IN THE
INDIANA SUPREME COURT

No. 02A03-1607-IF-1524

STATE OF INDIANA,
Appellant-Plaintiff,

v.

NORFOLK SOUTHERN RAILWAY COMPANY
Appellee-Defendant.

Appeal from the Allen Superior Court,

Lower Cause Nos.
02D05-1503-IF-2039, 02D06-1505-IF-3262, 02D06-1505-IF-2988, 02D04-1505-IF-3263, 02D05-1505-IF-3070, 02D05-1505-IF-3264, 02D06-1505-IF-3071, 02D04-1505-IF-3362, 02D05-1505-IF-3312, 02D06-1505-IF-3363, 02D04-1505-IF-3082, 02D06-1506-IF-6379, 02D04-1505-IF-3084, 02D04-1506-IF-6383, 02D06-1505-IF-3183, 02D04-1508-IF-9742, 02D06-1505-IF-3246, 02D04-1512-IF-15577, 02D05-1505-IF-3248, 02D06-1508-IF-9744, 02D04-1505-IF-3251, 02D06-1511-IF-13718, 02D04-1505-IF-3255,

The Honorable Wendy Davis, Judge, and
The Honorable David M. Zent, Magistrate.

RESPONSE TO PETITION TO TRANSFER

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RESPONSE TO PETITION TO TRANSFER

For over one hundred years, Indiana has exercised its inherent police power to proscribe trains from blocking roadways where tracks cross the roadway. In this case, the trial court held that Indiana cannot enforce its statute because Congress has expressly preempted the state law in two federal statutes. As the Court of Appeals correctly determined, neither the Interstate Commerce Commission Termination Act nor the Federal Railroad Safety Act expressly preempt Indiana's statute. Congress has not prevented Indiana from fining railroads for parking at crossings and stopping vehicle traffic for more than ten minutes. The Court of Appeals followed well-established preemption doctrine in upholding Indiana's statute. This Court should deny transfer.

Argument

I.
Indiana's long-standing statute proscribing blocking grade crossings is consistent with other states laws and does not regulate railroad operations.

Transfer should be denied because, a unanimous panel of the Court of Appeals aptly held that the trial court erred in finding that Indiana's blocked crossing statute was preempted by federal law. *State v. Norfolk So. Ry. Co.*, 84 N.E.3d 1230, 1237-38 (Ind. Ct. App. 2017)*, reh'g denied*. In its petition to transfer Norfolk Southern and the amici parties in their supporting materials attempt to construe this case as about the free movement of trains across the country and claim that Indiana is an outlier in its prohibition against blocked grade crossings (Appellant's Petition at 10-11). This is simply not so. Other states have similar

statutes to Indiana's—many of which prohibit stopped trains for merely five minutes in contrast with Indiana's ten-minute limit—and our nation's railways and railyards continue to function as they always have. *See* Ind. Code § 8-6-7.5-1; Ky. Rev. Stat. § 277.200 (West) (illegal to block crossing for more than 5 minutes); Mo. Ann. Stat. § 300.360 (West) (same); N.Y. R.R. Law § 53-c (McKinney); Ohio Rev. Code § 5589.21 (West) (same); S.C. Code Ann. § 57-7-240 (West) (same); "Blocked Crossings," *Compilation of State Laws & Regulations Affecting Highway-Rail Grade Crossing*, Federal Railroad Administration, Sixth Edition, http://www.fra.dot.gov/StateLaws (last accessed January 31, 2018). Here, the Court of Appeals properly balanced these interests in finding Indiana's blocked-crossing statute was not preempted. Norfolk Southern and the amici argue that there would be calamitous effects if Indiana's law were allowed to remain in force and it may cause a "ripple effect" across the country. But these laws have remained in place for decades without any adverse impact on travel. Thus, at its core, this case is about the ability of a railroad to act with impunity in inhibiting the movement of people and traffic through a municipality and an unwillingness to pay the associated fines resulting from those infractions. Indiana's blocked-crossing statute in its same basic form has been in place since at least 1972. *See* I.C. § 8-6-7.5-1. Since that time, it has remained largely unchallenged, and so-called the cataclysmic effects on interstate travel have been simply non-existent.[1]

[1] Only after the Indiana General Assembly modified the penalty for a violation of the blocked-crossing statute in 2015, which set the minimum fine for the Class C infraction at $250, was the statute challenged. Ind. Code § 8-6-7.5-3.

Contrary to Norfolk's contention, the Court of Appeals properly applied United States Supreme Court and this Court's jurisprudence advising that any preemption analysis begins with a strong presumption against preemption, particularly in areas that the state has historically governed through its police powers. Grade crossings are just such an area, which the United States Supreme Court has long-acknowledged are the "most obvious case of the police power." *Erie R.R. Co. v. Board of Public Utility Com'rs*, 254 U.S. 394, 410 (1921). With this backdrop, the Court of Appeals properly held that Norfolk Southern, particularly in light of the mere persuasive authority presented below, failed to meet its burden below showing that preemption was the clear and manifest intent of Congress through its own regulation of railroads.

