No. 23-669

IN THE

Supreme Court of the United States

MASSACHUSETTS COASTAL RAILROAD LLC
AND P. CHRISTOPHER PODGURSKI,

Petitioners,

v.

CHAD MARSH,

Respondent.

On Petition for a Writ of Certiorari to the
Supreme Judicial Court of Massachusetts

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Massachusetts' Prevailing Wage Act, Mass. Gen. Laws ch. 149, §§ 26–27F, requires businesses that obtain contracts for work on state-funded public-works projects to pay wages commensurate with the wages paid for similar work in the construction industry. The question presented is:

Whether the ICC Termination Act of 1995, 49 U.S.C. § 10501, preempts application of Massachusetts' prevailing-wage law to an employee of a railroad working on a public-works project.

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INTRODUCTION

Massachusetts' Prevailing Wage Act, Mass. Gen. Laws ch. 149, §§ 26–27H, provides that businesses that obtain contracts to work on state-funded public-works projects must pay a prevailing wage to designated employees working on those projects. The Supreme Judicial Court of Massachusetts (SJC) held that the ICC Termination Act of 1995 (ICCTA), 49 U.S.C. § 10501(b), does *not* preempt application of the prevailing-wage law to railroads awarded public-works contracts. It also rejected petitioners' field and conflict preemption theories.

The Court should deny petitioners' request for further review of the SJC's decision for four reasons. First, the SJC's decision is not "final" under 28 U.S.C. § 1257. The SJC decided that respondent's claims survived petitioners' motion to dismiss, but it did not foreclose petitioners from introducing evidence at the summary-judgment stage that would support its preemption defense. No erosion of federal policy would occur if the Court denied the petition and permitted state-court proceedings to proceed.

Second, this litigation is still in an early stage, and unresolved issues make this case a poor vehicle for addressing petitioners' preemption arguments. In particular, Massachusetts courts have not yet resolved whether the state's prevailing-wage law applies to the work performed by respondent or even the nature of the contracts at issue. And to the extent that petitioners can produce evidence at the summary-judgment stage pertinent to those issues, this Court's review would benefit by having the state courts assess that evidence in the first instance.

Third, the SJC correctly held that the ICCTA does not preempt the prevailing-wage law, and that decision broke no new ground. The SJC adhered to the accepted standard for evaluating preemption under the ICCTA and asked whether Massachusetts' law would regulate or have the effect of interfering with or unreasonably burdening railroading. Applying that standard to the record before it, the SJC determined that the ICCTA does not preempt Massachusetts' prevailing-wage law because that law does not regulate railroads *qua* railroads, but applies only to businesses that successfully obtain a public-works contract from the state. That decision does not conflict with the decision of any other court, as petitioners acknowledge.

Fourth, petitioners' field- and conflict-preemption arguments do not warrant further review. Because those arguments are not grounded in the ICCTA, they are not fairly encompassed in the question presented. The SJC's rejection of those arguments does not conflict with the decision of any other court and, on the merits, the SJC was correct: No federal law prohibits Massachusetts from deciding that its public-works contracts should be awarded only to those businesses, including railroads, that agree to pay their employees a prevailing wage.

STATEMENT

Statutory Background

1. The ICC Termination Act of 1995. Congress enacted the ICCTA, Pub. L. No. 104-88, 109 Stat. 803, "to reform economic regulation of transportation." H.R. Rep. No. 104-422, at 1 (1995). The ICCTA established the Surface Transportation Board (STB),

49 U.S.C. § 1301, as the federal agency responsible for regulating rail transportation.

As relevant here, the STB's jurisdiction extends to "transportation by rail carrier" that occurs "between a place in … a State and a place in the same or another State as part of the interstate rail network." *Id.* § 10501(a)(1), (2)(A). A "rail carrier" is a "person providing common carrier railroad transportation for compensation." *Id.* § 10102(5). "Transportation" encompasses both a "facility, instrumentality, or equipment of any kind related to the movement of passengers or property, or both, by rail" and "services related to that movement." *Id.* § 10102(9).

The STB has exclusive jurisdiction with respect to "transportation by rail carriers, and the remedies provided in [the ICCTA] with respect to rates, classifications, rules (including car service, interchange, and other operating rules), practices, routes, services, and facilities of such carriers." *Id.* § 10501(b)(1). The STB also has exclusive jurisdiction over "the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities," *id.* § 10501(b)(2), which are "tracks … used for loading cars, track switching, and other activities that are ancillary to main-line service." *Allied Erecting & Dismantling Co. v. STB*, 835 F.3d 548, 550 (6th Cir. 2016); *see also N.Y. & Atl. Ry. Co. v. STB*, 635 F.3d 66, 72 (2d Cir. 2011). "[T]he remedies provided under [the ICCTA] with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law." 49 U.S.C. § 10501(b).

