operations," *see* §20101. There is no federal regulation addressing how long stopped trains may block grade crossings. 87 Fed. Reg. 19176, 19176 (2022). States may therefore regulate blocked grade crossings until the Secretary steps in.

The United States sees things differently. It agrees that blocked grade crossings pose serious dangers. U.S. Br.21. But it suggests that Congress *both* stripped the States of their traditional authority over grade crossings *and* omitted any federal regulation. *See* U.S. Br.7, 22–23. This unlikely combination proves even less likely on inspection. Beyond saving room for state regulation, §20106(a)(2), Congress has assigned two federal agencies broad authority over railroads. One agency, the Federal Railroad Administration, has the power to "prescribe regulations and issue orders for every area of railroad safety." 49 U.S.C. §20103(a). Another, the Surface Transportation Board, has broad jurisdiction over—and rulemaking power to address—other matters concerning the movement of trains. 49 U.S.C. §§1321(a), 10501(b).

At this certiorari stage, the punchline is this. Deciding whether blocked grade crossings are a matter of "railroad safety"—a threshold step in the

preemption analysis—is vital to understanding the existing status of both state *and federal* authority. If—as Ohio believes—federal law does not preempt state regulation of blocked crossings, then this case would restore a state power that the lower courts should never have taken away. But even if the Court agrees with lower courts that state laws are preempted, resolving lower-court disagreement and explaining precisely how blocked-crossing laws are preempted would clarify which federal entity already possesses authority over blocked grade crossings.

This case would thus highlight which government actor—whether Congress, a federal agency, or the State—is presently responsible for the problem of blocked grade crossings. Answering the questions presented would foster "political accountability," *Murphy v. NCAA*, 138 S. Ct. 1461, 1477 (2018), as it would allow the "sovereign people" to know "without ambiguity" whom to credit or blame, *Gundy v. United States*, 139 S. Ct. 2116, 2134 (2019) (Gorsuch, J., dissenting).

I. Answering the questions presented would clarify which federal actor presently has authority over blocked grade crossings.

A. Recall some background. Traditionally, this Court has viewed the regulation of grade crossings as coming "within the police power of the States." *Lehigh Valley R. Co. v. Bd. of Pub. Util. Comm'rs*, 278 U.S. 24, 35 (1928). Since the 1800s, States have regulated how long trains may block the roads. Indiana Br.11. This case concerns whether federal law preempts this traditional exercise of state authority. Two acts of Congress are relevant.

The first is the Federal Railroad Safety Act of 1970 (the "Safety Act"). That Act gives the Secretary the power to regulate "every area of railroad safety." 49 U.S.C. §20103(a). But the Safety Act also "displays considerable solicitude for state law." *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 665 (1993). The Act contains a savings clause, with two safe harbors for state laws "related to railroad safety." §20106(a)(2). The first protects state laws until the Secretary—through the Federal Railroad Administration—"prescribes a regulation or issues an order covering the subject matter of the State requirement"; the second protects certain state laws, concerning "essentially local safety" problems, that are "more stringent" than federal regulations. *Id.*

The other relevant act is the Interstate Commerce Commission Termination Act of 1995 (the "Termination Act"). The Termination Act grants the Surface Transportation Board "exclusive" jurisdiction over "rail transportation" and rail track "operation[s]." §10501(b). For matters within that jurisdiction, the Termination Act thus prohibits States *and other federal agencies* from regulating. *Id.* The Surface Transportation Board has broad rulemaking authority to "carry[] out" its assigned jurisdiction. §1321(a).

Faced with this landscape, lower courts have held that federal law preempts state regulation of blocked grades crossings. But they have disagreed about why that is so. Some courts have said that the Termination Act preempts blocked-crossing laws, without analyzing the Safety Act. *E.g.*, *State v. Norfolk Southern Railway Co.*, 107 N.E.3d 468, 477 (Ind. 2018). Other courts have recognized that the Safety Act and its savings clause bear on the question. *E.g.*, Pet.App.12a (Kennedy, J., op.). But courts in this latter category

have split on whether blocked-crossing laws are "related to railroad safety" for purposes of the Safety Act. *Compare, e.g.*, *BNSF Ry. v. Hiett*, 22 F.4th 1190, 1195–96 (10th Cir. 2022) *with Vill. of Mundelein v. Wisconsin Cent. R.R.,* 227 Ill. 2d 281, 290–91 (Ill. 2008).

