No. 22-___

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Ohio's "Blocked Crossing Statute," Ohio Rev. Code §5589.21, prohibits stopped trains from blocking public roads for longer than five minutes, with certain exceptions. No federal law addresses how long stopped trains may block a grade crossing. But two acts of Congress address when federal law preempts state laws related to railroads. The first is the Interstate Commerce Commission Termination Act. The Act grants the Surface Transportation Board "exclusive" jurisdiction over railroad "transportation." 49 U.S.C. §10501(b). The second is the Federal Railroad Safety Act, which expressly permits States to 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." 49 U.S.C. §20106(a)(2).

This case presents two overlapping questions:

1. Does 49 U.S.C. §101501(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?

LIST OF PARTIES

The petitioner is the State of Ohio.

The respondent is CSX Transportation, Inc.

LIST OF DIRECTLY RELATED PROCEEDINGS

1. *State of Ohio v. CSX Transp., Inc.,* Case Nos. 18CRB440, 18CRB509, 18CRB606, 18CRB924, 18CRB1048 (Marysville Municipal Court, Marysville, Ohio) (cases dismissed February 26, 2019).
2. *State of Ohio v. CSX Transp., Inc.*, Case Nos. 14-19-07, -08, -09, -10, -11 (Ohio Ct. App. 3d Dist.) (decision issued April 27, 2020).
3. *State of Ohio v. CSX Transp., Inc.*, Case No. 2020-0608 (Ohio) (decision issued August 17, 2022).

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INTRODUCTION

Ohio, for almost 170 years, has regulated the length of time that stopped trains may block roadways at grade crossings. The Supreme Court of Ohio, in its decision below, concluded that federal law preempts this longstanding exercise of the State's police power. It erred.

The Federal Railroad Safety Act of 1970—call it the "Safety Act"—allows Ohio to enforce its blocked-crossing law. The Safety Act permits States to enforce laws "related to railroad safety" until federal regulations "cover[] the subject matter of the State requirement." 49 U.S.C. §20106(a)(2). There "are no Federal laws or regulations that specifically address how long a train may occupy a crossing." 87 Fed. Reg. 19176, 19176 (April 1, 2022). And rules regulating stoppage times at grade crossings are "related to railroad safety," §20106(a)(2), because they protect the public from the dangers that arise when trains block grade crossings. Because Ohio's law regulates an issue related to railroad safety, and because no federal regulation covers the subject matter of blocked grade crossings, the Safety Act permits Ohio to continue enforcing the law in question.

The Supreme Court of Ohio's contrary decision was unsurprising. It accords with the consensus view of courts around the country. Those courts—which include several circuits and state high courts—have held that federal law preempts state and local laws that regulate blocked grade crossings. Curiously, however, the consensus view does not rest on a consensus *rationale*. Some courts say that the Interstate Commerce Commission Termination Act of 1995—call it the "Termination Act"—preempts blocked-crossing

regulations *without regard* to the Safety Act. Others acknowledge that the Safety Act is relevant to the analysis, but they disagree about whether blocked-crossing laws are "related to railroad safety." §20106(a)(2).

If the stakes were lower, then it might make sense for the Court to brush aside these legal conflicts, which have not yet proved outcome-determinative. But the stakes are life and death. *See Byrd v. BNSF Ry. Co.*, No. CIV-21-1058, 2022 WL 2752802 (W.D. Okla. July 14, 2022). When parked trains block roads for extended periods, they endanger the public. Most significantly, they delay first responders from reaching emergencies in situations where every second counts. Because this case presents a significant federal question with important implications for public safety, the Court should grant Ohio's petition for a writ of certiorari and reverse.

OPINIONS BELOW

The Supreme Court of Ohio's decision is published at *State of Ohio v. CSX Transp., Inc.*, __ Ohio St. 3d __, 2022-Ohio-2832 (Ohio 2022), and reproduced at Pet.App.1a.

The decision of Ohio's Third District Court of Appeals is published at *State of Ohio v. CSX Transp., Inc.*, 154 N.E.3d 327 (Ohio Ct. App. 2020), and reproduced at Pet.App.44a.

The dismissal entry of the Marysville Municipal Court is reproduced at Pet.App.68a.

JURISDICTIONAL STATEMENT

Ohio charged CSX Transportation, Inc., with five violations of Ohio Rev. Code §5589.21 in the

Marysville, Ohio Municipal Court. The municipal court dismissed those charges, holding that federal law preempted §5589.21. Pet.App.74a. Ohio's Third District Court of Appeals reversed. Pet.App.63a. The Supreme Court of Ohio accepted jurisdiction over the case and issued an opinion on August 17, 2022. It reinstated the municipal court's dismissal, holding that federal law preempted §5589.21. Pet.App.1a (Kennedy, J., op.). The state proceedings are now final, and this petition timely invokes the Court's jurisdiction under 28 U.S.C. §1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The following provisions are relevant to this case and included in the appendix filed with this petition:

Article VI, cl.2 of the United States Constitution;

Ohio Rev. Code §5589.21(A)-(C);

49 U.S.C. §10501(b);

49 U.S.C. §20106(a).

STATEMENT

Grade crossings consist of intersections between a traditional state concern (roadways) and an area of greater federal involvement (railways). Reviewing the history of federal and state involvement in these areas provides context for the dispute in this case.

1. The federal regulation of railroads dates back to the Interstate Commerce Act of 1887. In response to abusive practices within the railroad industry, Congress created the Interstate Commerce Commission and empowered it to regulate interstate railroad rates. Paul Stephen Dempsey, *Transportation: A Legal History*, 30 Transp. L. J. 235, 265 (2003). Over the

years, Congress further empowered the Commission to perform some tasks relating to railroad safety. But it never gave the Commission a general power to issue safety regulations. Charles W. McDonald, *The Federal Railroad Safety Program: 100 Years of Safer Railroads*, at 20, U.S. Dept. of Transp. (1993), https://perma.cc/DJA7-RS3E. Relevant here, the Commission lacked the power to establish safety regulations applicable to grade crossings. That power "reside[d] exclusively in the states." *Am. Trucking Ass'ns v. United States*, 242 F. Supp. 597, 601 (D.D.C. 1965), *aff'd by* 382 U.S. 373 (1966) (*per curiam*).

Congress eventually decided that modernity required a different approach to railroad safety. In 1967, it created a separate agency, the Federal Railroad Administration, to address safety concerns. A few years later, Congress enacted the Federal Railroad Safety Act of 1970. Pub. L. No. 91-458, 84 Stat. 971 (Oct. 16, 1970). The Safety Act is the first of two congressional acts critical to the preemption analysis in this case.

