No. 22-459

IN THE
Supreme Court of the United States

STATE OF OHIO,

Petitioner,

v.

CSX TRANSPORTATION, Inc.,

Respondent.

On Petition for a Writ of Certiorari to the United States Supreme Court

BRIEF OF INDIANA AND 18 OTHER STATES AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

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?

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INTEREST OF THE *AMICI* STATES*

The States of Indiana, Alabama, Connecticut, Delaware, Idaho, Kansas, Kentucky, Michigan, Mississippi, Montana, Nebraska, Oklahoma, Oregon, South Carolina, Texas, Virginia, Washington, West Virginia, and the District of Columbia, respectfully submit this brief as *amici curiae* in support of Petitioner.

Amici States have a profound interest in, and critical perspective on, the role of State and local law in securing safe railroad crossings. For over a century, State and local authorities have regulated safety at railroad crossings through anti-blocking laws that limit how long stopped trains may block crossings. Those laws not only safeguard public thoroughfares but also ensure passage by emergency personnel to citizens in need. Yet, the decision below is one among several stripping States of their longstanding and "unquestioned police power to regulate grade crossings in the interest of the public safety." *R.R. Comm'n of Cal. v. S. Pac. Co.*, 264 U.S. 331, 341 (1924).

States have traditionally understood anti-blocking statutes as "immediately necessary for the safety and welfare of the people." Okla. Stat. tit. 66, § 190(A). One reason for requiring stopped trains to be "cut, separated, or moved" is "to clear the crossing upon the approach of any emergency vehicle." Fla. Stat. § 351.034. Anti-blocking laws deter railroad carelessness, ensuring local emergency services, such as firefighters and rescue squads, can quickly respond. Other reasons include compliance with "governmental

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* Pursuant to Supreme Court Rule 37.2(a), counsel of record for all parties received notice of *amici*'s intention to file this brief at least ten days before the due date for this brief.

safety regulations," Iowa Code § 327G.32(1)(d), and efficient commuting along roads not "closed for traffic by a standing car, train, engine, or other railroad equipment," Minn. Stat. § 219.383, lest drivers attempt driving around the gates to beat a train and avoid potentially long waits, endangering themselves and others.

Critically, no federal statute or regulation addresses blocked crossings, so without State and local intervention, railroads often become roadblocks to life-saving emergency care—a very real, widespread problem. According to the Federal Railway Administration, from December 2019 to September 2021, it received reports of 25,374 blocked crossings, and 18,801 incidents at 5,773 crossings; yet it conducted only 906 blocked crossing investigations. *See* Federal Railroad Administration, *Blocked Crossings Fast Facts*, (Nov. 2021), https://railroads.dot.gov/sites/fra.dot.gov/files/2021-11/Blocked%20Crossings%20Fast%20Facts%20110921.pdf. FRA, however, "has no regulatory authority" to sanction violations it finds because "any regulations regarding blocked crossings are at the State or local level." *Id.* Among States reporting incidents, Indiana and Illinois—where courts found anti-blocking laws preempted—made the top five. *Id.*; *see State v. Norfolk S. Ry. Co.*, 107 N.E. 3d 468, 477–78 (Ind. 2018); *Eagle Marine Indus., Inc. v. Union Pac. R.R. Co.*, 882 N.E.2d 522, 524 (Ill. 2008).

Though a widespread problem, blocked crossings impose local risks and costs and therefore constitute local safety hazards that are best addressed by States and municipalities. *Amici* States therefore urge the Court to grant the petition and reverse.

SUMMARY OF ARGUMENT

Anti-blocking laws like Ohio's facilitate swift access by municipal fire and rescue services to scenes of local emergencies that often implicate life and death. In recent years, too many emergency vehicles have arrived too late to save lives; too many EMTs have risked life and limb climbing over trains to reach those in need; too many fires have burned while emergency crews detoured miles out of the way; and too many communities have been bisected for days waiting for train crews to unblock intersections. Blocked grade crossings have serious—sometimes life-threatening—consequences for everyday Americans.

That is why States have regulated blocked crossings for over a century. While Congress began regulating aspects of railroading beginning with the Interstate Commerce Act in 1887, it left safety matters to the States. Whether by statute or common law, States historically regulated railroad worker safety, train warning signals, railway fencing, train speed limits, and—as far back as at least 1854—blocked grade crossings. Thirty-eight States still have anti-blocking laws today. *See* pp. 8–9, *infra*.