Resolving these disagreements has important implications for federal authority. The relationship between the Safety Act and the Termination Act matters for sorting out which railroad-related tasks Congress has assigned to different federal agencies. If read in isolation, the Termination Act gives the Surface Transportation Board "'exclusive' jurisdiction over virtually every area of rail transportation." U.S. Br.9. It follows, under that reading, that the Termination Act prevents all other government agencies—whether state or federal—from taking actions that "have the effect of managing or governing rail transportation." *See* U.S. Br.12 (quotation omitted). That reading would put much of what the Federal Railroad Administration does in jeopardy. The Administration has authored numerous regulations that directly manage rail transportation—regulations addressing things like train speed, hours of service, and railroad communications. *See* 49 C.F.R. Parts 213, 220, 228.

Clarifying whether blocked grade crossings are a matter of "railroad safety" would, in turn, clarify which federal agency should be regulating in this area. The Federal Railroad Administration has repeatedly suggested that it has no authority to regulate blocked grade crossings. Ohio Reply 3–4. But if blocked grade crossings are a matter of "railroad safety," those suggestions are wrong. *See* §20103(a). The Surface Transportation Board has also taken a hands-off approach to blocked grade crossings. But if

blocked grade crossings are a part of the Board's exclusive jurisdiction, *see* §10501(b), then the Board is the agency asleep at the switch.

Tellingly, federal officials do not give uniform answers. In 2019, the head of the Federal Railroad Administration told Congress that States had authority over blocked grade crossings. Ohio Reply 4. Now, federal messaging implies that neither the States nor federal agencies may regulate. *See* U.S. Br.7, 10, 22–23. Along those lines, the Secretary recently called for "more authority" from "Congress" to address blocked grade crossings. *Extended Interview: DOT Secretary Pete Buttigieg answers questions about blocked railroad crossings*, InvestigateTV (May 8, 2023), 1:35–52, https://www.youtube.com/watch?v=VAtQKaFIEgc. But he may be calling for authority he already possesses. *See* §20103(a). Answering the questions presented would identify which federal actor is presently accountable for blocked grade crossings. Without an answer, the public cannot know who is to blame for federal inaction.

B. The United States acknowledges the "variation" in lower courts' preemption rationales. U.S. Br.6–7. But it says that clarifying which act governs the analysis would have "no real-world impact." *Id.* To defend that view, the United States focuses myopically on whether *state* law is preempted, without considering the implications for *federal* authority. So it never confronts that, by answering the questions presented, the Court would presumably identify which federal agency already has authority to regulate blocked grade crossings. If nothing else, the Court's review would have the "real-world impact" of testing the United States's puzzling stance that further

legislation is needed for anyone to regulate this area. *See* U.S. Br.22–23.

Regardless, the United States's analysis leaves much unanswered. The United States initially presses an expansive reading of the Surface Transportation Board's exclusive jurisdiction under the Termination Act. U.S. Br.9–12. But it later hedges, saying—without explanation—that its broad reading of the Termination Act does nothing to supplant the Safety Act. U.S. Br.13. Similarly, the United States concedes that the Termination Act does not impliedly repeal the Safety Act, *id.*, but it never explains how to harmonize the two acts.

When the United States turns to the topic of "safety," its statements only deepen the confusion. It acknowledges that blocked grade crossings present serious public-safety concerns. U.S. Br.21. But it insinuates that, in regulating blocked crossings, Ohio is trying to exploit a "loophole" for a matter that just "happen[s] to touch" on safety. U.S. Br.13. At another point, the United States says it is "debatable" whether blocked crossings are "related to *railroad* safety." U.S. Br.14. But it later claims that the Federal Railroad Administration—a body that promulgates "railroad safety" regulations, *see* §20103(a)—has already covered the subject. U.S. Br.16.

All told, after finishing the United States's brief, a reader is left wondering (1) how the Termination Act and Safety Act coexist and (2) which laws count as "related to railroad safety." That the United States identifies no discernible, internally consistent test is a sure sign that its analysis is off.