The Safety Act. The Safety Act broadly addresses railroad safety. Its codified purpose "is to promote safety in every area of railroad operations" and to reduce all "railroad-related accidents and incidents." 49 U.S.C. §20101. The Safety Act thus covers *all* public-safety concerns arising from railroad operations—not just concerns pertaining to the safety of railroad employees and passengers. For example, the Act "protect[s] pedestrians in densely populated areas along railroad rights of way." 49 U.S.C. §20134(a).

The Safety Act empowers the Secretary of Transportation to "prescribe regulations and issue orders for every area of railroad safety." 49 U.S.C. §20103(a).

The Federal Railroad Administration—an agency the Secretary supervises—wields that rulemaking power. 49 C.F.R. §209.1(b). The Administration has prescribed various regulations applicable to railroads. *See* 49 C.F.R. Subtitle B., Chapter II. For example, the Administration has set brake requirements and speed limits for trains. 49 C.F.R. Part 232; 49 C.F.R. §213.9. It has also limited interference with "warning system[s]" at grade crossings. 49 C.F.R. §234.209. But, as proves critical later on, none of these regulations addresses how long a stopped train may block a grade crossing.

The Safety Act also addresses the relationship between federal and state regulations. In particular, the Safety Act balances the dual goals of uniformity and cooperative federalism. It envisions some degree of national cohesion: "Laws, regulations, and orders related to railroad safety … shall be nationally uniform *to the extent practicable*." 49 U.S.C. §20106(a)(1) (emphasis added). Yet, as the italicized words imply, the Safety Act leaves room for state regulation. And indeed, the Safety Act contains a savings clause that expressly permits certain state and local laws pertaining to safety. It says:

> A State may adopt or continue in force a law, regulation, or order related to railroad safety or security until the Secretary of Transportation (with respect to railroad safety matters), or the Secretary of Homeland Security (with respect to railroad security matters), prescribes a regulation or issues an order covering the subject matter of the State requirement. A State may adopt or continue in force an additional or more stringent law, regulation, or order related to railroad safety or security when 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).

Unpacking this language, the savings clause creates two safe harbors through which States may enforce laws "related to railroad safety." *Id.*

Safe harbor 1: States may regulate matters related to railroad safety as they see fit until the Secretary promulgates a regulation that "cover[s] the subject matter" in question. *Id.*

Safe harbor 2: Even when the Secretary has covered a subject, States may "continue in force an additional or more stringent law" if it is: (1) "necessary to eliminate or reduce an essentially local safety … hazard"; (2) compatible with federal law; and (3) not unreasonably burdensome. *Id.*

The Termination Act. A few decades after enacting the Safety Act, Congress enacted the Interstate Commerce Commission Termination Act of 1995. Pub. L. No. 104-88, 109 Stat. 803 (Dec. 29, 1995). The Termination Act abolished the Interstate Commerce Commission. And it codified a list of congressional policy goals to be pursued in "regulating the railroad industry." 49 U.S.C. §10101. Those goals predominantly focus on economic deregulation. For example, Congress wanted to foster "competition" in railroad rates, allow "rail carriers to earn adequate revenues," and "reduce regulatory barriers to entry into and exit

from the industry." *Id.* The list of goals also includes some that are less economic in nature; goals like avoiding "detriment to the public health and safety" and promoting "energy conservation." *Id.*

The Termination Act created the Surface Transportation Board to replace the Interstate Commerce Commission. 49 U.S.C. §§1301(a), 1302. The Termination Act assigns the Board jurisdiction over railroad "transportation." 49 U.S.C. §10501(a). In general terms, the Act defines "transportation" to include most things "related to th[e] movement" of trains. 49 U.S.C. §10102(9). In more concrete terms, the Act gives the Board authority over things like railroad rates, 49 U.S.C. §10701, railroad licensing, 49 U.S.C. §10901, and railroad finances, 49 U.S.C. §11301.

Another provision of the Termination Act—central to the preemption dispute here—says this about the Surface Transportation Board's jurisdiction:

> The jurisdiction of the Board over—
>
> > (1) 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; and
> >
> > (2) the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are located, or intended to be located, entirely in one State,
>
> *is exclusive.* Except as otherwise provided in this part, 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.

49 U.S.C. §10501(b) (emphasis added). Beyond the provision just quoted, the Termination Act does little to explain how the Surface Transportation Board's "exclusive" authority interacts with that of other state or federal government entities. If the grant of "exclusive" jurisdiction to the Board gave the Board sole authority to regulate *all* railroad matters—safety-related and otherwise—neither the Federal Railroad Administration nor the States would regulate those matters, the Safety Act notwithstanding. But that is not what has happened, and for good reason. The Termination Act does *not* expressly repeal the Safety Act. *See Tyrrell v. Norfolk S. Ry. Co.*, 248 F.3d 517, 522–23 (6th Cir. 2001). Nor does it repeal, or otherwise limit the scope of, the Safety Act's savings clause. *See id.* at 523–25. Accordingly, the Federal Railroad Administration and the States have continued to adopt safety-related regulations pertaining to the railroad industry.

2. Now turn to the State's traditional authority over grade crossings. Even after Congress began regulating railroads, grade crossings remained an area "within the police power of the States." *Lehigh Valley R. Co. v. Bd. of Pub. Util. Comm'rs*, 278 U.S. 24, 35 (1928). According to this Court, the public's interest in using the streets is a "more important interest" than the railroads' interest in using grade crossings, and regulations pertaining to grade crossings "obvious[ly]" implicate the States' traditional "police power." *Erie R. Co. v. Bd. of Pub. Util. Comm'rs*, 254 U.S. 394, 410 (1921).

Exercising its traditional authority over grade crossings, Ohio has prohibited stopped trains from blocking roads for extended periods since at least 1853. *See Capelle v. Baltimore & Oh. R. Co.*, 136 Ohio St. 203, 207–08 (Ohio 1940). Today, Ohio does so through its "Blocked Crossing Statute." Ohio Rev. Code §5589.21. That law prohibits trains from blocking roads for "longer than five minutes." *Id.*, §5589.21(A). Once a blockage hits the five-minute mark, a train must begin to clear the road. *Id.,* §5589.21(B). The Blocked Crossing Statute exempts obstructions caused by moving trains and obstructions that are beyond a railroad's control. *Id.*, §5589.21(C). It does not, however, exempt obstructions traceable to routine train operations, like "switching, loading, or unloading." *Id.*

Ohio's General Assembly left no doubt that it enacted the Blocked Crossing Statute to prevent trains from impeding first responders. It codified the following statement:

> The general assembly finds that the improper obstruction of railroad grade crossings by trains is a direct threat to the health, safety, and welfare of the citizens of this state inasmuch as improper obstructions create uniquely different local safety problems by preventing the timely movement of ambulances, the vehicles of law enforcement officers and firefighters, and official and unofficial vehicles transporting health care officials and professionals.