Under the ICCTA, the STB generally lacks jurisdiction over "public transportation provided by a local government authority" or by their contractors. *Id.* § 10501(c)(1), (2); *see also id.* § 5302 (defining "public transportation" and "local governmental authority"). The ICCTA provides, however, that local governmental authorities and their contractors providing public transportation remain "subject to applicable laws of the United States related to—(i) safety; (ii) the representation of employees for collective bargaining; and (iii) employment, retirement, annuity, and unemployment systems or other provisions related to dealings between employees and employers." *Id.* § 10501(c)(3)(A).

2. Massachusetts' Prevailing Wage Act. Enacted in 1935, the Massachusetts Prevailing Wage Act "governs the setting and payment of wages on certain public works projects." Pet. App. 8a (cleaned up). By requiring that laborers working on the "Commonwealth's public works projects are paid a fair wage as determined by the Commonwealth based on prevailing market conditions," *id.* at 1a, the law guards against "rewarding a contractor that submits an artificially low bid on public works projects by paying its employees less than the prevailing wage," *id.* at 1a–2a.

The Massachusetts law provides that, "[p]rior to awarding a contract for the construction of public works," public agencies must request from the commissioner of the state Department of Labor Standards the "rate of wages to be paid" to "mechanics and apprentices, teamsters, chauffeurs and laborers" who would be employed to carry out the project. Mass. Gen. Laws ch. 149, § 27. Prevailing wage rates are determined based on the wages paid to municipal

employees, union laborers, and workers in the private construction industry. *Id.* § 26. Wage rates must be "made a part" of the public-works contract and "be the minimum rate or rates of wages for said employees during the life of the contract." *Id.* § 27. A separate provision of the law applies to equipment operators on public-works projects. *Id.* § 27F.

Proceedings below

1. Respondent Chad Marsh commenced this action in 2021 alleging that petitioners Massachusetts Coastal Railroad LLC (MCR) and P. Christopher Podgurski, the railroad's managing officer, violated Massachusetts' prevailing-wage law and other state-law wage statutes. According to the amended complaint, MCR employed Mr. Marsh for two years, during which time it entered into contracts with the state of Massachusetts to complete integrated rail freight and logistics projects. Pet. App. 3a–4a. The amended complaint identifies one of those projects—the South Coast Rail Project, which involved "restor[ing] commuter rail service between Boston and southeastern Massachusetts." *Id.* at 3a. And the complaint alleges that MCR's contracts are public-works contracts subject to the prevailing-wage law but that MCR did not pay him the prevailing wage for his work on the projects. *Id.* at 4a.

Petitioners moved to dismiss, arguing that the ICCTA preempts Massachusetts' prevailing-wage law. *Id.* at 7a, 47a. While concluding that the public-transportation exclusion in the ICCTA did not apply because MCR did not operate as a "rail carrier," *id.* at 52a–53a, the superior court held that the ICCTA did not preempt Mr. Marsh's claims, *id.* at 50a. The court also held that petitioners' argument that MCR's

contracts did not involve public-works projects within the meaning of the state law are "more appropriately resolved at a later stage of the proceedings." *Id.* at 43a.

2. The SJC unanimously affirmed. The SJC began its preemption analysis with two observations about the prevailing-wage law: First, the SJC explained that, in requiring prevailing wages in public-works contracts, Massachusetts was acting as a "market participant[]," using its control over "how to spend public funds to achieve [its] policy objectives." *Id.* at 13a. Second, the SJC observed that Massachusetts did not target the prevailing-wage law "at the railroad industry or rail transportation." *Id.* at 14a.

With those observations in mind, the SJC turned to the ICCTA's express preemption provision. The court noted that, "[i]n view of the plain language of the ICCTA's preemption clause, Federal courts and the STB have concluded that 'Congress narrowly tailored the ICCTA pre-emption provision to displace only "regulation," i.e., those [S]tate laws that may reasonably be said to have the effect of "manag[ing]" or "govern[ing]" rail transportation.'" *Id.* at 17a (footnote omitted) (quoting *Fla. E. Coast Ry. v. City of W. Palm Beach*, 266 F.3d 1324, 1331 (11th Cir. 2001)). Therefore, the court explained, "[t]he ICCTA does not preclude State laws that may have a 'remote or incidental effect on rail transportation.'" *Id.* at 18a (quoting *Fla. E. Coast Ry.*, 266 F.3d at 1331).

Applying this framework, the SJC considered "whether application of the Prevailing Wage Act to define the wages paid to construction workers on public works projects is a preempted 'regulation' of rail transportation, on the one hand, or a permissible State law with an incidental effect on railroad

activities, on the other." *Id.* at 19a. The SJC concluded that "[o]n the record before [it]," petitioners had not shown that the state wage law had an impermissible effect on railroading. *Id.* at 20a. The court found "little, if any, adverse economic effects" on railroad operations because the cost of the law "is, by design, absorbed by the Commonwealth." *Id.* (quotation marks omitted). The court emphasized that "no railroad is required to bid on a public works project," *id.* at 21a; rather, "the Prevailing Wage Act sets forth contractual terms governing public works projects voluntarily agreed to by the contractor, here, a railroad," *id.* at 23a. Furthermore, the state law "is not a permitting or preclearance process that could prevent, interfere with, or delay rail operations," *id.* at 26a, and it does not "regulate the operational aspects of … the movement of property or passengers over the rail lines," *id.* at 27a. Having held that the ICCTA does not preempt the prevailing-wage law, the SJC declined to consider whether the public-transportation exclusion saved the law from preemption. *Id.* at 28a n.32.