Two more points. *First*, while the United States mostly avoids discussing the present status of federal

regulatory authority, it makes one notable observation in that regard. Specifically, it identifies a statute—about the licensing of track construction—that creates an exception to the Surface Transportation Board's general authority. U.S. Br.10 (citing 49 U.S.C. §10906). The idea being that there are at least some topics within the Board's exclusive jurisdiction on which the Board lacks authority to act. *Id.* The United States, however, identifies no similar carveout that would apply to blocked grade crossings. Thus, if blocked grade crossings are a part of the Board's exclusive jurisdiction, then the Board may presumably regulate them. *See* §§1321(a), 10501(b).

Second, the United States is wrong to suggest that *both* the Safety Act *and* the Termination Act might preempt blocked-crossing laws. U.S. Br.13–14. That is impossible for any railroad-safety law, given the Safety Act's structure. Within the same statute, the Safety Act houses both a preemption clause and a savings clause. §20106(a). In operation, the statute saves whichever railroad-safety laws it does not preempt, and vice versa. *See Easterwood*, 507 U.S. at 663–65. So, for laws "related to railroad safety," §20106(a), the Safety Act controls the analysis. There is no alternative preemption under the Termination Act.

II. The Safety Act does not preempt by implication.

A. For the above reasons, the Court should grant certiorari regardless of which side it expects to prevail. That said, the United States's approach to the Safety Act is at odds with the Act's text.

Return to the Act's first safe harbor. It says that States may enforce laws "related to railroad safety … until the Secretary of Transportation … prescribes a

regulation or issues an order covering the subject matter of the State requirement." §20106(a)(2). Those words set a "relatively stringent standard" for preemption; a standard that displays "considerable solicitude for state law." *Easterwood*, 507 U.S. at 665, 668. If federal "regulations provide no affirmative indication of their effect" on state law, courts should not "find pre-emption solely on the strength" of implications. *Id.* at 668. Said differently, "covering" is a relatively "restrictive term" that allows for preemption "only if the federal regulations substantially subsume the subject matter." *Id.* at 664. And one must define a law's subject matter with "a relatively narrow scope." *Norfolk Southern Ry. v. Box*, 556 F.3d 571, 573 (7th Cir. 2009). Otherwise, the first safe harbor's language is "self-defeating," since many federal regulations address subjects of railroad safety at an abstract level. *Id.*

Here, the analysis is straightforward. The subject of Ohio's Blocked Crossings Statute—Ohio Rev. Code §5589.21—is how long a stopped train may block the road. There are no federal regulations that "in fact cover" blocked crossings. *Easterwood*, 507 U.S. at 675; *see* 87 Fed. Reg. at 19176. The Secretary, therefore, has not covered the subject. Indeed, the Secretary and the Federal Railroad Administration doubt their current authority over blocked grade crossings. *Above* 4–5. So it is implausible to think that they have already covered the subject.

B. The United States's contrary analysis looks nothing like a "relatively stringent standard." *Easterwood*, 507 U.S. at 668. The United States posits that because federal regulations address different-but-related subjects—like train speed, warning devices at grade crossings, and air-brake testing—the

regulations must implicitly cover blocked grade crossings. U.S. Br.16. Federal regulations, it speculates, will sometimes conflict with blocked-crossing laws. U.S. Br.16–17. So it must be that the Federal Railroad Administration wants no regulation of blocked grade crossings, *see* U.S. Br.16–17, even though the Secretary has suggested the opposite, *Interview: Secretary Buttigieg*, InvestigateTV, 1:35–2:08; *accord id.* at 3:30–32.

This analysis contradicts the Safety Act. The first safe harbor's text shows that the Act imposes no preemption until the Secretary acts. But the United States makes assumptions favoring preemption, based on guesses about why the Federal Railroad Administration has chosen to regulate some subjects but not others. Accepting that approach would render the first safe harbor largely, if not completely, ineffective.

The United States also argues that Ohio's statute contains no exception to account for federal regulations. U.S. Br.19. That is both incorrect and irrelevant. Ohio's statute does not penalize railroads for "circumstances wholly beyond [their] control." Ohio Rev. Code §5589.21(C). Thus, if an otherwise impermissible blockage is due to federal regulations—and not poor planning on the railroad's part—then there is no violation. Regardless, the fact that conflict preemption might require Ohio's statute to yield in as-applied situations does not mean that the Safety Act expressly preempts Ohio's statute in all scenarios.