Ohio Rev. Code §5589.20.

Ohio's longstanding regulation is no outlier. Indiana has prohibited trains from blocking public roads since at least 1865. *State v. Norfolk S. Ry. Co.*, 107

N.E.3d 468, 472 (Ind. 2018). Kansas has regulated blocked grade crossings since 1897. *State v. BNSF Ry. Co.*, 432 P.3d 77, 84 (Kan. Ct. App. 2018). And most other States have some form of anti-blocking law. *See* 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.

3. Local officials have repeatedly cited CSX, Transportation, Inc. for violating the Blocked Crossing Statute in areas near Marysville, Ohio. This case concerns five blocking citations that CSX received over a six-month stretch in 2018. Pet.App.3a (Kennedy, J., op.). The five incidents involved blockings at four different roadways. Pet.App.23a (Brunner, J., dissenting). As alleged, these blockings were not "mere technical or close-call violation[s]." *Id.* Four of the five violations involved trains allegedly parked on roadways for an hour or longer. *Id.*

CSX moved to dismiss all of the charges. It admitted, through the affidavit of an employee, that its "trains occasionally block grade crossings while loading and unloading" materials at a Honda plant near Marysville. Pet.App.3a (Kennedy, J., op.). But CSX argued that both the Termination Act and the Safety Act facially and expressly preempted Ohio's Blocked Crossing Statute. (CSX argued in the alternative that two of the incidents were beyond its control and thus not in violation of the Blocked Crossing Statute. None of the courts below reached that alternative argument.) The State opposed CSX's motion to dismiss, arguing that the Blocked Crossing Statute fell within the Safety Act's savings clause.

The municipal court dismissed all of the charges based on preemption. It lamented the lack of any federal regulations "addressing the critical importance of the timely passage of emergency and law enforcement vehicles." Pet.App.73a. But it held that the Termination Act preempted the Blocked Crossing Statute by giving the Surface Transportation Board exclusive jurisdiction over railroad transportation. Pet.App.74a. The court reached that holding by analyzing the Termination Act in isolation, without considering whether the Blocked Crossing Statute could be enforced under the Safety Act's savings clause.

4. The State appealed, and the Ohio Court of Appeals for the Third District reversed. Following the municipal court's lead, the Third District analyzed preemption by considering the Termination Act alone. But it concluded that the Termination Act does not displace state laws that have only a "remote or incidental effect on rail transportation." Pet.App.58a (quotations omitted). Applying that test, the Third District held that the municipal court erred by issuing a "sweeping" ruling at the motion-to-dismiss stage that would bar "any attempt" by the State to regulate blocked grade crossings. Pet.App.62a.

5. CSX appealed to the Supreme Court of Ohio, which agreed to hear the case. That court reversed the Third District, reinstating the municipal court's dismissal on preemption grounds. But the case produced no majority opinion.

Justice Kennedy wrote the lead opinion. Her analysis began with the Termination Act. Recall that the Termination Act gives the Surface Transportation Board "exclusive" jurisdiction over railroad "transportation" and the "operation" of train tracks. §10501(b).

Justice Kennedy reasoned that, because Ohio's Blocked Crossing Statute regulates how long trains may remain stopped while performing railroad operations, the state law "usurps the exclusive jurisdiction of the" Surface Transportation Board. Pet.App.8a. Therefore, at least at first blush, the state law was "preempted by the Termination Act." *Id.*

But Justice Kennedy recognized that the preemption analysis could not stop there. Reading the Termination Act to cover all matters of railroad "transportation" or the "operation" of train tracks brings the Termination Act into "conflict" with the Safety Act. Pet.App.11a. After all, the Safety Act contains a savings clause that expressly *permits* States to enforce laws "related to railroad safety" in certain situations. §20106(a)(2). To harmonize the two bodies of law, Justice Kennedy turned to the interpretive principle that, when a conflict exists between general and specific statutory provisions, the specific provision operates as an exception to the general provision's coverage. *See, e.g.*, *Morton v. Mancari*, 417 U.S. 535, 550–51 (1974). Justice Kennedy interpreted the Safety Act as a specific exception—for laws "related to railroad safety"—to the Termination Act's general preemptive scope. Pet.App.12a. Thus, the Blocked Crossing Statute would not be preempted if, but only if, it came within the Safety Act's savings clause.

Justice Kennedy concluded that the Safety Act did not exempt the Blocked Crossing Statute from preemption. More precisely, she concluded that Ohio's statute was not "related to railroad safety," and thus not encompassed by the savings clause. §20106(a)(2). This language, Justice Kennedy reasoned, encompasses only "laws that make it safer to operate a railroad or that prevent accidents such as

derailment and collisions with pedestrians and automobiles." Pet.App.13a. In her view, laws about blocked grade crossings do not prevent the relevant kind of risk. It followed from this interpretation of "railroad safety" that the Termination Act controlled the analysis and preempted the Blocked Crossing Statute. Pet.App.15a.

Justice Fischer wrote a separate concurrence. He concluded that the Safety Act, rather than the Termination Act, preempted the Blocked Crossing Statute. He explained that the Safety Act controlled the analysis because Ohio's statute *was* a law "related to railroad safety." He stressed that the Safety Act, by its own terms, is meant "to promote safety in *every area* of railroad operations *and* reduce railroad-related accidents and incidents." Pet.App.17a (quoting §20101). The Blocked Crossing Statute, he continued, was a law "designed to protect citizens from railroad-related accidents or incidents." Pet.App.18a.

Although Justice Fischer concluded that Ohio's Blocked Crossing Statute was "related to railroad safety," and thus potentially subject to the savings clause, he concluded that the State came within neither of the clause's two safe harbors. He looked initially to the clause's first safe harbor, which applies only to safety-related laws regulating a "subject matter" that no federal regulation "cover[s]." §20106(a)(2). Justice Fischer determined that the Blocked Crossing Statute regulated "the broad subject matter of grade-crossing safety." Pet.App.19a. Based on that broad framing, he determined that the Federal Railroad Administration had covered that subject matter by requiring some States, including Ohio, to submit "action plans" regarding certain high-risk grade crossings. *Id.*; *see* 49 C.F.R. §234.11(c), (e).

Justice Fischer further reasoned that federal regulations setting speed limits for trains also covered the subject matter in question. Pet.App.19a–20a. Justice Fischer went on to consider the Safety Act's second safe harbor, which allows States to impose "more stringent" regulations under certain conditions. §20106(a)(2). He concluded that Ohio's statute did not meet those conditions because Ohio's statute was "incompatible with"—not simply more stringent than—the Termination Act. Pet.App.20a.

