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

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

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

2. Does 49 U.S.C. §20106(a)(2) save from preemption state laws that regulate the amount of time a stopped train may block a grade crossing?

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REPLY

This case presents two interrelated questions. Together, they ask whether federal law preempts state laws regulating the amount of time a stopped train may block a grade crossing. The answer is no; neither the Interstate Commerce Commission Termination Act of 1995 (the "Termination Act") nor the Federal Railroad Safety Act of 1970 (the "Safety Act") preempts these laws.

CSX's opposition brief reveals much agreement with Ohio. CSX agrees that no federal regulation "address[es] how long a train may occupy a crossing." 87 Fed. Reg. 19176, 19176 (April 1, 2022); *accord* BIO.29. It agrees that, notwithstanding the absence of any such regulation, the consensus view in lower courts is that federal law preempts state blocked-crossing laws. Finally, it agrees that lower courts have offered differing rationales for this conclusion; some say the Termination Act preempts blocked-crossing laws, while others think the Safety Act does the preemptive work. BIO.16.

But the parties diverge sharply regarding the case's significance. Ohio believes the case is exceptionally important, both because blocked grade crossings threaten public safety and because the lower-court consensus has the effect of preempting many different laws in many different States. CSX insists that blocked grade crossings have not yet caused enough death or destruction to warrant this Court's review. BIO.3. But it would be better for this Court to weigh in *before* CSX and others inflict more irreparable harm on American families.

A varied group of *amici* filed briefs confirming the case's importance. Eighteen geographically diverse

States—along with the District of Columbia—urge this Court's involvement. *See* Indiana Br.1. So does the association that represents Ohio prosecutors. *See* OPAA Br.2. And so too does a national coalition of unions and labor attorneys. Rail Transportation Workers Br.2. This last coalition represents railroad employees across the country.

All told, this case is an ideal vehicle for improving public safety and returning to the States their historic power to regulate grade crossings. At the very least, the case presents the Court with an opportunity to definitively answer the questions presented—questions that have already had over two decades to percolate in the lower courts.

I. This case is exceptionally important.

The questions presented are significant, both in public-safety and federalism terms. CSX makes no convincing argument otherwise.

Public safety. Blocked grade crossings endanger Americans nationwide. When parked trains block roads for prolonged periods, they delay first responders. *E.g.*, Ashlyn Webb, *Stopped in their tracks: Parked Norfolk Southern trains delay first responders*, WMAZ (Sept. 23, 2022), https://perma.cc/Y48H-U9L4. That delay endangers lives. Blocked crossings also cause inconvenienced people to make bad choices—climbing over stopped trains to make it to school on time, for example. *E.g.*, *Residents of New Haven fed up with trains blocking their path for extended periods*, Wane 15 (Mar. 13, 2021), https://perma.cc/9RFR-25TE.

CSX dismisses these reported dangers as anecdotal. BIO.20–25. But no one can seriously deny the

problem. *See* Mike Hendricks, *'They just don't care': Trains blocking roads can be deadly. It's only getting worse*, The Kansas City Star (Dec. 13, 2022), https://bit.ly/3jl5ecf (describing some "tragic delays"). While "no one knows" how often these tragedies occur, that is because no one has kept track. *Id.* We do know, however, that blocked grade crossings are far from "isolated events." BIO.21. In 2020 and 2021, citizens from across the country reported tens of thousands of blocked grade crossings to the Federal Railroad Administration. Federal Railroad Administration, *Blocked Crossings Fast Facts* (Nov. 2021), https://perma.cc/AJ9B-FBR3. CSX suggests these figures are unreliable. BIO.23. But these numbers likely *understate* the problem, as they capture only blockages observers took the time to report.

The dangers of blocked crossings are likely increasing. As trains get longer, and as more courts hold blocked-crossing laws unenforceable, the problems "have only grown worse." Hendricks, *'They just don't care'*; *accord* Brian Haytcher, *Railroad crossing issues continue*, Star Beacon (Nov. 5, 2022), https://perma.cc/8PFS-CVK2. Were this Court to deny Ohio's petition, it would send yet another signal that trains can block grade crossings with impunity.