The historic police powers of the state include the regulation of grade crossings and obstructions to vehicular and pedestrian traffic. *See CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 669-70 (1993) ("Jurisdiction over rail road-highway crossings resides almost exclusively in the States"). Since at least 1881, Indiana has had a law that made it an offense to remain stopped over a public highway. *See Cleveland, C., C. & I. Ry. Co. v. Wynant,* 100 Ind. 160 (1885); *State v. Louisville, N.A. & C. Ry. Co.*, 86 Ind. 114, 117 (1882) (holding that a railroad company may be subject to indictment for "unnecessarily or unreasonably" blocking or encumbering streets). Under Indiana's current law a railroad corporation may not block a grade crossing and obstruct public travel in excess of ten minutes except for reason or circumstances beyond the corporation's control. I.C. § 8-6-7.5-1; *see State v. CSX*

Transportation, Inc., 673 N.E.2d 517, 519 (Ind. Ct. App. 1996) (requiring public attempt to cross before violation occurs); *Norfolk & Western Railway Co. v. State*, 387 N.E.2d 1343, 1344 (Ind. Ct. App. 1979), *trans. denied*. Because of this historical exercise of power, not only is there a presumption against preemption, but the interests of the state in regulating the public use of roadways—even as they intersect railways—fundamentally calls for restraint and favor before the courts. *See Erie R.R. Co. v. Board of Utility Comm'rs*, 254 U.S. 394, 410 (1921) (noting that states interest in streets as opposed to that of railroads is the "more important interest" because of a street's use by the whole public).

II.
There is a presumption against preemption because grade-crossing regulation is a traditional police power of the state and neither the ICCTA or the FRSA expressly rebut that presumption.

Both this Court and the United States Supreme Court have held that there can be no preemption for federal statutes as they pertain to a subject traditionally governed by state police powers absent the clear and manifest intent of Congress. *Wyeth v. Levine*, 555 U.S. 555, 565 (2009); *Easterwood*, 507 U.S. at 663-64; *Kennedy Tank & Mfg. Co., Inc. v. Emmert Indus. Corp*., 67 N.E.3d 1025, 1028 (Ind. 2017). "Where the text of a preemption clause is open to more than one plausible reading, courts ordinarily "accept the reading that disfavors pre-emption." *Id.* at 334-35; *see also Bond v. United States*, __ U.S. __, 134 S.Ct. 2077, 2088 (2014) (noting that legislation operating with presumption that statutes do not preempt state law); *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 449 (2005) (even when there is a plausible reading of preemption, courts have a duty to accept the reading that

disfavors preemption). It was with this unmistakable standard that the Court of Appeals properly interpreted the preemptory effects of the Interstate Commerce Commission Termination Act and the Federal Railroad Safety Act. Neither Norfolk nor any of the amicus parties, either below or on transfer, properly address the posture of the substantial nature of their own burden in this case.

The Court of Appeals kept its inquiry narrowed to the question presented by Norfolk: whether Indiana's blocked-crossing statute was *expressly* preempted. Norfolk as repeatedly stated that it was only arguing express preemption. *See Norfolk*, slip op. at 9 n.4. However, now the parties seem discordant on which body of law they would like to raise for transfer, as several of the amicus parties note that the standard that should be used is whether an unreasonable burden has been placed on the rail transport—a decidedly "implied" premise. *See Franks Inv. Co. LLC v. Union Pacific R. Co.,* 593 F.3d 404 (5th Cir. 2010) (distinguishing express preemption as the direct language in the statute versus implied preemption through "the scope of the statute" in field or conflict preemption); *New Orleans v Barrois,* 533 F.3d 321 (5th Cir. 2008) (permitting private, at-grade crossing but finding no express preemption, instead using an as-applied analysis). Thus, to the extent that the amici argue that an implied analysis should have been used by the Court, that matter was not specifically before them and should not be grounds for consideration on transfer.