Justice Brunner dissented. She would have held that neither the Termination Act nor the Safety Act preempts the Blocked Crossing Statute.

Initially, Justice Brunner agreed with her colleagues that any sound preemption analysis required consideration of *both* the Termination and Safety Acts. She stressed that the Termination Act should not be read to impliedly repeal the Safety Act. In her words, state laws "related to railroad safety … are preempted, if at all, by the" Safety Act. Pet.App.31a.

With that in mind, Justice Brunner turned to the Safety Act. Again, its savings clause allows States to pass laws "related to railroad safety" *unless* the Secretary "prescribes a regulation or issues an order covering the subject matter of the" state law in question. §20106(a)(2). Justice Brunner concluded that the Blocked Crossing Statute came within this safe harbor. The Blocked Crossing Statute, she explained, "related to railroad safety," §20106(a)(2), since that phrase captures all laws "expressly aimed at preventing railroad operations from causing incidents that risk the safety of" others. Pet.App.33a. That left only the question whether the Secretary had prescribed a regulation or order covering the same subject matter

as the Blocked Crossing Statute. The answer, Justice Brunner explained, was no; "there is no federal regulation … directly covering the topic of blocked crossings." Pet.App.37a–38a. Courts, she said, should not read regulations of related-but-different topics (like train speed) as "implicitly preempt[ing]" Ohio's ability "to address the topic of blocked crossings." Pet.App. 42a.

The three opinions below each received two justices' votes. (One other justice, Justice Stewart, concurred in the judgment without joining a written opinion.) Thus, two justices concluded that the Termination Act preempted the Blocked Crossing Statute; two justices concluded that the Safety Act preempted the Blocked Crossing Statute; and two justices concluded that the Safety Act *permitted* Ohio to enforce the Blocked Crossing Statute. But all six of those justices agreed on one thing: failing to regulate the amount of time trains may park on public roads poses a "significant danger to the public." Pet.App.15a (Kennedy, J., op.); *see also* Pet.App.16a, 21a (Fischer, J., concurring in judgment only); Pet.App.22a–23a (Brunner, J., dissenting).

REASONS FOR GRANTING THE WRIT

This case asks two interrelated questions. The first is whether the Termination Act preempts state laws that limit the amount of time trains may park on grade crossings. The second is whether the Safety Act's savings clause permits States to enforce such laws, thus protecting those laws from preemption. The questions presented are "of great importance, as shown by an abundance of case law from numerous jurisdictions." Pet.App.21a (Fischer, J., concurring in judgment only). Currently, "applicable federal law

does not adequately protect the public." *Id.* Indeed, "no federal law exists to regulate blocked railroad crossings." Pet.App.22a (Brunner, J., dissenting).

Despite federal inaction, a flawed consensus among lower courts is preventing state and local governments from exercising their police powers to protect their citizens. There has been plenty of time—over two decades—for these preemption questions to percolate in the lower courts. Circuits and state high courts are consistently getting the answers wrong. And they are reaching the wrong answers in conflicting ways. The Supreme Court of Ohio's fractured 2-2-1-2 decision nicely illustrates how courts have struggled to find a consensus rationale for displacing the States' traditional authority over grade crossings. To make matters worse, as the lower courts struggle, lives hang in the balance.

"We would all benefit from additional guidance that encourages safety and uniformity in all jurisdictions." Pet.App.21a (Fischer, J., concurring in judgment only). This Court can provide that guidance, and it should do so in this case.

I. Blocked grade crossings endanger lives and are of immense concern to the States.

The question whether States can regulate obstructions at grade crossings is exceptionally important, as it implicates both public safety and federalism.

Public safety. There are roughly 130,000 public grade crossings in the United States. Federal Railroad Administration, *Highway-Rail Grade Crossings Overview* (Dec. 4, 2019), https://perma.cc/455Y-USKQ. About 5,700 of them are located in Ohio. Ohio Pub. Util. Comm'n, *Ohio's rail grade crossing programs*,

https://perma.cc/L83Z-KKE6. Local communities that surround these grade crossings, both in Ohio and elsewhere, have "long dealt with the issue of blocked crossings," where "stopped trains impede the flow of motor vehicle or pedestrian traffic at railroad tracks for extended periods of time." Federal Railroad Administration, *Blocked Crossings Fast Facts* (Nov. 2021), https://perma.cc/AJ9B-FBR3.

When parked trains block grade crossings, they create serious safety risks. For one thing, blockages incentivize bad choices. "[F]rustrated individuals may be tempted to crawl between stopped railcars" so that they can get on with their day. *Id.* In the Chicago area, "blockages, which in extreme cases trap people at crossings for several hours, have spurred children to climb through stopped trains." Zak Koeske, *Blocked rail crossings present dangers, major delays in Southwest Side communities, Ald. Matt O'Shea tells congressional committee*, Chicago Tribune (Feb. 13, 2020), https://perma.cc/CC7L-CZZ2. Drivers, too, "may take more risks." 84 Fed. Reg. 27832, 27832 (June 14, 2019). If drivers are "aware that trains routinely block a crossing for extended periods of time," they may "driv[e] around lowered gates at a crossing or attempt[] to beat a train through a crossing without gates, in order to avoid a lengthy delay." *Id.*

Of perhaps greatest concern, blocked crossings interfere with the work of emergency personnel. *See, e.g.*, Karen Madden, et al., *Trains Block Wisconsin Roads, Lives*, Wisconsin Rapids Tribune (Aug. 6, 2015), https://perma.cc/BJ6K-9M28. Because of a blocked grade crossing, "emergency response vehicles and first responders may be significantly delayed from responding to an incident or transporting patients to a hospital." 84 Fed. Reg. at 27832. For instance, when

trains block grade crossings in Marysville, Ohio, they sever two fire stations "from immediate access to their response areas." Pet.App.50a. In Lake Township, Ohio, railroads routinely use grade crossings "as a parking lot" for trains, with blocked crossings lasting hours and sometimes days. Debbie Rogers, *Worst in the country: Lake Twp. tops for blocked crossings*, Sentinel-Tribune (Mar. 10, 2022), https://perma.cc/6E9W-NSU6. "Emergency vehicles often have to take a detour around" these blockages, costing them minutes when there is no time to spare. *Id.*

All of this risks "human tragedy." *Id.* In May 2021, a blockage delayed first responders in Lake Township from transporting the victim of a car crash to the hospital. *Id.* This past March, a blocked grade crossing in Lockland, Ohio delayed firefighters from responding to a fire, allowing "for significant fire growth." Titus Wu & Erin Couch, *Ohio can't enforce law against trains blocking crossings, court rules*, Cincinnati Enquirer (Aug. 17, 2022), https://perma.cc/DHZ2-HWKS; *see also* Whitney Miller, *'We're fed up': Lockland officials say stopped train delayed first responders heading to house fire*, WCPO Cincinnati (Mar. 31, 2022), https://perma.cc/S8YD-398V. And in a recent case from Davis, Oklahoma, a paramedic "had to climb through a stopped train" to reach a medical emergency. Jack Money, *Train bill clears committee*, The Oklahoman (Feb. 14, 2019), https://perma.cc/KSN6-C95A.