The SJC also rejected petitioners' implied-preemption theories, neither of which were grounded in the ICCTA. *See id.* 29a n.34, 35a. First, the SJC held that petitioners' field-preemption theory lacked merit even under the assumption that the relevant field was "the wages of railroad employees, as opposed to wages paid on public works projects." *Id.* at 30a. The SJC acknowledged that the Sixth and Seventh Circuits had relied on this Court's 1917 decision in *Wilson v. New*, 243 U.S. 332 (1917), to support the conclusion that the Adamson Act of 1916, which caps certain railroad employees' workday and enacted a temporary bar on reducing worker pay, preempts

application of state overtime regulation. Pet. App. 32a (citing *R.J. Corman R.R./Memphis Line v. Palmore*, 999 F.2d 149 (6th Cir. 1993); *Wisc. Cent., Ltd. v. Shannon*, 539 F.3d 751 (7th Cir. 2008)). The SJC explained, however, that neither *Wilson* nor the Adamson Act speaks of preempting the field of wage regulation, "much less [imposing] a ban on State prevailing wage laws." *Id.* at 33a.

The SJC also found no conflict between Massachusetts' prevailing-wage law and a federal prevailing-wage law, the Davis-Bacon Act. *Id.* at 35a. As the SJC explained, the Davis-Bacon Act sets only a "floor" on wages, not a ceiling. *Id.* at 36a (quoting *Frank Bros. v. Wisc. Dep't of Transp.*, 409 F.3d 880, 897 (7th Cir. 2005)).

Finally, the court held that the complaint adequately alleges that MCR's contracts involved public-works projects and thus survived petitioners' motion to dismiss on state-law grounds. *Id.* 37a & n.39.

REASONS FOR DENYING THE WRIT

I. The state-court decision below is not a final judgment under 28 U.S.C. § 1257.

This Court has jurisdiction under 28 U.S.C. § 1257 to review "[f]inal judgments or decrees rendered by the highest court of a State." Here, the SJC affirmed the denial of petitioners' motion to dismiss, allowing the case to proceed in the trial court. Pet. App. 40a. In so doing, it also noted that some of petitioners' arguments were not appropriate for decision at the motion to dismiss stage. *Id.* at 37a–38a & nn. 38–41. When a state supreme court "remand[s] a case for trial," its decision is not final "'as an effective determination of the litigation.'" *O'Dell v. Espinoza*,

456 U.S. 430, 430 (1982) (per curiam) (quoting *Mkt. St. Ry. Co. v. R.R. Comm'n of Cal.*, 324 U.S. 548, 551 (1945)).

In a "limited set of situations," however, this Court has "found finality as to the federal issue despite the ordering of further proceedings in the lower state courts." *O'Dell*, 456 U.S. 430. Those situations comprise cases falling within four categories identified in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), and petitioners argue that the fourth of those categories applies here. Pet. 2. That category applies where (1) "the federal issue has been finally decided in the state courts with further proceedings pending in which the party seeking review here might prevail on the merits on nonfederal grounds, thus rendering unnecessary review of the federal issue by this Court"; (2) "reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action rather than merely controlling the nature and character of, or determining the admissibility of evidence in, the state proceedings still to come"; and (3) "a refusal immediately to review the state-court decision might seriously erode federal policy." *Id.* at 482–83.

At this stage of the litigation, this case does not satisfy the *Cox* exception, for two reasons. To start, the "federal issue"—whether the ICCTA preempts Massachusetts' prevailing-wage law—has not been "finally decided." *Id.* In considering whether the prevailing-wage law was preempted because it "interferes with or unreasonably burdens rail-roading," the SJC confined its analysis to "the record before [it]." Pet. App. 20a. Because the case was on appeal from the superior court's denial of a motion to dismiss, the record is not yet developed. As the SJC

stated, "*nothing in the present record* suggests payment of a prevailing wage would pose an undue burden" on petitioners. *Id.* at 21a n.26 (emphasis added). If such evidence exists, petitioners will have the opportunity to provide it—and the state courts will have an opportunity to assess it—at the summary-judgment stage or at trial.

In addition, immediate review is not necessary to prevent a serious erosion of federal policy. Unlike in *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174 (1988), where a state supreme court decision on a preemption issue permitted "direct state regulation" of federally owned nuclear production facilities, *id.* at 179, in this case the SJC's decision concerns only privately owned railroads that choose to seek state public-works contracts. No federal policy is at serious risk at this time, particularly because the court below has not yet determined whether the Massachusetts law even applies to the projects at issue. *See* Pet. App. 37a & n.39.

Because jurisdiction under 28 U.S.C. § 1257 is lacking, the petition should be denied.