In 1970, Congress enacted the Federal Railroad Safety Act (Safety Act) to grant the Federal Railroad Administration (FRA), authority to "prescribe regulations and issue orders for every area of railroad safety." 49 U.S.C. § 20103(a). Congress, however, preserved nearly all of States' regulatory authority over railroad safety. *See* 49 U.S.C. § 20106(a)(2). As the federal government recognized two decades later, "[j]urisdiction over railroad-highway

crossings" remained "almost exclusively in the States." *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 670 (1993).

In 1995, Congress passed the Interstate Commerce Termination Act (Termination Act), replacing ICC with the much leaner Surface Transportation Board (STB). The Termination Act conferred "exclusive" jurisdiction on STB "over transportation by rail carriers," "rates," "classifications," "rules," "practices," "services," "facilities," "switching," and "side tracks." 49 U.S.C. § 10501(b). But the Termination Act did not expressly address safety. It thus necessarily left the States' longstanding authority to promulgate safety regulations at grade crossings intact.

By the late 1990s, however, courts began to hold that the Safety Act, Termination Act, or both (there is no agreement as to which) preempt anti-blocking laws. As the Ohio Supreme Court's fractured decision below illustrates, no consensus exists for why anti-blocking laws are preempted. Neither the Safety Act nor the Termination Act clearly manifests a congressional intent to strip the States of their police powers to address blocked crossings. The FRA has even represented to Congress that it lacks regulatory authority to address such hazards, and STB has in court briefs disclaimed responsibility for promulgating railroad safety regulations. In an area of traditional State responsibility, federal law simply does not provide a clear statement of preemption, as this Court's doctrine requires.

Every grade crossing is different as to traffic congestion, number of lanes, and proximity to emergency station houses, among other factors bearing on public safety. As even the FRA Administrator has testified to Congress, given such vagaries, States remain best suited to evaluate and address problems posed by blocked crossings. The

Court should take this case to uphold and to clarify States' authority to enforce anti-blocking regulations.

REASONS FOR GRANTING THE PETITION

I. Review is Warranted Because Blocked Crossings Imperil Citizen Safety Across the Country

Absent enforceable anti-blocking statutes and ordinances, railroads have little incentive to remove idle trains from grade crossings expeditiously. The results can be tragic, as incidents across the country demonstrate.

1. Last year, in Tennessee's Bedford County, Bobby Patel suffered a medical emergency that required immediate attention. When a family member called 911, however, the dispatched "ambulance reached the tracks, but could not pass due to a train blocking the crossing." News Channel 5 Nashville, *Bedford County Man Dies After Train Blocks Ambulance Route*, (May 20, 2021), https://tinyurl.com/5e3bacbv. Brett Young, the Director of Bradford County EMS, noted that two other responders took different routes; "one was blocked by a different train" and "the other responder was able to reach the home less than two minutes before the ambulance." *Id.* By that time it was too late and Patel passed away.

In Leggett, Texas, a small town just north of Houston, "paramedics crawled in between the train cars" at a blocked crossing, endangering themselves should the train restart, to respond to a 911 call made on behalf of 11-week-old K'Twon Hudson by his mother. Miya Shay, *Rural Polk County Town Reignites Effort To Push Union Pacific To Act After Baby's Life Lost*, ABC News (Nov. 21, 2021), https://abc13.com/ktwon-franklin-leggett-texas-glover-road-union-pacific-controversy-what-did-do-to-let-baby-die/11257624/. During the "[m]ore than 30 minutes" between that

initial 911 call and "when K'Twon was finally loaded onto an ambulance," *id.*, paramedics "ended up doing CPR right there on the train track" until the train eventually moved. *Id.* Notwithstanding these heroic efforts, K'Twon died in the hospital two days later. *Id.*

Leggett is not the only town where residents climbed between rail cars to address a life-threatening emergency. In Leeds, Alabama, a suburb 20 miles east of Birmingham, an "ambulance was unable to reach a special needs patient after a train blocked the only entrance to a subdivision." *Train Blocks Ambulance From Reaching Special Needs Patient*, EMS1 News, (Jan. 3, 2018), https://www.ems1.com/ambulances-emergency-vehicles/articles/train-blocks-ambulance-from-reaching-special-needs-patient-Yd8DUSo7QO4A3A6f/. A local news station showed a cellphone video "of residents carrying the patient to paramedics, lifting him between the rail cars," risking their lives trying to save his. *Id.* The man was admitted to the hospital's intensive care unit; whether he ever recovered after delayed treatment is unknown.