Other communities have faced more dire consequences. *See, e.g.*, *Bedford County man dies after train blocks ambulance route*, NewsChannel5 Nashville (May 20, 2021), https://perma.cc/LPS2-385S. Last year, in Dixmoor, Illinois, blockages caused an ambulance to be rerouted seven times while taking a

patient to the hospital. Jessie Molloy, *'Completely trapped': Freight trains are blocking crossings for hours at a time, Dixmoor residents say*, Chicago Tribune (May 4, 2022), https://perma.cc/9PWZ-RZ96. Upon reaching the hospital, the patient was pronounced dead. *Id.*

The facts from a recent wrongful-death lawsuit are equally tragic. *See Byrd v. BNSF Ry. Co.*, No. CIV-21-1058, 2022 WL 2752802 (W.D. Okla. July 14, 2022). Larry Gene Byrd died of a heart attack on September 6, 2020. According to his wife—the plaintiff in the lawsuit—her husband began having chest pains early that morning. First responders were soon dispatched to help him. *Id.* at *1. But the "only route to the Byrd home required the first responders to travel over a railroad crossing." *Id.* And a train was stopped on that crossing. At first, the train's conductor allegedly refused to move the train, openly disregarding requests from police. *Id.* The train did eventually move, but by the time first responders reached the Byrds' home "it was too late for the defibrillator efforts to be successful in restarting Mr. Byrd's heart." *Id.*

Making matters worse, blocked grade crossings are a persistent problem. Due to public outcry over blocked crossings, *see* 84 Fed. Reg. at 27832, the Federal Railroad Administration began compiling reports of blocked grade crossings on its website on the last day of 2019. By October 2021, the Administration had already received over 25,000 reports of blocked grade crossings. Federal Railroad Administration, *Blocked Crossings Fast Facts*. Unfortunately, Ohio is the national leader in this regard, with over 5,000 reported blockages over that timeframe. *Id.* And these numbers understate the scope of the problem, since they

capture only those blockages that observers have reported online to the Administration.

Those problems might be worsening. Though blockages have occurred for years, "lengthening trains are making the issue more painful for some localities." Shaun Courtney, *Rail Prevails as Long Trains Block First Responders at Crossings*, Bloomberg (Sept. 10, 2019), https://perma.cc/6AEP-C79K. Further, as railroads stack up court victories that allow them to go unregulated—more on that below—they have even less reason to behave reasonably. It thus appears that, in some communities, railroads have recently "escalated" abusive practices. *See* Rogers, *Worst in the country*.

Federalism. These tragic consequences might "be tolerable if necessary to preserve a time-honored legal principle vital to our constitutional Republic." *Boumediene v. Bush*, 553 U.S. 723, 827–28 (2008) (Scalia, J., dissenting). But no such need exists here. Rather, the "time-honored" tradition is to allow States to regulate grade crossings for the safety of their citizens.

In our system of dual sovereignty, the States' reserved powers include the "broad authority to enact legislation for the public good." *Bond v. United States*, 572 U.S. 844, 854 (2014). That authority is "often called a 'police power.'" *Id.* (quoting *United States v. Lopez*, 514 U.S. 549, 567 (1995)). And that authority includes the power to regulate grade crossings. "Grade crossings," this Court explained more than a century ago, "call for a necessary adjustment of two conflicting interests—that of the public using the streets and that of the railroads" using the train tracks. *Erie R. Co. v. Bd. of Pub. Util. Comm'rs*, 254

U.S. 394, 410 (1921). Normally, "the streets represent the more important interest of the two." *Id.* And the Court has traditionally 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); *see also Cincinnati, Indianapolis & W. Ry. Co. v. Connersville*, 218 U.S. 336, 343–44 (1910).

Congress, for its part, "lack[s] a police power." *Bond*, 572 U.S. at 854. Under the Supremacy Clause, however, federal laws are "the supreme Law of the Land." U.S. Const. art. VI, cl.2. It follows that Congress may preempt the States' police power if it does so through a proper exercise of its enumerated powers. Even so, this Court does not lightly assume that Congress intends to destroy a longstanding balance of power. The Court instead reads congressional enactments "against the backdrop of" the usual "relationship between the Federal Government and the States." *Bond*, 572 U.S. at 857–58 (quotations omitted). As a corollary, if Congress seeks to "radically readjust the balance of state and national authority," this Court requires a "clear statement" assuring "that the legislature has in fact faced, and intended to bring into issue," such a change. *Id.* at 858 (alterations accepted, quotations omitted).

These principles shed light on the legal stakes of this case. Since the 1850s, Ohio has regulated the length of time that trains may block roadways. *See Capelle v. Baltimore & Oh. R. Co.*, 136 Ohio St. 203, 207–08 (Ohio 1940). In the years since, Congress has asserted federal authority to regulate railroads. But Congress has expressly allowed States to continue regulating railroad-related safety problems until the federal government "cover[s]" the matter. 49 U.S.C.

§20106(a)(2). Read together, the Termination Act and the Safety Act do not "radically readjust" the balance of power over grade crossings—and the opaque interaction between the two bodies of law certainly does not amount to a "clear statement" of Congress's intent to strip the States of their traditional authority over grade crossings. *Bond*, 572 U.S. at 858 (alterations accepted, quotations omitted). Indeed, decades after enacting the Safety and Termination Acts, Congress enacted a separate law showing that it *wants* States involved in this area. Specifically, within the Fixing America's Surface Transportation Act of 2015, Congress tasked the Federal Railroad Administration with developing a "model" state-action plan to help States evaluate and reduce grade-crossing problems, including the "public safety risks posed by blocked highway-rail grade crossings due to idling trains." Pub. L. No. 114-94, 129 Stat. 1312, §11401(a) (Dec. 4, 2015).

If nothing else, the historical balance of power over grade crossings strongly favors this Court's stepping in to provide a clear answer. Assuming Ohio is to lose power it has exercised for 170 years, this Court should be the one to decide the issue.