II. Numerous unresolved issues make this case a poor vehicle for addressing the question presented.

The petition should be denied for the additional reason that several unresolved factual and state-law legal questions would impede this Court's consideration of the preemption question. Most importantly, the Massachusetts courts have not yet decided the contested question whether, and under what circumstances, the state's prevailing-wage law applies to MCR's state contracts.

Petitioners have argued that "the projects on which [petitioner] worked were not public works" subject to the law. Pet. App. 37a. Although the SJC held that the complaint was adequately pleaded on that point, it recognized that petitioners could introduce evidence refuting that allegation in summary-judgment motions or at trial. *Id.* at 37a & n.39. Thus, the premise of the petition—that Massachusetts' prevailing-wage law cannot be applied to the work that MCR performed for the state—is at this point hypothetical because the Massachusetts courts have not yet decided the disputed question whether the prevailing-wage law applies in the first place. *See* Pet. 8 n.5 ("Issues related to the proper application of the prevailing wage act under Massachusetts state law will continue to be litigated in the state courts."); *id.* at 9 (arguing that the prevailing-wage law does not apply to "maintenance work" performed by MCR).

Moreover, the STB's jurisdiction extends only to "transportation by rail carrier" that occurs "as part of the interstate rail network." 49 U.S.C. § 10501(a)(1), (2). And the STB's exclusive jurisdiction over "construction" applies only to specified types of tracks or facilities. *See id.* § 10501(b)(2); *Allied Erecting*, 835 F.3d at 550. But the record does not contain information sufficient to determine whether these provisions are satisfied. The complaint does not specify whether MCR's state contracts involved "spur, industrial, team, switching, or side tracks, or facilities." 49 U.S.C. § 10501(b)(2). And the allegations that MCR's contracts involved "integrated rail freight and logistics" and a commuter rail service between Boston and southeastern Massachusetts," *see* Pet.

App. 3a, are insufficient to allege that the projects comprise part of the interstate rail network.

Another obstacle to review is that petitioners' arguments are largely premised on facts outside the record. Among other things, petitioners assert that Marsh was a "maintenance worker[]," Pet. i, who performed "emergency maintenance work," "emergency railway track maintenance" and "Force Account Work," *id.* at 5, 7; that Marsh performed work pursuant to a 2010 contract between MCR and the state, *id.* at 9; that none of the work performed by Marsh was subject to public bidding, *id.* at 13 n.8; that the state contracted with MCR to comply with federal regulations, *id.* (citing 49 C.F.R. § 213.7); and that MCR is "authorized by and registered with" the STB, *id.* at 6. None of these facts are in the complaint, however, *see* Pet. App. 37a & n.39, and thus would not be before this Court were certiorari granted.

Finally, the preemption question is complicated by the SJC's decision not to address respondent's alternative argument that he "worked on projects, such as the South Coast Rail project," which involve public transportation under 49 U.S.C. § 10501(c) and, thus, "expressly fall outside of the STB's jurisdiction." Pet. App. 28a n.32. The superior court concluded that the section 10501(c) exclusion did not apply because MCR was not providing services to the state as a "rail carrier." *Id.* at 52a–53a. The STB's exclusive jurisdiction under the ICCTA, however, depends on the existence of "transportation" being provided by a "rail carrier." *See N.Y. & Atl. Ry. Co.*, 635 F.3d at 72 ("Both the courts and the STB thus consistently find that to fall within the STB's exclusive jurisdiction, the facility or activity must satisfy both the 'transportation' and 'rail carrier' statutory requirements."). Be-

cause the SJC found it unnecessary to address section 10501(c)'s exception to the STB's jurisdiction, it did not need to resolve MCR's status as a "rail carrier" vis-à-vis its state contracts. This unresolved alternative basis for rejecting petitioners' preemption argument highlights that this case is a poor vehicle for review of the ICCTA's preemptive scope, as the answer to that question may ultimately not apply in this case.

III. The SJC's conclusion that the ICCTA does not preempt the prevailing-wage law does not warrant review.

A. The SJC's decision does not conflict with the decision of any other court and does not raise an important federal question.

The SJC's holding that Massachusetts' prevailing-way law may be applied to railroads that enter into public-works contracts with the state does not conflict with the decision of any other court. Petitioners do not contend otherwise. To the contrary, they concede that the SJC addressed "an issue of first impression." Pet. i, 4. This Court's intervention is not needed to address a question that has been decided by only a single state supreme court on a limited evidentiary record.

To the extent that petitioners argue that the decision below is inconsistent with the SJC's own prior decision in *Bay Colony Railroad Corp. v. Town of Yarmouth*, 23 N.E.3d 908 (Mass. 2015), a conflict between two decisions of a single state supreme court is not a basis for this Court's review. In any event, no such conflict exists. *Bay Colony* addressed express preemption under the Federal Aviation Administration Authorization Act of 1994 (FAAAA). The FAAAA preempts state laws "having the force and effect of law related to a price, route, or service of any motor carrier

… with respect to the transportation of property." 49 U.S.C. § 14501(c). *Bay Colony* holds that this provision preempts a state law barring railroads from operating motor vehicles to provide solid waste transportation services in locations where it does not operate rail lines. 23 N.E.3d at 911–12. *Bay Colony* does not address state authority to regulate employee wages under the FAAAA, much less the ICCTA.