Blocked crossings have also hindered firefighters' ability to reach blazing buildings, such as a burning nursing home in Lyndon, Kentucky, a Louisville suburb. Despite the fire department's location "two to three minutes" away, a fire truck had to turn around at two blocked crossings, take the freeway, and arrived "almost 10 minutes" later. John Charlton, *First Responder Expresses Concern About Trains Stopping on Railroads, Blocking Routes*, WHAS11 News, (Sept. 8, 2022), https://www.whas11.com/article/news/investigations/focus/freight-trains-first-responders-response-times-kentucky/417-6a1aa594-a4d3-48ad-9e01-ec801c32574e. Kentucky law authorizing fines for railroads that block crossings has been enjoined since 2020,

when a federal court held Kentucky's anti-blocking statutes, Ky. Rev. Stats. §§ 277.200 and 525.140, "expressly preempted by federal law." *Ass'n of Am. Railroads v. Hatfield*, 435 F. Supp. 3d 769, 781 (E.D. Ky. 2020).

Big cities suffer too. "We have about 900 instances each year," explained Houston Fire Chief Sam Peña. David González, *Stopped Trains In Houston Create More Than Just Delays*, KHOU11 News, (Feb. 4, 2022), https://www.khou.com/article/news/stopped-trains-houston/285-4a720b6e-87a7-436f-bb14-85b3d0b5e1d8. "In 2021," he continued, "we had over 1,300 instances in which our emergency crews had to reroute because they were being blocked by a stopped train." *Id.* These delays cost first responders valuable minutes in situations where seconds count, risking human lives and destruction of personal property. Texas's anti-blocking statute, Tex. Trans. Code § 471.007(a), was found preempted in 2001 and repealed in 2015. *See Friberg v. Kan. City S. Ry. Co.*, 267 F.3d 439, 444 (5th Cir. 2001).

2. Even when they do not put lives at risk, blocked crossings create hardships for communities.

Consider tiny Fortville, Indiana, a town with a population under five thousand. There, a "parked train blocked four of Fortville's five railroad crossings for more than 20 hours" one weekend in 2019. Mitchell Kirk, *Train Troubles: Blocked Crossings Raising Concerns In Fortville*, Greenfield Reporter, (July 6, 2019), https://www.greenfieldreporter.com/2019/07/06/train_troubles_blocked_crossings_raising_concerns_in_fortville/. According to Fortville's police chief, Bill Knauer, his department had to contact the offending railroad company *eight times*; he "added the train company did not have another crew scheduled to take the

previous one's place." *Id.* Such slipshod practices, Knauer lamented, results in railcar obstructions that "essentially cut our town in half" while his "hands are tied." *Id.* Indiana, however, has been unable to address this problem since 2018, when the Indiana Supreme Court ruled that the Termination Act preempted its anti-blocking statute. *See Norfolk S. Ry. Co.*, 107 N.E. 3d at 478.

A similar story unfolded in Lake Township, Ohio. There, Police Chief Mark Hummer explained that in March 2022, while Ohio's anti-blocking statute was stayed pending appeal, "crossings are blocked more now than they're open"—even for as long as "83 hours straight"—in part because "[t]rains used to be 60-80 cars long, but now often can be up to 150." *Worst In The Country: Lake Township Tops In Blocked Crossings*, Sentinel Tribune, (March 10, 2022), https://www.sent-trib.com/2022/03/10/worst-in-the-country-lake-township-tops-in-blocked-crossings/. According to the Government Accountability Office, railroads run longer trains to "increase efficiencies, such as fuel efficiency, and decrease costs by reducing the number of train crew and other costs." *Freight Trains Are Getting Longer, and Additional Information Is Needed to Assess Their Impact*, U.S. Gov. Accountability Office 13 (May 2019). But longer trains block more crossings and "create[] safety risks by causing emergency response delays and exacerbating dangerous motorist and pedestrian behavior." *Id.* at 28. Lake Township's Fire Chief, Bruce Moritz, explained "that a blockage hampered a transport" team on their way to a hospital after a truck accident. Sentinel Tribune, at 1. "Someone's going to die or someone's house is going to burn down" due to an impeded crossing, he warned. *Id.*

These dire accounts provide a window into the lived experiences of real people across America, especially those in

rural communities who may lose access to life-saving care whenever a stopped train separates them from paramedics. Courts have rendered State officials powerless to address the urgent public safety hazards posed by blocked crossings, sometimes depriving citizens of emergency services.

II. States Have Long Used Anti-Blocking Laws to Make Grade Crossings Safer

The tragedies and harms described above do not need to happen. To be blunt, there is no good reason for courts to declare State and local anti-blocking laws preempted. Such laws have historical support and no federal statute expressly preempts them. Particularly revealing, courts finding preemption cannot agree on the rationale, which also means States and municipalities cannot discern whether any form of anti-blocking law would survive scrutiny. The Court should take this case to clear up this unfortunate, unnecessary, and nationally important problem.