A final note before moving on. Earlier this year, Oklahoma asked the Court to review a ruling from the Tenth Circuit holding that the Termination Act preempted a blocked-crossing statute. *See City of Edmund, Okla. v. BNSF Ry. Co.*, 142 S. Ct. 2835 (2022). Though the Court denied review in that case, that provides all the more reason for review here. (As discussed more below, this case is a better vehicle than that one.) The importance of the question presented explains why, even with the lopsidedness of existing caselaw, two separate States have independently

asked for the Court's review in such a short timeframe.

II. Circuits and state high courts have offered conflicting justifications for concluding that blocked-crossing laws are preempted.

Several circuits, state high courts, and other lower courts have addressed whether federal law preempts states and localities from regulating blocked grade crossings. The general consensus is that federal law—through either the Termination Act or the Safety Act—preempts such regulation. But that general consensus masks significant disagreement. Though the lower courts are reaching consistent outcomes, they are doing so via inconsistent reasoning. This inconsistency is a sign of a problem.

Begin with some basic principles relating to preemption. The Supremacy Clause provides that federal laws are "the supreme Law of the Land." U.S. Const. art. VI, cl.2. That language "supplies a rule of priority," under which federal law prevails when federal law and state law conflict. *Va. Uranium, Inc. v. Warren*, 139 S. Ct. 1894, 1901 (2019) (Gorsuch, J., op.). But "[t]here is no federal preemption *in vacuo*." *Kansas v. Garcia*, 140 S. Ct. 791, 801 (2020). Preemption does not allow for a "freewheeling judicial inquiry into whether a state statute is in tension with federal objectives." *Chamber of Commerce v. Whiting*, 563 U.S. 582, 607 (2011) (quotations omitted). Nor may litigants "win preemption of a state law" by "invoking some brooding federal interest" in displacing state law. *Va. Uranium, Inc.*, 139 S. Ct. at 1901 (Gorsuch, J., op.). Instead, they must point to federal statutory text that "does the displacing" of state law. *Id.* Along

similar lines, when a federal statute contains a savings clause that preserves state authority, the Court should look to that clause as a "direct route" for answering preemption questions. *Williamson v. Mazda Motor of Am., Inc.*, 562 U.S. 323, 339 (2011) (Thomas, J., concurring).

The preemption analysis in this case hinges on two acts of Congress—the Safety Act and the Termination Act. Lower courts have disagreed over how to read those two acts. To understand the discord, it helps to divide the preemption analysis into three steps. The first step involves reconciling the Termination Act's broad grant of federal jurisdiction with the Safety Act's savings clause. Pet.App.10a–12a (Kennedy, J., op.). The second step addresses whether laws that regulate public-safety issues caused by railroads are laws "related to railroad safety" for purposes of the Safety Act's savings clause. Pet.App.17a–18a (Fischer, J., concurring in judgment only). The third step considers whether laws prohibiting blocked grade crossings satisfy the remaining conditions of the Safety Act's savings clause. Pet.App.36a–41a (Brunner, J., dissenting). Circuits and state high courts are in conflict at the first two steps, and that has prevented many courts from even reaching the critical third step.

Step one. To decide whether and to what extent either the Termination Act or the Safety Act preempts state laws, one must first read the two acts together. Courts have a "duty to interpret Congress's statutes as a harmonious whole rather than at war with one another." *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1619 (2018). That duty matters here because, if read in isolation, the Termination Act could be read to impliedly repeal the Safety Act. Recall that the

Termination Act gives the Surface Transportation Board "exclusive" jurisdiction over rail "transportation" and rail track "operation[s]." 49 U.S.C. §10501(b). And the Termination Act defines "transportation" to capture most things related to the movement of trains. 49 U.S.C. §10102(9). Combining those points, one could interpret the Termination Act to prohibit all state and federal government entities other than the Board from imposing regulations affecting trains. That interpretation would stop both the States *and* the Federal Railroad Administration from regulating most railroad-related safety issues. And it would effectively repeal those portions of the Safety Act empowering the Administration and the States to enact regulations pertaining to railroad safety.

Several lower courts, on their way to holding that the Termination Act preempts blocked-crossing laws, have embraced this broad reading of the Termination Act. *See, e.g.*, *State v. BNSF Ry. Co.*, 432 P.3d 77, 85–87 (Kan. Ct. App. 2018); *Burlington N. & Santa Fe Ry. v. DOT*, 206 P.3d 261, 262–65 & n.2 (Or. Ct. App. 2009). In one early case, the Fifth Circuit held that federal law preempted Texas's blocked-crossing statute without looking beyond the Termination Act's "all-encompassing language." *Friberg v. Kan. City S. Ry. Co.*, 267 F.3d 439, 444 (5th Cir. 2001). Though the Fifth Circuit has since clarified its position as to the Safety Act, *see below* 28–29, its simplistic analysis in *Friberg* led several other courts astray.

The Supreme Court of Indiana is the most notable example. In *State v. Norfolk Southern Railway Co.*, 107 N.E.3d 468 (Ind. 2018), Indiana's high court addressed the State's blocked-crossing statute. The intermediate appellate court had determined, in light of the Safety Act's savings clause, that the statute was

not preempted. *State v. Norfolk S. Ry.*, 84 N.E.3d 1230, 1237–38 (Ind. Ct. App. 2017). Relying on *Friberg*, the Supreme Court of Indiana disagreed. It held that, because Indiana's statute "directly regulates rail operations," the Termination Act "categorically preempts it." *Norfolk S. Ry. Co.*, 107 N.E.3d at 477. The Safety Act played no role in the analysis. *See id.* at 477–78.

The Supreme Court of Ohio rejected that approach in its decision below; all three opinions recognized that laws falling within the Safety Act's savings clause *are not* preempted by the Termination Act. Pet. App.12a (Kennedy, J., op.); Pet.App.17a (Fischer, J., concurring in judgment only); Pet.App.31a–32a (Brunner, J., dissenting). The upshot is that, in Indiana, the preemption analysis stops at the Termination Act, with no consideration of the Safety Act's savings clause. But in Ohio and other jurisdictions, the analysis continues to the Safety Act. This means Ohio has more freedom to enforce laws related to railroad safety than does its neighbor to the west.

Step two. Many courts have rejected the broad reading the Supreme Court of Indiana embraced in *Norfolk*. Those courts recognize that state laws permitted by the Safety Act's savings clause are *not* preempted. In particular, the Safety Act permits certain laws "related to railroad safety," §20106(a)(2), meaning the Termination Act does not preempt those laws.