CSX suggests that the Federal Railroad Administration is the "appropriate" government body to address any problem. BIO.3, 14, 20. But CSX simultaneously dodges the issue of whether, under its reading of the Termination Act, the Administration can even regulate blocked grade crossings. *See* BIO.19. The Administration has publicly said that it lacks "regulatory authority" over blocked grade crossings. Federal Railroad Administration, *Blocked Crossings Fast Facts*. It thinks "[r]ailroads, states and local

jurisdictions are best positioned to address blocked highway-rail grade crossings." Federal Railroad Administration, *Press Release* (Dec. 20, 2019), https://perma.cc/Q69B-4WDB. Or, as the head of the Administration testified to Congress a few years ago, the power to regulate "the duration of a crossing being blocked by a train" "all resides at the State and municipal level." *The State of the Rail Workforce*, Hearing Before the Subcommittee on Railroads, Pipelines, and Hazardous Materials, 116th Cong. (June 20, 2019), at 17, https://perma.cc/F4XX-SKEJ; *see also id.* at 101–03. So the Administration is consistently punting to the States an issue that lower courts consistently hold States lack the power to address.

If the Court is disinclined to grant certiorari based on the States' interests alone, it should call for the view of the Solicitor General. She could confirm that this case, in addition to presenting an important preemption question, implicates the question whether the Federal Railroad Administration can regulate blocked grade crossings.

Federalism. Most States have chosen to regulate how long trains may block the roads. Federal Railroad Administration, *Compilation of State Laws and Regulations Affecting Highway-Rail Grade Crossings*, at 250–74 (7th ed. 2021), https://perma.cc/TJ2D-XFN8. For that reason, a coast-to-coast coalition of States—from Connecticut to Indiana to Oregon—supports Ohio's petition. Indiana Br.1. That so many States have chosen to regulate grade crossings reinforces the significance of the just-discussed safety issues; it would be surprising to find so many States regulating an unimportant matter. Regardless, the fact that federal law is being interpreted to render so many state

laws inoperative underscores the case's federalism implications.

States normally regulate public-safety issues through their police powers. And this Court has traditionally viewed regulation of grade crossings as part of those powers. *Lehigh Valley R. Co. v. Bd. of Pub. Util. Comm'rs*, 278 U.S. 24, 35 (1928). Thus, Ohio and other States have long regulated this area, some for more than a century. Indiana Br.11–14. This historical backdrop supports this Court's involvement: the States should not lose their traditional authority over grade crossings without a clear explanation from this Court as to why, despite a seemingly on-point savings clause, *see* 49 U.S.C. §20106(a)(2), their laws are preempted.

CSX has little to say about federalism. It emphasizes that the federal government has long regulated railroads. BIO.6. That is true, but it does not speak to the specifics of this case. Even with the federal government's longstanding regulation of railroads, "[t]he care of grade crossings is peculiarly within the police power of the States." *Lehigh Valley*, 278 U.S. at 35.

II. The lower courts are reaching the wrong answer through inconsistent rationales.

Again, this case asks whether federal law preempts blocked-crossing laws. It does not. The Safety Act contains a savings clause that permits States to enforce laws "related to railroad safety" until federal regulations "cover[] the subject matter of the State requirement." §20106(a)(2). That savings clause controls here. State laws regulating how long stopped trains may block grade crossings are "related to railroad safety," *id.*—they address a safety threat that "railroad operations" cause directly, *see* 49 U.S.C.

§20101. No federal regulation addresses how long a stopped train may occupy a grade crossing. Therefore, because federal regulations do not cover the subject matter of blocked grade crossings, Ohio and other States may continue to enforce their blocked-crossing laws. *See, e.g.*, Ohio Rev. Code §5589.21 (Ohio's "Blocked Crossing Statute").

Nonetheless, the consensus among lower courts—after two decades of percolation—is that federal law preempts state and local blocked-crossing laws. CSX argues that lower courts are reaching the correct result, and it denies any inconsistency in their approaches. It is wrong in both regards. To understand where the errors and discord lie, it helps to divide the analysis into three steps.

Step one. Any proper analysis must first address the relationship between the Termination Act and the Safety Act. The Termination Act grants the Surface Transportation Board "exclusive" jurisdiction over "rail transportation" and rail track "operation[s]." 49 U.S.C. §10501(b). But the Safety Act includes a savings clause that gives States broad leeway to enforce laws "related to railroad safety" until federal regulations "cover[] the subject matter of the State requirement." §20106(a)(2). At this first step, some courts have read the Termination Act in isolation without considering the Safety Act's potential application. *State v. Norfolk Southern Railway Co.*, 107 N.E.3d 468 (Ind. 2018). Others, including the Supreme Court of Ohio, have recognized that a proper analysis must account for the Safety Act and its savings clause. *E.g.*, Pet.App.12a (Kennedy, J., op.); Pet.App.17a (Fischer, J., concurring in judgment only).