Petitioners provide no basis for their suggestion that the SJC's decision will have "far-ranging consequences" for railroads "nationwide." Pet. 3. According to petitioners, prevailing-wage laws exist in "[r]oughly half" of the states and in "various cities." *Id.* at 10. But the existence of such laws does not necessarily imply their application to railroads. For instance, petitioners note that Pennsylvania's prevailing-wage law excludes railroad workers in certain circumstances. Pet. 4 n.2. California excludes "work on rolling stock" from its prevailing-wage law. *See Busker v. Wabtec Corp.*, 492 P.3d 963, 966 (Cal. 2021). Indeed, the application of Massachusetts' prevailing-wage law to MCR remains an open question in this case. Pet. App. 37a–40a, 43a; Pet. 8 n.5. And petitioners have not identified any other court decision addressing the application of prevailing-wage laws to railroad workers.

Petitioners also complain that the SJC's decision will subject railroads to state law, rather than a uniform national standard. Pet. 35–36; *see also id.* at 12, 18, 19, 29, 30. But every decision rejecting a preemption theory has the effect of subjecting a party to state law, so that alone is not a reason for this Court's review. Moreover, with respect to the railroad industry, there is uniform agreement that the ICCTA allows room for state laws that do not interfere with

or unreasonably burden railroading. *See, e.g.*, Pet. App. 17a–19a (citing authorities). And with respect to prevailing-wage laws in particular, a railroad can avoid being subject to a "patchwork" of state laws by refraining from undertaking public-works projects. Pet. 18; *see* Pet. App. 21a.

B. The SJC correctly held that the ICCTA does not preempt the Massachusetts law.

Below, petitioners argued that the ICCTA expressly preempts Massachusetts' prevailing-wage law. When considering an express preemption provision, "the task of statutory construction must in the first instance focus on the plain wording of the clause, which necessarily contains the best evidence of Congress' pre-emptive intent." *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993). A court may also consider "the text and structure of the statute at issue." *Id.* But as the Court stated in the context of a statute regulating railroads, "a court interpreting a federal statute pertaining to a subject traditionally governed by state law will be reluctant to find preemption," unless preemption is "the clear and manifest purpose of Congress." *Id.*

1. The ICCTA's "remedies … with respect to regulation of rail transportation" are "exclusive." 49 U.S.C. § 10501(b). Looking to this provision, the court below explained that "State laws that may reasonably be said to have the effect of managing or governing rail transportation" are expressly preempted. Pet. App. 17a (cleaned up). The STB agrees. *See Ass'n of Am. R.R.–Pet. For Declaratory Ord.*, No. FD 36369, 2020 WL 7778233, at *2 (STB Dec. 29, 2020). And the courts of appeals broadly agree as well. *See Island Park, LLC v. CSX Transp.*, 559 F.3d 96, 102–03 (2d Cir. 2009);

N.Y. Susquehanna & W. Ry. v. Jackson, 500 F.3d 238, 252 (3d Cir. 2007); *Norfolk S. Ry. v. City of Alexandria*, 608 F.3d 150, 157–58 (4th Cir. 2010); *Union Pac. R.R. v. City of Palestine*, 41 F.4th 696, 704 (5th Cir. 2022); *Adrian & Blissfield R.R. v. Village of Blissfield*, 550 F.3d 533, 539 (6th Cir. 2008); *BNSF Ry. v. Cal. Dep't of Tax & Fee Admin.*, 904 F.3d 755, 760–61 (9th Cir. 2018); *Fla. E. Coast Ry.*, 266 F.3d at 1331; *Delaware v. STB*, 859 F.3d 16, 18 (D.C. Cir. 2017); *see also* H.R. Rep. No. 104-422, at 167 (explaining that the ICCTA's exclusivity "is limited to remedies with respect to rail regulation—not State and Federal law generally").

Massachusetts' prevailing-wage law does not manage or govern any of the rail transportation activities regulated by the ICCTA and subject to the STB's jurisdiction. More specifically, the state law does not regulate rail "transportation," because it does not "regulate the operational aspects of rail transportation, affecting the movement of property or passengers over the rail lines." Pet. App. 27a. The state law also "is not a permitting or preclearance process that could prevent, interfere with, or delay rail operations." Pet. App. 26a; *see also Ass'n of Am. R.R.*, 2020 WL 7778233, at *2.

Moreover, the "remedies" identified in the ICCTA address the services that railroads provide to their customers, not the wages they pay to employees. For instance, section 10501(b) specifies that the STB has exclusive jurisdiction over the ICCTA's remedies concerning "rates, classifications, rules (including car service, interchange, and other operating rules), practices, routes, services, and facilities" of rail carriers. Elsewhere, the ICCTA authorizes administrative or judicial remedies for persons harmed "as a result of an act or omission of [a rail]

carrier in violation of [the ICCTA]" or by a carrier's failure to obey an STB order. 49 U.S.C. § 11704(a), (b). Those remedies are unavailable for wage disputes, however, because the ICCTA does not regulate employee wages.