Historically, the States' core authority extended to regulation of railroad safety hazards, including blocked crossings. Thirty-seven states and the District of Columbia have adopted statutes or regulations limiting how long trains may block grade crossings.† Those statutes and regulations reflect that States have long regulated railroad safety.

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† *See* Ala. Code § 37-8-115; Ariz. Rev. Stat. § 40-852; Ark. Code §§ 23-12-1007, 1008; Conn. Gen. Stat. §§ 13b-339, 13b-342; Del. Code tit. 17, § 701(c); D.C. Mun. Regs. tit. 18, § 2211, 24 § 120; Fla. Stat. §§ 351.03, 351.034; Ga. Code § 46-8-197; Idaho Code § 49-1425; 625 Ill. Comp. Stat. 5/18c-7402; Ind. Code §§ 8-6-7.5-1, 5-2, 5-3; Iowa Code § 327G.32; Kan. Stat. §§ 66-273, 274; Ky. Rev. Stat. §§ 277.200, 277.990; La. Stat. §§ 48:391, 392; Mass. Gen. Laws ch. 160, § 151; Mich. Comp. Laws

1. When America's first railroad, the Baltimore and Ohio, opened in 1830, rail safety was a matter for State common law or of positive law that fell "within the police power of the States." *Lehigh Valley R. Co. v. Bd. of Pub. Util. Comm'rs*, 278 U.S. 24, 35 (1928). For example, Vermont adopted a statute in 1862 that required trains to blow a whistle a certain distance from grade crossings. *See* G.S. 1862, 28, § 55 (codified as amended Vt. Stat. tit. 5 § 3582), *enforced in Wakefield v. Conn. & P.R. Co.*, 37 Vt. 330, 335–36 (Vt. 1864). That same decade, the Wisconsin Supreme Court imposed common law liability for a railroad's negligent failure to build a fence, which resulted in an infant being maimed. *See Schmidt v. Milwaukee & St. P. Ry. Co.* 23 Wis. 186, 194–95 (Wis. 1868). Still in the nineteenth century, the City of Indianapolis set train speed limits to four miles per hour. *See Cleveland, C., C. & I. Ry. Co. v. Harrington*, 30 N.E. 37, 39 (Ind. 1892). This era also produced the railroad safety case responsible for the famous fellow-servant rule. *See Farwell v. Boston & Worcester R.R. Corp*, 45 Mass. 49 (Mass. 1842).

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§ 462.391; Minn. Stat. § 219.383; Miss. Code. §§ 77-9-235, 236; Mo. Stat. § 71.013; Mont. Code § 69-14-626; Neb. Rev. Stat. §§ 17-225, 74-594, 74-1323; N.H. Rev. Stat. §§ 373:15–17; N.J. Stat. § 39:4-94; N.Y. R.R. L. § 53-c; N.D. Cent. Code §§ 49-11-01, 19, 19.1; Ohio Rev. Code §§ 5589.21, 5589.24, 5589.211; Or. Rev. Stat. §§ 811.475; 824.222–23; 75 Pa. Cons. Stat. §§ 3713, 6907–08; 39 R.I. Gen. Laws § 39-8-4; S.C. Code §§ 57-7-240, 58-17-4080; S.D. Codified Laws §§ 49-16A-94, 119; Utah Code § 41-6a-1204; Vt. Stat. tit. 5 §§ 3586–9; Va. Code § 56-412.1; W. Va. Code § 31-2A-2, 3, 6; Wis. Stat. § 192.292. *See also* Cal. Pub. Util. Comm. Gen. Order No. 135 (1974).

By the turn of the twentieth century and beyond, other State supreme courts imposed common law liability on railroads for negligent actions and omissions by signal watchmen resulting in injuries to third parties. *See, e.g., Evans v. Lake Shore & M.S.R. Co.*, 50 N.W. 386, 387 (Mich. 1891); *Hodgin v. S. Ry. Co.*, 55 S.E. 413, 414 (N.C. 1906); *Bickel v. Penn. R. Co.*, 217 Pa. 456, 461–62 (Pa. 1907); *Webster v. Roth*, 18 N.W.2d 1, 4 (Wis. 1945).

Even in the 1960s, courts could say with confidence that "jurisdiction to establish safety regulations," including for "rail-highway grade-crossing matters," belonged "exclusively" to States. *Am. Trucking Ass'ns, Inc. v. United States*, 242 F. Supp. 597, 601 (D.D.C. 1965), *aff'd* 382 U.S. 373, 373 (1966).