This first step matters not just for state authority, but for federal authority, too. If the Surface Transportation Board truly has "exclusive" jurisdiction over all matters of "rail transportation"—a broadly defined term, *see* 49 U.S.C. §10102(9)—then the Termination Act impliedly repealed parts of the Safety Act. *See Tyrrell v. Norfolk S. Ry. Co.*, 248 F.3d 517, 521–23 (6th Cir. 2001). Such a repeal would limit the Federal Railroad Administration's authority, as the Administration issues many regulations that "invade" the areas of "rail operations and services." BIO.30; *see* 49 C.F.R. Part 232.

CSX never openly contends that the Termination Act impliedly repealed the Safety Act. It says the relationship between the two acts is "complicated." BIO.17 (quotation marks omitted). But CSX never explains with any precision what this complicated relationship looks like. CSX instead argues that the precise relationship does not matter. There is nothing "inconsistent," the argument goes, about some courts finding preemption under the Termination Act and others finding preemption under the Safety Act. BIO.2.

This suggestion does not withstand scrutiny. The key provision of the Safety Act contains *both* a preemption clause *and* a savings clause. §20106(a). The savings clause outlines which laws "related to railroad safety" the States may "continue" to enforce. §20106(a)(2). The Safety Act preempts any railroad-safety law it does not save. *See CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 663–65 (1993). So, for laws "related to railroad safety," §20106(a)(2), the Safety Act provides the answer on preemption—one way or another. There is no role for the Termination Act to play. Therefore, if Ohio is correct that blocked-

crossing laws are laws "related to railroad safety" to which the Safety Act applies, then any court finding preemption under the Termination Act is performing the wrong analysis—and doing so in a way that will keep the States *or* the Federal Railroad Administration from regulating blocked grade crossings.

Step two. For courts open to the Safety Act's potential application, the next step is to consider the Safety Act's coverage. Specifically: Which laws are laws "related to railroad safety" for purposes of the Safety Act's savings clause? §20106(a)(2). Some courts have read that phrase as broadly referring to laws directed at all safety risks caused by trains, regardless of whether the risks stem directly from railroad accidents. *Vill. of Mundelein v. Wisconsin Cent. R.R.*, 227 Ill. 2d 281, 290–91 (Ill. 2008); *Iowa, Chicago & E. R.R. Corp. v. Washington Cnty., Iowa*, 384 F.3d 557, 560 (8th Cir. 2004). Others have read the phrase narrowly to apply only to laws that regulate railroad accidents as opposed to railroad-related dangers more generally. *BNSF Ry. v. Hiett*, 22 F.4th 1190, 1195–96 (10th Cir. 2022); *Elam v. Kansas City S. Ry. Co.*, 635 F.3d 796, 808 (5th Cir. 2011).

CSX does not seriously dispute that a conflict exists between circuits and state high courts regarding which laws are related to "railroad safety." *See* BIO.18. It just says the issue does not matter because the dispute has yet to prove outcome-determinative in blocked-crossing cases. But, for reasons just explained, the meaning of "railroad safety" under the Safety Act is an important threshold issue for States hoping to enact safety legislation. It controls which act of Congress (the Termination Act or Safety Act) governs preemption.

Step three. If blocked-crossing laws are laws "related to railroad safety," the final step is to consider whether laws prohibiting blocked grade crossings satisfy the remaining conditions of the Safety Act's savings clause. For example, the savings clause allows States to enforce laws until a federal regulation "cover[s] the subject matter of the State requirement." §20106(a)(2). That test shows "considerable solicitude for state law"; to cover a subject matter is to "substantially subsume the subject matter." *Easterwood*, 507 U.S. at 664–65. Subject matter, moreover, should be viewed with "a relatively narrow scope." *Norfolk S. Ry. Co. v. Box*, 556 F.3d 571, 573 (7th Cir. 2009).

Because of disagreements at the first two steps, many courts—including the Fifth Circuit, Tenth Circuit, and Supreme Court of Indiana—are not reaching this critical step. Courts that have reached this step have erred. They have defined the "subject matter" of blocked-crossing laws at an unduly high level of generality. *E.g.*, Pet.App.19a (Fischer, J., concurring in judgment only). They have, as a result, concluded that federal regulations about different-but-related subjects (like train speed or brake testing) implicitly cover the field. *See, e.g.*, *CSX Transp., Inc. v. City of Plymouth*, 283 F.3d 812, 817 (6th Cir. 2002).