But what does "related to railroad safety" mean? There are at least two possibilities. The phrase could be read broadly, so that it encompasses all laws regulating safety issues arising from "railroad-related … incidents." 49 U.S.C. §20101. On this reading, the

savings clause can apply to laws directed at all safety risks caused by trains, regardless of whether the risks stem directly from railroad accidents. But the phrase could also be read narrowly, so that it covers only laws regulating "hazard[s] to the railroad system or its participants." *BNSF Ry. v. Hiett*, 22 F.4th 1190, 1196 (10th Cir. 2022) (quoting *People v. Burlington N. Santa Fe R.* 148 Cal. Rptr. 3d 243, 252 (Cal. Ct. App. 2012)). On this reading, the savings clause applies only to state laws "that make it safer to operate a railroad or that prevent accidents such as derailment and collisions with pedestrians and automobiles." Pet. App.13a (Kennedy, J., op.). In other words, on this reading, the savings clause applies only to laws that regulate railroad accidents as opposed to railroad-related dangers more generally.

At least two courts have embraced the broader reading. Consider first the Supreme Court of Illinois' decision in *Village of Mundelein v. Wisconsin Central Railroad*, 227 Ill. 2d 281 (Ill. 2008). There, a village charged a railroad with violating its blocked-crossing ordinance. The railroad defended itself by arguing that the Safety Act (not the Termination Act) preempted the ordinance. The Supreme Court of Illinois eventually agreed that the Safety Act preempted the village's ordinance. But the court first concluded—as a threshold to its analysis under the Safety Act—that the village's ordinance was related to railroad safety. *Id.* at 290 (quotations omitted). It reasoned that a state or local law "falls within the scope of" the Safety Act if it regulates a safety risk that "applies exclusively to railroad operations." *Id.* at 290–91. The blocked-crossing ordinance qualified.

The Eighth Circuit embraced a similar interpretation in *Iowa, Chicago & Eastern Railroad Corp. v.*

Washington County, Iowa, 384 F.3d 557 (8th Cir. 2004). That case involved an Iowa statute that required railroads to repair bridges that carried either "highways over the rail line" or "the rail line over … highways." *Id.* at 558 & n.1. The railroad argued that the Termination Act preempted Iowa's statute. In making this argument, the railroad contended that the Safety Act's savings clause had no role to play. It argued that Iowa's law was about "highway improvement" rather than "rail safety," and that the Iowa law therefore fell outside the scope of the Safety Act's savings clause. *Id.* at 560. The court rejected that "cramped reading of the" Safety Act. *Id.* It reasoned that the Safety Act was broad enough to cover "highway safety risks created at rail crossings," such as "the risk that school buses and emergency vehicles will bottom out on a highway bridge." *Id.*

While Illinois and the Eighth Circuit have adopted the broad reading of "related to railroad safety," the Fifth and Tenth Circuits have issued opinions predicated on the narrower view. In *Elam v. Kansas City Southern Railway*, 635 F.3d 796 (5th Cir. 2011), a plaintiff brought a tort action after she drove her automobile into the side of a parked train at a grade crossing. She claimed that the railroad was negligent per se because it was parked on the road in violation of Mississippi's blocked-crossing statute. *Id.* at 802. The Fifth Circuit rejected that claim, reasoning that the Termination Act completely preempted Mississippi's statute. *Id.* at 807. To reach that holding, the Fifth Circuit considered whether Mississippi's statute was a "rail safety" law for purposes of the Safety Act's savings clause. *Id.* at 808. It concluded that the State's blocking statute was not a "rail safety" law. *Id.* Thus, the Fifth Circuit held that Mississippi's statute

was "incompatible with" the Termination Act "and not saved by" the Safety Act. *Id.*

The Tenth Circuit deepened the split in *Hiett*, 22 F.4th 1190. In that case, a railroad argued that federal law preempted Oklahoma's blocked-crossing statute. The Tenth Circuit agreed. As part of its preemption analysis, it considered whether Oklahoma's statute fell within the Safety Act's savings clause. It held that the statute did "not concern rail safety." *Id.* at 1196. The Court drew a distinction between "*public* safety" laws and "rail safety" laws. *Id.* at 1195–96. It concluded that only laws concerning "hazard[s] to the railroad system or its participants" qualify as rail-safety laws for purposes of the Safety Act. *Id.* at 1196 (quotations omitted). And Oklahoma's blocked-crossing law, it determined, did not count.

Resolving this dispute over the meaning of "related to railroad safety" would restore uniformity across the country regarding the States' power to regulate rail-related issues. But it would also clarify the scope of *federal* power to address the problem of blocked grade crossings. The Federal Railroad Administration has publicly said that is has "no regulatory authority" to address the problem of blocked grade crossings. Federal Railroad Administration, *Blocked Crossings Fast Facts*; *accord* Courtney, *Rail Prevails*. But, under the Safety Act, the Administration may "prescribe regulations … for every area of *railroad safety*." 49 U.S.C. §20103 (emphasis added); *cf.* Pub. L. No. 117-58, 135 Stat. 737, §22404 (Nov. 15, 2021) (tasking the Administration—under the subtitle of "Rail Safety"—with "conducting outreach to communities, first responders, and railroads" about blocked grade crossings). If blocked grade crossings are a matter of "railroad safety" within the meaning of the Safety Act, then the

Administration is underestimating its ability to address this public-safety problem.

Step three. The third step of the analysis is to apply the Safety Act's savings clause, which "speaks directly" to the question of when States may regulate the issue of blocked crossings. *See Mazda Motor of Am., Inc.*, 562 U.S. at 339 (Thomas, J., concurring). Admittedly, no significant split exists at this step, at least among cases addressing blocked-crossing laws. But, because of disagreement at the first two steps, many courts—including the Fifth Circuit, Tenth Circuit, and the Supreme Court of Indiana—are not even reaching the issue. And the courts to have reached the question have answered it incorrectly.

Blocked-crossings laws satisfy both of the safe harbors within the Safety Act's savings clause. But the analysis need not move past the first safe harbor. (That said, Ohio's second question presented encompasses—and Ohio preserves its arguments with respect to—the question whether Ohio can satisfy the second safe harbor, which allows States to enact certain regulations aimed at essentially local safety problems. *See above* 6, 9.)

The Safety Act's first safe harbor says:

> 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."

§20106(a)(2).