2. Anti-blocking laws fit this broader historical State authority. Indeed, some jurisdictions maintained anti-blocking laws for over a century—and a few date back to the mid-nineteenth century. *See, e.g.*, St. 1854, c. 378 (1854) (codified as amended at Mass. Gen. Laws ch. 160, § 151 (1971)); Ind. Rev. Stat. § 2176 (1896) (codified as amended at Ind. Code § 8-6-7.5-1 (1972); Kan. Stat. §§ 66-273, 274 (1897); St. 1902, § 20139 (1902) (codified as amended at Conn. Gen. Stat. § 13b-339 (1949)); St. 1888, c. 8 § 6980(a) (1888) (codified as amended at Ohio Rev. Code § 5589.21 (2000)); *see also Fay v. Minneapolis, St. P. & S. S. M. Ry. Co.*, 111 N.W. 683, 684–85 (Wis. 1907) (affirming railroad's common law negligence for blocking a grade crossing).

Courts enforcing anti-blocking laws have recognized that holding railroads accountable for blocking grade crossings falls "within the power of the Legislature." *Tracy v. New York, N.H. & H.R. Co.*, 72 A. 156, 157 (Conn. 1909);

cf. Pittsburgh, Cincinnati & St. Louis Ry. Co. v. Brown, 67 Ind. 45, 47–48 (Ind. 1879) (observing that regulations of fencing, whistles, and stops "are police regulations").

Cases from both the nineteenth and twentieth centuries demonstrate, in graphic detail, the importance of anti-blocking statutes to public safety. In Ohio, a nine-year-old child attempted to climb through railcars that had blocked a grade crossing for several minutes. Then, "without warning," the train jolted "suddenly and violently backward," catching the child's foot "between the couplings of two cars" and injuring him. *Lake Erie & W.R. Co. v. Mackey*, 53 41 N.E. 980, 981 (Ohio 1895). The Ohio Supreme Court affirmed a judgment against the railroad, concluding that Ohio's anti-blocking statute "clearly implies the duty to remove the obstruction after the lapse of five minutes" and the railroad's noncompliance produced a cognizable negligence claim. *Id.* at 382.

In Wisconsin, a railroad company left a freight train partially across a grade crossing for nearly thirty minutes during which time the plaintiff sought to cross the tracks in a horse-drawn-buggy. *See Fay*, 111 N.W. at 684–85. During this attempt, a steam valve on the engine suddenly produced an unusual noise that startled the plaintiff's horse, throwing the plaintiff from the buggy and injuring him. *Id.* The Wisconsin Supreme Court affirmed a verdict for the plaintiff and concluded that the railroad company "had no right to leave its engine or cars standing upon the street for an unnecessary and unreasonable length of time in such condition as to unnecessarily endanger the safety of travelers thereon." *Id.* at 684.

In Kansas, a plaintiff suffered property damage because the "defendant's train, standing on the track five minutes,

blocked Wichita's Central Avenue and delayed the fire department three or four minutes in reaching the fire." *Walker v. Mo. Pac. Ry. Co.*, 149 P. 677, 678 (Kan. 1915). Wichita had ordinances prohibiting railroads from "blocking any street longer than five minutes" and "stopping trains, engines, or cars, on Central Avenue." *Id.* The Kansas Supreme Court reversed a judgment for the railroad, remanded, and concluded that the ordinances were appropriate under Kansas's anti-blocking statute. *Id.*

Through the 1960s, State courts continued to enforce such laws. In 1940 the Ohio Supreme Court confirmed that damages "may be recovered" from railroads that block grade crossings for longer than five minutes. *Capelle v. Baltimore & O. R. Co.*, 24 N.E.2d 822, 824 (Ohio 1940). In 1966, Massachusetts successfully prosecuted a railroad company under its anti-blocking statute. *See Com. v. N.Y. Cent. R. Co.*, 216 N.E.2d 870, 873 (Mass. 1966). Recognizing "the State's right of control over highways at railroad crossings," the Massachusetts Supreme Judicial Court upheld the prosecution lest "local authorities . . . be seriously crippled in their duty to preserve the public safety." *Id.* at 873. In 1967, Harrodsburg, Kentucky adopted an anti-blocking ordinance and later successfully prosecuted it. *See City of Harrodsburg v. S. Ry. Co.*, 455 S.W.2d 576, 577 (Ky. 1969). The Kentucky Court of Appeals observed that blocked grade crossings "create a very serious safety problem, as well as materially impede the flow of interstate highway traffic," and "requir[ing] trains to clear the street crossings" did not "seriously burden interstate commerce." *Id.* at 580.