Petitioners argue that the STB has "exclusive jurisdiction over 'construction', 'employment' and 'other provisions related [to] dealings between employees and employers' vis-à-vis railroad operations." Pet. 18. The quoted terms appear in 49 U.S.C. § 10501(b) and (c), but those provisions do not authorize the STB to regulate employee wages. As to the term "construction," it relates to the STB's jurisdiction over "spur, industrial, team, switching, or side tracks, or facilities." *Id.* § 10501(b)(2). The complaint does not establish that MCR's contracts with Massachusetts involve those types of tracks or facilities. But even if it did, the STB's jurisdiction over such "construction" would not grant it authority to regulate the wages of railroad construction workers. *See* Pet. App. 19a n.25.

As to the terms "employment" and "other provisions related to dealings between employees and employers," they appear in section 10501(c). That provision states that the "applicable laws of the United States" related to those and other subjects apply to local governmental authorities and their contractors that provide public transportation excluded from the STB's jurisdiction. Nothing in that provision suggests that the ICCTA is an "applicable law" when it comes to employment or dealings between employees and employers.

2. Courts of appeals and the STB have concluded that ICCTA preemption reaches beyond state laws that directly regulate matters within the STB's

jurisdiction, to encompass laws with the effect of "interfer[ing] with or unreasonably burden[ing] railroading." Pet. App. 19a (quoting *N.Y. Susquehanna & W. Ry.*, 500 F.3d at 252). The SJC correctly held that, "[o]n the record" in this case, Massachusetts' prevailing-wage law does not have that effect. Pet. App. 20a; *see also id.* at 21a n.26 ("[N]othing in the present record suggests payment of a prevailing wage would pose an undue burden.").

In implementing its prevailing-wage law, Massachusetts is acting "as [a] market participant[], *id.* at 13a, proposing "contractual terms governing public works projects voluntarily agreed to by the contractor," *id.* at 23a. And "voluntary agreements must be seen as reflecting the carrier's own determination and admission that the agreements would not unreasonably interfere with interstate commerce." Pet. App. 22a (quoting *PCS Phosphate Co. v. Norfolk S. Corp.*, 559 F.3d 212, 221 (4th Cir. 2009), quoting in turn *Township of Woodbridge v. Consolidated Rail Corp.*, 5 S.T.B. 336, 340 (2000)); *see also Union Pac. R.R. v. Chicago Transit Auth.*, 647 F.3d 675, 682 (7th Cir. 2011) ("If a state or local government secures the use of property in a way that affects railroad transportation by contract or other agreement, there is no issue of federal preemption."). Petitioners are therefore wrong to assert that Massachusetts' prevailing-wage law would "determine wage rates for railroad workers for all railroads using or involved with tracks located in Massachusetts." Pet. 20. Only railroads that voluntarily undertake public-work projects would be required to pay covered employees prevailing wages. *Cf. Building & Constr. Trades Council of Metro. Dist. v. Associated Builders & Contractors of Mass./R.I., Inc.*, 507 U.S. 218, 227

(1993) ("When a State owns and manages property," its interaction "with private participants in the marketplace … is not subject to pre-emption by the [National Labor Relations Act], because pre-emption doctrines apply only to state *regulation*.").

Petitioners argue, however, that the effect of the 89-year-old prevailing-wage law will be to increase "employee expenses and consequently … railroad rates, charges, services, and operations." Pet. 20; *see also id.* at 13 (asserting increased rates). The record contains no evidence to support that assertion, and the SJC explained why such evidence is unlikely to exist: The "economic impact of the Prevailing Wage Act is, by design, absorbed by the Commonwealth," Pet. App. 20a, because "a contractor is expected to calculate its labor costs using the prevailing wage schedule published by the [state] in its bid." *Id.* Indeed, one of the purposes of the law is to "avoid rewarding a contractor that submits an artificially low bid on public works projects by paying its employees less than the prevailing wage." *Id.* at 1a–2a. Petitioners do not even attempt to grapple with the SJC's analysis on this point.

IV. The Court should not review the SJC's implied preemption analysis.

A. Petitioners' implied preemption arguments are not properly before this Court.

Petitioners have framed the question presented as "[w]hether the ICCTA preempts Massachusetts' prevailing wage act for railroad maintenance workers." Pet. i. Before the SJC, however, petitioners' field-preemption theory did "not rely on the ICCTA or its statutory framework." Pet. App. 29a n.34. Rather, it rested on the Adamson Act, 49 U.S.C. § 28301. *See*

Pet. App. 30a–31a. Likewise, petitioners' conflict-preemption argument below focused on the Davis-Bacon Act, not the ICCTA. *See id.* at 35a. They argued below that "requiring State prevailing wages to be paid on State public works projects would conflict with the Federal Department of Transportation's determination that the Davis-Bacon Act's prevailing wage requirements for federally funded projects do not apply to federally funded railroad projects." *Id.*

The questions whether the Adamson Act or the Davis-Bacon Act preempt Massachusetts' prevailing-wage law are not fairly encompassed by the question "[w]hether the ICCTA preempts Massachusetts' prevailing wage act." Pet. i. And the SJC did not address whether the ICCTA impliedly preempts Mr. Marsh's claims. Implied preemption issues are therefore not properly presented to this Court.