Importantly, blocked-crossing laws are of great value, regardless of whether federal-law conflicts will sometimes occur. Conflict preemption prevents the application of state law only "to the extent of any conflict with" federal law. *Crosby v. Nat'l Foreign Trade*

Council, 530 U.S. 363, 372 (2000). Thus, even if compliance with federal regulations affords railroads more time to remain parked on the roads, "the extent of any conflict" will not last forever. And cited violations of blocked crossing laws frequently involve more than "mere technical" or "close-call violation[s]." *See* Pet.App.23a (Brunner, J., dissenting). In Ohio, for instance, railroads often park their trains on roads for hours and even days. *E.g.*, Marella Porter, *Lockland kids climb over stopped train, as blocked railroad crossings continue to trouble community*, WKRC (Oct. 2, 2023), https://perma.cc/6TA5-B5R4; Debbie Rogers, *Worst in the country: Lake Twp. tops for blocked crossings*, Sentinel-Tribune (Mar. 10, 2022), https://perma.cc/6E9W-NSU6. Even if Ohio cannot enforce its statute to the minute, the statute remains a vital tool for combatting egregious violations.

One final detail deserves attention. In hinting that conflicts will be frequent, the United States reads Ohio's statute as requiring stopped trains to "clear[]" a grade crossing "within a time limit." U.S. Br.17. But Ohio reads its statute only as mandating that a train must *start* moving after five minutes. A train need not be *clear* of the road within five minutes. After all, the statute says that a railroad must "cause" its train "to be removed" from the road "[a]t *the end* of each five minute period." Ohio Rev. Code §5589.21(B) (emphasis added).

III. This case is an ideal vehicle for resolving an exceptionally important issue of public safety and federalism.

A. This case is a perfect chance to address a critical issue of public safety and federalism.

Begin with safety. When parked trains block the roads, they encourage people to make poor decisions. Children, for example, might climb under a train to get to school. Parked trains also block emergency responders. *See* Ohio Rev. Code §5589.20. With trains getting longer, these dangers are worsening. That is presumably why blocked grade crossings have received increased attention in recent months. Peter Eavis, et al., *Blocked Rail Crossings Snarl Towns, but Congress Won't Act*, The New York Times (July 11, 2023), https://perma.cc/9B42-2YJH; Anread Salcedo, et al., *Miles-long trains are blocking first responders when every minute counts*, The Washington Post (May 25, 2023), https://perma.cc/X5L7-GFGP; Topher Sanders, et al., *As Rail Profits Soar, Blocked Crossings Force Kids to Crawl Under Trains to Get to School*, ProPublica (April 26, 2023), https://perma.cc/YD9J-S9EN.

As for federalism, grade crossings are within States' traditional authority. *Lehigh Valley*, 278 U.S. at 35. Ohio, for instance, has regulated this area for roughly 170 years. *See Capelle v. Baltimore & Oh. R. Co.*, 136 Ohio St. 203, 207–08 (Ohio 1940). The Court should not take lightly the States' loss of such a long-held power.

B. The United States identifies no vehicle problems with this case, and it brushes aside the States' traditional authority over grade crossings.

On safety, Ohio and the United States are somewhat aligned. The United States accepts the "seriousness" of Ohio's "public safety concerns." U.S. Br.21. That concession is unsurprising: faced with a video of a child crawling under a stopped train, the Secretary recently described this issue as "shocking." *Interview:*

Secretary Buttigieg, InvestigateTV, 0:00–0:17. Thus, the United States seemingly agrees that there is need to "shine a spotlight" on blocked grade crossings for the sake of public safety. *Id.* at 1:40–41.

But Congress, the United States implies, has chosen deregulation over safety. *See* U.S. Br.21–23. As discussed above (at 1–4), that account underestimates the regulatory authority Congress has delegated. The United States further stresses that Congress has appropriated funds to address problematic grade crossings. U.S. Br.22. Such funds, while helpful for certain grade crossings, are far from an acceptable solution. There are about 130,000 public grade crossings in this country. Pet.16. And, in the last year, the Federal Railroad Administration received slightly under 20,000 reports from citizens concerning blocked grade crossings. Federal Railroad Administration, *Blocked Crossing Data*, https://www.fra.dot.gov/blockedcrossings/incidents (accessed Nov. 28, 2023). The identified funding is, relatively speaking, a drop in the bucket.

CONCLUSION

The Court should grant the petition for a writ of certiorari and reverse.

Respectfully submitted,

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