Throughout the 1970s and 1980s, and into the 1990s, State courts still recognized common law accountability for railroads that blocked grade crossings. In *Penn. R.R. Co. v.*

Goldenbaum, 269 A.2d 229 (Del. 1970), the court permitted a widow to sue a railroad after her husband was killed when their automobile collided with a stopped locomotive at a grade crossing. In 1979, the Indiana Court of Appeals affirmed a judgment against a railroad company under the State's anti-blocking statute. *Norfolk & W. Ry. Co. v. State*, 387 N.E.2d 1343, 1345 (Ind. Ct. App. 1979). In 1982, the Iowa Supreme Court rejected a due process challenge to the State's anti-blocking statute. *See Chicago & Nw. Transp. Co. v. Iowa Transp. Regul. Bd.*, 322 N.W.2d 273, 276 (Iowa 1982). In 1988, the Arizona Supreme Court held that blocking a crossing could constitute negligence, as "common sense leads to the conclusion that the trier of fact could find that leaving the train on the crossing was a cause of the accident." *Terranova v. S. Pac. Transp. Co.* 761 P.2d 1029, 1033 (Ariz. 1988). And in 1992 the Illinois Court of Appeals held that a railroad violated the State's anti-blocking law. *See People ex. rel. Village of McCook v. Ind. Harbor Belt R.R. Co.*, 628 N.E.2d 297, 298 (Ill. Ct. App. 1992).

These cases reflect that, as a matter of statutory and common law, the States have for decades exercised authority over railroad safety, including through anti-blocking laws. Courts traditionally understood the States' police powers to hold railroads accountable for hazards at blocked crossings as one feature of this authority. And citizens could count on States to protect their safe commutes.

III. Neither the Termination Act Nor the Safety Act Preempts Anti-Blocking Statutes

Congress enacted two statutes that frame the anti-blocking discussion: (1) Federal Railroad Safety Act (Safety Act), Pub. L. No. 91-458, 84 Stat. 971 (Oct. 16, 1970) (codified as amended at 49 U.S.C. § 20101 (2012); and (2) the

Interstate Commerce Commission Termination Act (Termination Act), Pub. L. No. 104-88, 109 Stat. 803 (Dec. 29, 1995). Courts have held that both statutes preempt State anti-blocking laws but cannot agree on why or how (as Ohio's certiorari petition illustrates). One reason for the disagreement is that nothing in the text of either statute suggests that Congress intended to strip the States of their longstanding police powers to regulate stopped trains at railroad grade crossings. In fact, both statutes expressly recognize an appropriate berth for State regulation of railroad hazards. States remain the best source of authority to regulate blocked crossings.

The long history of State railroad regulations—including anti-blocking laws—has implications for the preemption analysis. When a federal enactment threatens a "field which the States have traditionally occupied," the analysis must "start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). Furthermore, when legislation "affect[s] the federal balance, the requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision." *United States v. Bass*, 404 U.S. 336, 349 (1971).

Neither the Termination Act nor the Safety Act contains a "clear and manifest" statement that preempts anti-blocking laws. In fact, "no federal laws or regulations specifically concerning highway-rail crossings blocked by trains" exist at all. Ben Goldman, Cong. Rsch. Serv., *Locomotive Idling, Air Quality, and Blocked Crossings* 2 (March 4, 2022), https://crsreports.congress.gov/product/pdf/IF/IF10978. Lower court decisions inferring agency preemption

from regulations bearing only indirectly on blocked crossings contravene the presumption against preemption.

A. As federal authorities have themselves acknowledged, the Safety Act and Termination Act leave anti-blocking laws to States and localities

1. The Safety Act, enacted in 1970, authorizes the Secretary of Transportation to "prescribe regulations and issue orders for every area of railroad safety." 49 U.S.C. § 20103(a). Yet it expressly preserves State authority to enact laws "related to railroad safety or security" absent a federal regulation "covering the subject matter of the State requirement." *Id.* § 20106(a)(2). Even after a federal regulation exists, States may adopt "more stringent" measures when "necessary to eliminate or reduce an essentially local safety or security hazard" (when consistent with federal law and not unreasonably burdensome for interstate commerce). *Id.* §§ 20106(a)(2)(A)–(C).

In *CSX Transportation, Inc. v. Easterwood*, the Court recognized the Safety Act's "considerable solicitude for state law." 507 U.S. 658, 665 (1993). It demanded a showing that any preempting federal regulations "cover[]"—by "substantially subsum[ing]"—the same subject matter as a State law, not merely "touch upon" or "relate to" it. *Id.* And it rejected the argument that an "elliptical reference" in a federal manual to traffic signs and signals preempted State negligence law for failure to maintain adequate warning devices, observing that the manual itself recognized "[j]urisdiction over railroad-highway crossings reside[d] almost exclusively in the States." *Id.* at 669–70. *Easterwood*

thus reflects that Safety Act preemption "is even more disfavored than preemption generally." *S. Pac. Transp. Co. v. Pub. Util. Comm'n*, 9 F.3d 807, 813 (9th Cir. 1993).