B. The SJC's implied preemption determinations do not conflict with the decision of any other court.

In any event, petitioners' implied preemption arguments do not warrant review. The SJC concluded that the Davis-Bacon Act does not preempt Massachusetts' prevailing-wage law, and petitioners correctly do not contend that this holding conflicts with the decision of any other court. In concluding that the Davis-Bacon Act did not have preemptive effect, the SJC followed the reasoning of *Frank Brothers*, 409 F.3d 880. *See* Pet. App. 35a–36a. *Frank Brothers* held that, even for federally funded projects, the Davis-Bacon Act, together with the Federal-Aid Highway Act, 23 U.S.C. § 113, do not preempt application of a state prevailing-wage law to workers excluded from federal prevailing-wage protections. 409 F.3d at 882–

83, 897–98. Petitioners have not identified a contrary decision by any court.

Petitioners also correctly do not argue that the SJC's decision on field preemption conflicts with that of any other court. Although the SJC disagreed in some respects with the reasoning employed by the Sixth and Seventh Circuits in *R.J. Corman* and *Wisconsin Central*, that disagreement does not evince a conflict requiring this Court's intervention.

R.J. Corman and *Wisconsin Central* addressed field preemption under the Adamson Act. Originally enacted in 1916, ch. 436, 39 Stat. 721, the Adamson Act provides that "eight hours shall … be deemed a day's work and the measure or standard of a day's work for the purpose of reckoning the compensation" of railroad employees "actually engaged in any capacity in the operation of trains" across state lines. *Id.* § 1, 39 Stat. at 721–22. The Act also imposed a temporary bar on any reduction in employees' salary, which expired within a year of its 1916 enactment. *Id.* §§ 2, 3, 39 Stat. at 722. In 1917, this Court upheld the constitutionality of the Adamson Act against arguments that it infringed on liberty of contract. The Court relied on the temporary nature of the bar on reducing wages, explaining that it "le[ft] the employers and employees free as to the subject of wages to govern their relations by their own agreements after the specified time." *Wilson*, 243 U.S. 332.

Although this Court has never held that the Adamson Act preempts state wage regulation, *R.J. Corman* and *Wisconsin Central* interpret *Wilson* as foreclosing state regulation of overtime pay for workers employed by interstate railroads. *R.J.*

Corman, 999 F.2d at 153–54 (holding that state law was preempted "as to interstate railroads"); *Wisc. Cent.*, 539 F.3d at 765–66 (same). Regardless of whether that reading of *Wilson* is correct, *but see infra* pp. 22–23, the Sixth and Seventh Circuits addressed state laws that imposed overtime regulations on interstate railroads based on the railroads' operations in one state. Those cases did not address the issue presented here: whether the Adamson Act preempts a state from enforcing a prevailing-wage condition against any railroad that voluntarily contracts with the state to undertake a public-works project. Because the state laws at issue are meaningfully different, *R.J. Corman* and *Wisconsin Central* do not conflict with the SJC's decision below.

C. Petitioners' field preemption argument lacks merit.

In addition to falling outside petitioners' question presented, petitioner's argument that the Adamson Act preempts Massachusetts' prevailing-wage law is wrong. First, the SJC correctly determined that *Wilson* does not support the conclusion that the Adamson Act preempts the field of state wage regulation. As the court explained, "[n]othing in the [Adamson Act] or its surrounding circumstances supports the conclusion that Congress intended by the statute to forever ban State laws regarding minimum wages as applied to railroad workers, much less a ban on State prevailing wage laws." Pet. App. 33a. Rather, *Wilson*'s recognition that wages would be set by private negotiations after the temporary bar on wage reduction expired reflected the then-prevalent view that Congress lacked the constitutional authority to establish permanent wage scales through legislation. *See*, *e.g.*, *Adkins v. Children's Hosp. of D.C.*, 261 U.S.

525, 554 (1923) (referring to "essential difference" in Congress's authority between regulating "hours of labor" and "fixing wages"), *overruled by W. Coast Hotel Co. v. Parrish*, 300 U.S. 379, 400 (1937); *see also* Pet. App. 33a.

Second, as petitioners themselves recognize, *see* Pet. 31–32, this Court has long since abandoned the economic due process principles that undergird *Wilson*. But even under the *ancien régime*, those principles had no application to the voluntarily agreed-to terms of a public-works contract. *See Atkin v. Kansas*, 191 U.S. 207, 222–24 (1903) (holding that liberty of contract does not limit states' authority to "prescribe the conditions upon which it will permit public work to be done on its behalf"). Thus, even if the Adamson Act is read to preempt the field of state wage *regulation*, Massachusetts' prevailing-wage law, which applies only to businesses that voluntarily obtain public-works contracts, would not have been a "regulation" as understood by *Wilson*. *Cf. Cal. Div. of Lab. Standards Enf't v. Dillingham Constr., N.A.*, 519 U.S. 316, 334 (1997) (holding that apprenticeship program under state prevailing-wage law was not preempted by the Employee Retirement Income Security Act because it merely "alter[ed] the incentives, but [did] not dictate the choices, facing ERISA plans").