Parsing this text, a court applying the first safe harbor must identify "the subject matter of the State requirement" and then decide whether existing

federal regulations "cover[]" that subject matter. *Id.* As this Court has recognized, "cover[]" is a "restrictive term" that "displays considerable solicitude for state law" and sets a "relatively stringent standard." *CSX Transp. v. Easterwood*, 507 U.S. 658, 664–65, 668 (1993). Federal regulations will "cover" a subject matter "only if the federal regulations substantially subsume the subject matter of the relevant state law." *Id.* at 664. And, in conducting this analysis, courts must carefully and narrowly define the state law's subject matter. Why? Because, at a high-enough level of abstraction, "many federal regulations deal with railroad safety." *Norfolk Southern Ry. v. Box*, 556 F.3d 571, 573 (7th Cir. 2009) (Easterbrook, J., writing for the court). Accordingly, the first safe harbor's "structure makes sense only if" one defines the relevant subject matter with "a relatively narrow scope." *Id.* In other words, the first safe harbor is "self-defeating" unless one precisely defines the subject matter covered by the challenged state law. *Id.*

The first safe harbor permits States to enact blocked-crossing laws because no federal regulation "cover[s]" the relevant "subject matter." §20106(a)(2). "[T]here are no federal laws or regulations that specifically address how long a train may occupy a crossing." 84 Fed. Reg. at 27832. And the Secretary of Transportation has not issued any order, or prescribed any regulation, affirmatively allowing stopped trains to occupy grade crossings for as long as they like. Nor has the Secretary issued an order or prescribed a regulation saying that state and local governments cannot regulate blocked grade crossings. Thus, there are no federal orders or regulations that "cover[]" the subject matter of how long stopped trains may occupy a grade crossing.

Lower courts have concluded otherwise. *See, e.g.*, *Mundelein*, 882 N.E.2d at 553; *CSX Transp. Inc. v. City of Plymouth*, 283 F.3d 812, 817 (6th Cir. 2002); *Krentz v. Conrail*, 910 A.2d 20, 34–35 (Pa. 2006); *City of Seattle v. Burlington N. R. Co.*, 41 P.3d 1169, 1173–75 (Wash. 2002); *City of Weyauwega v. Wis. Cent. Ltd.*, 919 N.W.2d 609, 620 (Wis. App. Ct. 2018). But they have reached this conclusion only by defining the subject matter of blocked-crossing laws—and, relatedly, the coverage of federal regulations—at an exceedingly high level of generality. Consider, for example, Justice Fischer's concurrence below. In his view, Ohio's statute implicated "the broad subject matter of grade-crossing safety." Pet.App.19a. Under that framing, any safety issue that arises at a grade crossing—whether it be train speed, warning devices, track conditions, blocked crossings, or anything else—falls under a single "subject matter." This Court's decision in *Easterwood* bars courts from employing so lofty a level of abstraction. After all, the Court in that case treated warning devices at grade crossings and train speed at grade crossings as *different subject matters* under the Safety Act's first safe harbor. *See* 507 U.S. at 666–75. If that is right, then blocked-crossing laws must address a different, more-specific subject matter than the one Justice Fischer identified.

The Sixth Circuit's analysis in *Plymouth* also relied upon an overly generalized view of the "subject matter" state and federal regulations cover. That court, in assessing Michigan's blocked-crossing statute, identified federal regulations governing "the speed at which trains may travel and the stops that trains must make to test their air brakes." *Plymouth*, 283 F.3d at 817. Those regulations, it held, covered the blocking of grade crossings "because the amount

of time a moving train spends at a grade crossing is mathematically a function of the length of the train and the speed at which the train is traveling." *Id.* Thus, in the Sixth Circuit, if a generalized mathematical relationship exists between state and federal regulations, courts assume federal preemption.

This style of preemption analysis should set off alarm bells. Preemption is not supposed to be a "free-wheeling judicial inquiry into whether a state statute is in tension with federal objectives." *Whiting*, 563 U.S. at 607 (quotations omitted). But, when it comes to blocked-crossing laws, lower courts are assuming that federal regulations about different subjects, like train speed or brakes, "implicitly preempt" state and local regulation. Pet.App.42a (Brunner, J., dissenting). Rather than showing "considerable solicitude" for state laws, *Easterwood*, 507 U.S. at 665, these courts are holding that federal preemption occurs through unspoken administrative fiat. As a result, there is "a jurisdictional gap in which States lack the power to patrol the potentially hazardous operation of trains." *Id.* at 678 (Thomas, J., concurring in part and dissenting in part).

Such an approach to preemption is particularly strange when one looks at what the Federal Railroad Administration has actually said about blocked grade crossings. As mentioned already, the Administration has stated that it has "no regulatory authority" over blocked grade crossings. Federal Railroad Administration, *Blocked Crossings Fast Facts*. It has thus punted the problem to others: "Railroads, states and local jurisdictions are best positioned to address blocked highway-rail grade crossings." Press Release, Federal Railroad Administration (Dec. 20, 2019), https://perma.cc/FU9C-QH2N. How, one might ask,

can the Administration cover a subject it thinks it has no power to regulate?

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The law has had enough time to develop. States and localities have been defending their blocked-crossing laws for more than two decades. Lower courts are wrongly holding that such laws are preempted. And they are offering conflicting rationales along the way. With all that is at stake in this area, the Court should not await a cleaner split of authority. The questions presented deserve this Court's attention.

III. This case is an ideal vehicle for addressing the questions presented.

For two reasons, this case is an especially attractive vehicle for offering clarity in this heavily litigated area.

First, this case was resolved at the motion-to-dismiss stage. Thus, the Court can focus on the purely legal question of whether federal law expressly preempts state and local blocked-crossing laws in all applications. Relatedly, because of the posture of this case, the Court need not grapple with the separate, fact-intensive question of conflict preemption: namely, whether blocked-crossing laws conflict with federal regulations in certain factual scenarios. *See* Pet.App.42a (Brunner, J., dissenting).

Second, the fractured nature of the Supreme Court of Ohio's decision is a good thing in this setting. As already discussed at length, the preemption analysis in this case involves multiple steps. The various opinions below help illustrate the different paths the analysis may potentially travel.

That last feature makes this case a better vehicle than one the Court recently declined to hear. *See City of Edmund, Okla.*, 142 S. Ct. 2835. In Oklahoma's case, both the Tenth Circuit and the district court held that the Termination Act controlled the preemption analysis. *See Hiett*, 22 F.4th at 1194–96; *BNSF Ry. Co. v. City of Edmond*, 504 F. Supp. 3d 1249, 1257–62 (W.D. Okla. 2020). Those courts, therefore, did not reach step three of the analysis. That is, they did not address whether Oklahoma's blocked-crossing statute satisfied the terms of the Safety Act's safe harbors. Here, on the other hand, most of the Supreme Court of Ohio's justices reached that step. Pet.App.18a–20a (Fischer, J., concurring in judgment only); Pet.App. 36a–41a (Brunner, J., dissenting). So the important question of how those safe harbors apply is squarely presented.

CONCLUSION

The Court should grant the petition for certiorari and reverse.

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