Lower courts inferring that federal train regulations governing speed limits, 49 C.F.R § 213.307, systems maintenance, *id.* § 234.209, and brake testing, *id.* § 232.305, somehow govern blocked crossings are therefore incorrect. These regulations do not "cover," let alone "substantially subsume," the subject matter of anti-blocking statutes. Former FRA Administrator Ronald Batory, who administered the Safety Act, acknowledged this in 2019. He testified that "all" authority to address blocked crossings currently "resides at the State and municipal level," "nothing in the existing CFR" empowers FRA "to get involved with the duration of a crossing being blocked by a train," and FRA's role "is to provide technical expertise, data, education, and outreach to assist all stakeholders in resolving specific instances of blocked crossings." *The State of the Rail Workforce,* Hearing Before the House Subcomm. on Railroads, Pipelines, & Hazardous Materials, 116 Cong. 17, 103 (2019) (Testimony of Ronald L. Batory) ("Batory Testimony"). "Local authorities and railroads," Batory concluded, "have . . . developed ways to mitigate . . . concerns" about stopped trains blocking emergency vehicles. *Id.* at 102.

As Administrator Batory suggests, the cost-benefit calculus implicated by speeding trains differs in kind from that implicated by idle trains perched across roadways. Lower courts seem to think that, because one theoretical means of coping with anti-blocking laws is for a train to go faster, or to test brakes less frequently, both of which solutions are prohibited by federal law, preemption is implicit. But the corollary to that reasoning is that the FRA *prefers*

blocked crossings as a matter of policy—a position unsubstantiated by FRA rulemaking or statements, and one that Administrator Batory rejects.

2. The Termination Act, enacted in 1996, established the STB to regulate "transportation by rail," 49 U.S.C. § 10101(1), defining "transportation" to include movement by "a locomotive, car, . . . or equipment . . . by rail." *Id.* § 10102(9)(A). "The jurisdiction of the Board over . . . transportation by rail carriers . . . is exclusive." *Id.* § 10501(b). Such exclusive jurisdiction includes "the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities" used by railroads. *Id.* § 10501(b)(2). The Termination Act, however, cabins its sweep by recognizing that "it is the policy of the United States Government . . . to *minimize* the need for Federal regulatory control over the rail transportation system and to require fair and expeditious regulatory decisions when regulation is required." *Id.* § 10101(2) (emphasis added). STB principally functions as an economic regulator, tasked with, *inter alia*, determining "adequate revenues," ensuring "fair wages," and avoiding "undue concentrations of market power" under the Termination Act. *Id.* § 10101.

Considering this limited range of exclusive authority, STB has disclaimed responsibility over blocked grade crossings. In *Tyrrell v. Norfolk S. Ry. Co.*, which upheld Ohio's minimum track clearances as "a permissible gap filler in the federal rail safety scheme," 248 F.3d 517, 525 (6th Cir. 2001), STB filed an amicus brief to explain the interplay among the Safety Act, the Termination Act, federal agencies, and State railroad safety laws. *See* Brief of Surface Transportation Board as Amicus Curiae at 6, *Tyrrell*, 248 F.3d 517 (No. 99-4505) ("STB Br."). The STB brief

contrasts FRA and STB as distinct entities with distinct responsibilities. While "FRA has authority to adopt rules or standards governing the safety of all facets of railroad operations," STB "considers safety" only incidentally when "adjudicating individual cases or regulating *non-safety* aspects of railroad operations." *Id.* at 8 (emphasis added).

Critically, STB did not interpret the Termination Act—its authorizing legislation—to regulate or confer power to regulate railroad safety. *See* STB Br., at 9–16. STB's brief explained that, where FRA does not regulate, "States may impose safety regulations." *Id.* at 17. Indeed, it admonished, court decisions holding that the Termination Act preempts State safety laws "would create significant confusion" and cause STB to "be flooded with requests from states and localities regarding the types of railroad safety matters . . . that are not part of the Board's economic regulation" responsibilities. *Id.* at 20–21. Yet because FRA has not promulgated a uniform national regulation, "the express preemption provision in the [Safety Act], at 49 U.S.C. § 20106, *specifically allows* a role for state regulation." Reply Brief of Surface Transportation Board as Amicus Curiae at 4–5, *Tyrrell*, 248 F.3d 517 (No. 99-4505) ("STB Reply") (emphasis added) (footnote omitted).