Third, petitioners' field-preemption theory is inconsistent with *Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246 (1994). *Hawaiian Airlines* addressed the Railway Labor Act, 45 U.S.C. § 151 *et seq.*, which "provid[es] a comprehensive framework for resolving labor disputes." 512 U.S. at 252. Despite its comprehensiveness, the Railway Labor Act does not "undertake governmental regulation of wages, hours,

or working conditions," and does not preempt "the field of regulating working conditions themselves." *Terminal R.R. Ass'n of St. Louis v. Bhd. of R.R. Trainmen*, 318 U.S. 1, 6–7 (1943). Recognizing that "[p]re-emption of employment standards 'within the traditional police power of the State' 'should not be lightly inferred,'" *Haw. Airlines*, 512 U.S. at 252 (quoting *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 21 (1987)), *Hawaiian Airlines* rejects an interpretation of the Railway Labor Act that would result in "pervasive pre-emption" of "all claims involving rights and duties that exist independent of" a collective bargaining agreement, *id.* at 255 n.5. If the "comprehensive" Railway Labor Act does not preempt the field of employee relations, there is no basis for concluding that the narrower provisions of the Adamson Act do so.

Finally, petitioners have not established that Mr. Marsh is an employee covered by the Adamson Act. The Adamson Act applies to railroad employees "actually engaged in any capacity in operating trains used for transporting passengers or property on railroads" across state lines, within a federal territory or possession, or to or through a foreign country. 49 U.S.C. § 28301(a). According to the amended complaint, however, Mr. Marsh did not operate trains across state lines, but worked for petitioners "as an equipment operator." Pet. App. 3a. The Adamson Act, therefore—even under the cases cited by petitioners—would not cover his wages and, likewise, would not preempt application of the prevailing-wage law to his wages.

D. Petitioners' implied conflict preemption argument lacks merit.

Again, petitioners argued below that Massachusetts' prevailing-wage law conflicts with Davis-Bacon Act. Even assuming that question is properly presented here, the SJC correctly rejected it.

State law may conflict with federal law, and thus be preempted, when "compliance with both federal and state regulations is impossible … or when state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hillman v. Maretta*, 569 U.S. 483, 490 (2013) (cleaned up). Petitioners do not argue that complying with Massachusetts' prevailing-wage law makes it impossible for them to comply with federal law. Instead, they argue here that the Massachusetts law imposes "an economic burden on railroads that would thwart the objectives of the ICCTA." Pet. 28. As explained above, *supra* p. 19, petitioners fail to demonstrate a burden caused by the prevailing-wage law that would support preemption under the ICCTA's express language. Recycling allegations of burden as a basis for conflict preemption does not lead to a different conclusion.

Petitioners' principal conflict-preemption theory, Pet. 28–29, is that the state prevailing-wage law conflicts with the Davis-Bacon Act due to a 2008 agency determination that the federal statute's prevailing-wage requirements do not apply to a railroad's "relocation work … to accommodate highway construction," *see* Memorandum from Dwight A. Horne, Director, Office of Program Administration, Federal Highway Administration, to Directors of Field Services (June 26, 2008),

https://www.fhwa.dot.gov/construction/contracts/080625.cfm. The agency's 2008 memorandum relies on a 1985 memorandum concluding that railroads performing such relocation work are not undertaking "highway projects" within the meaning of the Federal-Aid Highway Act, 23 U.S.C. § 113. *See* Memorandum from Dowell H. Anders, Acting Chief Counsel, Federal Highway Administration, to Rex C. Leathers, Associate Administrator for Engineering and Operations (HEO-1) (May 15, 1985), https://www.fhwa.dot.gov/programadmin/contracts/051585.cfm. The Federal-Aid Highway Act, in turn, incorporates the Davis-Bacon Act and applies only to federally funded projects. Nothing in those statutes or administrative determinations suggests that states may not impose their own prevailing-wage requirements as a condition for awarding their own public works projects paid for by state funds.

In rejecting the argument that the Davis-Bacon Act preempts state prevailing-wage laws, the SJC followed the Seventh Circuit's decision in *Frank Brothers*. *See* Pet. App. 35a–36a. In *Frank Brothers*, the court of appeals held that, even for federally funded highway projects, the Federal-Aid Highway Act and the Davis-Bacon Act do not preempt application of state prevailing-wage law to workers excluded from federal prevailing-wage protections. 409 F.3d at 882–83, 897–98. The case against preemption is even stronger here, where there is no evidence that federal funds are implicated by the public-works projects at issue. Accordingly, as the SJC recognized, the holding in *Frank Brothers* is also "true for railroad workers working on [Massachusetts'] public works projects." Pet. App. 36a. Petitioners offer no argument for concluding otherwise.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

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