CSX makes the same error. It says that laws about brake testing and train speed cover the subject matter of "anti-blocking statutes." BIO.28. Its analysis highlights the problem. CSX argues that, in "specified situations," blocked-crossing laws may conflict with those regulations. *Id.*; *see also* BIO.29 (arguing that, given speed limits, it "could well take more time" to clear tracks than a state law allows). This argument fails because the relevant question is whether blocked-crossing statutes regulate a subject that

federal regulations "substantially subsume." *Easterwood*, 507 U.S. at 664. Whether blocked-crossing laws might sometimes conflict with federal regulations matters for conflict preemption in particular cases, not express preemption under the Safety Act.

At this final step, CSX also misreads Ohio's Blocked Crossing Statute. The statute allows stopped trains to obstruct the road for five minutes. "At *the end* of each five minute period," the railroad must begin to "cause" the train "to be removed" from the road. Ohio Rev. Code §5589.21(B) (emphasis added). The train need not be fully "clear" of the road within five minutes, as CSX suggests. BIO.29. So Ohio's Blocked Crossing Law does not regulate moving trains. And its regulation of *stopped* trains does not address a subject that federal regulations already cover.

III. This case has no vehicle problems.

This case was resolved at the motion-to-dismiss stage, without any factual development. That makes it an excellent vehicle for deciding the purely legal questions presented.

CSX suggests two vehicle problems.

First, CSX makes a waiver argument concerning the phrase "related to railroad safety." In proceedings below, the State argued that the Blocked Crossing Statute fell within the Safety Act's savings clause. Ohio Br.4–8, *Ohio v. CSX Transp., Inc.*, No. 2020-0608 (Ohio), https://perma.cc/3SSL-EWWD. But CSX clips a quote from the State's brief to the Supreme Court of Ohio—the quote appears in a passage discussing the general purpose of the Blocked Crossing Statute—to argue that the State has waived the issue of whether

blocked-crossing laws are "related to railroad safety" for purposes of the Safety Act. *See* BIO.31 (quoting Ohio Br.20).

But issues are preserved for this Court's review whenever they were "pressed or passed upon below." *United States v. Williams*, 504 U.S. 36, 41 (1992) (quotation marks omitted). Below, this issue was pressed *and* passed upon.

The Supreme Court of Ohio passed upon the question whether Ohio's Blocked Crossing Statute is a law related to railroad safety—a majority of the court thought it was. Pet.App.13a (Kennedy, J., op.); Pet.App.18a (Fischer, J., concurring in judgment only); Pet.App.22a–23a (Brunner, J., dissenting).

The question was also pressed below. On top of the State's briefing, the Ohio Attorney General—who jointly represents Ohio in this Court—participated as an *amicus*. The Attorney General is Ohio's "chief law officer" and "shall appear" in cases before the Supreme Court of Ohio that implicate the State's interests. Ohio Rev. Code §109.02. The Attorney General appeared below and argued that blocked-crossing laws are laws "related to railroad safety." OAG Br.33–34, *Ohio v. CSX Transp., Inc.*, No. 2020-0608 (Ohio), https://perma.cc/9SM3-HH59. Notably, CSX also argued below that blocked-crossing laws are related to railroad safety. CSX Br.19, *Ohio v. CSX Transp., Inc.*, No. 2020-0608 (Ohio), https://perma.cc/GU6G-B9DE.

Second, CSX makes a separate waiver argument regarding the Safety Act. BIO.32. The Safety Act's savings clause contains two safe harbors from preemption. §20106(a)(2). The first, discussed already, permits States to regulate railroad-safety issues until a federal regulation "cover[s] the subject

matter." *Id.* The second permits some state laws that are "more stringent" than federal regulations. *Id.* CSX argues that the State has waived any argument concerning the second safe harbor. BIO.32.

Even if arguments regarding the second safe harbor were waived, Ohio's primary argument, which relates to the first safe harbor, would be preserved. So the supposed waiver is hardly a vehicle problem. Regardless, the Ohio Attorney General argued below that the Blocked Crossing Statute meets the second safe harbor. OAG Br.42–45. And Justice Fischer's dispositive concurrence passed on the issue. Pet.App.20a (Fischer, J., concurring in judgment only); *see also* Pet.App.14a–15a (Kennedy, J., op.). So this issue is preserved for review if the Court wishes to reach it.

CONCLUSION

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

Respectfully submitted,

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