* * *

In short, a cycle of confusion has ensued: STB says FRA has authority over grade crossings, FRA disclaims it, deferring to the States, but courts preclude State action. The result is a regulatory void this Court should now address.

B. States are best positioned to address local challenges presented by blocked crossings

That Congress left safety regulations to the States makes sense. Each grade crossing is "unique unto itself, based on the number of tracks and the number of lanes of traffic" involved, meaning blockages present challenges unique to each part of the country and each community within a State. Batory Testimony, at 18.

For example, a blocked crossing in a "heavily urbanized environment," like the San Gabriel Valley, "see[s] up to 2,000 vehicle-hour delays, meaning it is the equivalent of 2,000 vehicles idling for an hour." *Tracking Toward Zero: Improving Grade Crossing Safety and Addressing Community Concerns,* Subcomm. on Railroads, Pipelines, & Hazardous Materials, 116 Cong. 21–22 (Feb. 5, 2020), https://www.congress.gov/116/meeting/house/110397/documents/CHRG-116hhrg42574.pdf (testimony of Mark Christoffels, Chief Engineer, San Gabriel Valley Council of Governments). Frustrated motorists may try "driving around the gates" to beat a train to the crossing rather than endure long waits—almost certainly "resulting in accidents." *Id.* at 22.

Rural communities also suffer, but in different ways. They may have fewer roadways, meaning a blocked crossing "obstructing emergency vehicle[s]" may force those vehicles "miles out of their way" to "respond to a fire, accident or medical crisis." *Hearing on Examining Freight Rail Safety*, House Transp. & Infrastructure Comm., at 17 (June 14, 2022), https://transportation.house.gov/imo/media/doc/Ferguson%20Testimony.pdf (testimony of SMART Transportation Division President Jeremy Ferguson). What works for Los Angeles may fail in Leggett.

State legislators, considering this reality, tailored anti-blocking statutes to their communities. Representing smaller districts within each State than their federal counterparts, these legislators bring uniquely local perspectives to legislation. For example, Vermont prohibited railroads from blocking "a highway or road required for farm use at rail level" "for a longer period than five minutes at any one time" but *exempted* "any grade crossings . . . extending through the city of Rutland between the River Street underpass and the Pine Street overpass" and "the grade crossing in the town of Norton." Vt. Stat. tit. 5, § 3587. Thus, Vermont legislators, considering the needs of affected communities, determined that some crossings deserve different treatment and crafted a statute to meet that objective.

Iowa proceeded differently. Rather than prescribe exemptions like Vermont, it delegated to "political subdivision[s]" special authority to "pass an ordinance regulating the length of time a specific crossing may be blocked" whenever a subdivision "demonstrates that an ordinance is necessary for public safety or convenience." Iowa Code § 327G.32(3). "Public safety or convenience may include, but is not limited to, high traffic density at a specific crossing of a main artery or interference with the flow of authorized emergency vehicles." *Id.* § 327G.32(4). This approach, subject to certain restrictions, allows municipalities to ameliorate conditions known to them that may have eluded State legislators.

Illinois set statewide standards based on population and peak hours. For instance, "[i]n a county with a population of greater than 1,000,000, as determined by the most recent federal census, during the hours of 7:00 a.m. through 9:00 a.m. and 4:00 p.m. through 6:00 p.m. it is un-

lawful for a rail carrier to permit any single train or railroad car to obstruct public travel at a railroad-highway grade crossing in excess of a total of 10 minutes during a 30 minute period." 625 Ill. Comp. Stat. 5/18c-7402(1)(b).

Again, a single approach may not work within individual States, let alone nationwide. "Railroads, states and local jurisdictions," it follows, "are best positioned to address blocked highway-rail grade crossings." U.S. Dep't of Transp., *Federal Railroad Administration Launches Web Portal For Public to Report Blocked Railroad Crossings* (Dec. 20, 2019), https://railroads.dot.gov/sites/fra.dot.gov/files/2019-12/FRA%2015-19%20Blocked%20Crossing%20Portal_0.pdf (quoting FRA Administrator Ronald Batory). Even "FRA does not believe a federal, one-size-fits-all solution would effectively address the issue." Batory Testimony, at 103.

* * *

A collection of fractured decisions from lower courts have left the States without the maneuverability afforded by the Safety Act, harming communities. Grade crossings remain unregulated, imperiling citizens, now "unprotected by either state or federal law," who lack recourse to hold railroads accountable. *Thiele v. Norfolk & W. Ry. Co.*, 68 F.3d 179, 184 (7th Cir. 1995). The Court should take this case to resolve whether States, in the name of public safety, retain anti-blocking authority.

CONCLUSION

The petition for writ of certiorari should be granted.

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