A. The Court of Appeals properly held that the ICCTA does not expressly preempt Indiana's blocked-crossing statute.

For its part, Norfolk turns a plain language reading of the ICCTA's preemption clause on its head by arguing that the Court of Appeals should have looked to the broad language and implicit intent (Appellee's Petition at 16-17). However, the statutory construction analysis always begins with "the plain wording of the clause, which necessarily contains the best evidence of Congress' pre-emptive intent." *Easterwood*, 507 U.S. at 664. The relevant preemption clause of the ICCTA grants exclusive jurisdiction to the Surface Transportation Board over "rates, classifications, rules…, practices, routes, services, and facilities of [rail carriers]; and…construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities…" 49 U.S.C. § 10501(b). This language is silent about the traditional police power of the states over public safety and grade crossings. In the intersection of railways and public roads, the Eighth Circuit has noted, "[The ICCTA's] silence cannot reflect the requisite 'clear and manifest purpose of Congress' to preempt traditional state regulation of public roads and bridges that Congress has encouraged in numerous other statutes." *Iowa, Chicago & E. R.R. Corp. v. Washington Cty., Iowa*, 384 F.3d 557, 561 (8th Cir. 2004) (quoting *Easterwood,* 507 U.S. at 664) (holding that ICCTA did not preempt state regulation regarding a proceeding about whether railroad must replace bridges at its own expense); *see also Wheeling & Lake Erie Ry. Co. v. Pennsylvania Pub. Util. Comm'n*, 778 A.2d 785, 792 (Pa. Commw. Ct. 2001) ("[T]here is no conflict between the exclusive jurisdiction of the [STB] to economically regulate the rail

carriers…and the states' authority to regulate the public safety of the rail-highway crossing, which is also part of the public highway").

Norfolk claims that the Court of Appeals erred, in part, because it did not follow the conclusory and cursory holding in *CSX Transportation, Inc. v. Georgia Public Service Commission*, 944 F. Supp. 1573 (N.D. Ga. 1996), later repeated by the Ninth Circuit Court of Appeals, that there could not be a "broader statement of Congressional intent" than the ICCTA preemption clause (Appellee's Petition at 16). As the State pointed out below, the chief problem with this clear and unambiguous language was that this language had nothing to do with blocked crossings and failed to account for any presumption against preemption.

The Northern District Court of Georgia's opinion was within an area that was arguably the exact purpose of the ICCTA in the first place—the closing of railway operations. *CSX Transportation, Inc.*, 944 F. Supp. at 1580-85. The Northern District of Georgia was analyzing the specific definition of whether a rail "agency" fit within the definitional purview of "rail carriers" as specifically enumerated in the ICCTA's preemption clause. *Id.* at 1582. The primary concern was the entry and exit of railroad carriers and agencies into the market, which were explicitly mentioned as the intent of the ICCTA. *See* 49 U.S.C. § 10101(7); *CSX Transportation, Inc.*, 944 F. Supp. at 1583. Similarly, the Fifth Circuit in *Friberg*, upon which much of the law Norfolk cites as persuasive relies, is superficial and fails to account for even the Surface Transportation Board's own acknowledgment that state laws may coexist with its jurisdiction under the ICCTA. *See Friberg v.*

Kan. City S. Ry. Co., 267 F.3d 439, 443 (5th Cir. 2001); *cf. Fayus Enterprises v. BNSF Ry. Co.*, 602 F.3d 444, 451 (D.C. Cir. 2010)*; Adrian & Blissfield R.R. Co. v. Village of Blissfield*, 550 F.3d 533, 539-40 (6th Cir. 2008); *New York Susquehanna and Western R.R. Corp. v. Jackson*, 500 F.3d 238, 252-54 (3rd Cir. 2007). Likewise, the Ninth Circuit's holding in *City of Auburn v. United States*, 154 F.3d 1025 (9th Cir. 1998), is distinguishable because it was merely about environmental regulations operating as a type of preclearance for the reopening of a rail line. 154 F.3d at 1031.

Here, the Court of Appeals properly found that Indiana's blocked crossing law is not facially preempted by the ICCTA because there is no direct conflict. No preemption will be found where the state law merely regulates activity that is merely a peripheral concern to federal law and does not discriminate against railroads. *Jackson*, 500 F.3d at 252-54. The core concern of the ICCTA is to regulate the economics and finances of the rail carriage industry. *Id.* While the language is broad, the analysis is strained by Norfolk to shoehorn the public's access to their roadways through grade crossings into a financial and economic regulation for the operation of railroads. *See, e.g., Home of Economy v. Burlington Northern Santa Fe R.R.*, 694 N.W.2d 840, 844-46 (N.D. 2005) (holding that STB does not have exclusive jurisdiction over grade crossings because it is not explicitly covered in the ICCTA).

What's more, Congress clearly knew that they were passing the ICCTA within the regulatory framework of the FRSA, which had been enacted two decades prior. However, it would be nonsensical for Congress to intend for the ICCTA to

preempt all state regulation, while leaving in place the long-standing ability of states under the FRSA to pass their own regulations. *See* 49 U.S.C. § 20106 (2007). In fact, this view has been rejected by other courts. *See Tyrrell v. Norfolk Southern Ry. Co.*, 248 F.3d 517, (6th Cir. 2001) (noting that the ICCTA and its legislative history contain no evidence that Congress intended to supplant FRSA-established authority; also noting that "repeals by implication are disfavored" (citation omitted)). Further, as multiple plausible readings must be interpreted against preemption, it is clear that the silence as to obstruction of traffic bars facial preemption. *See Riegel*, 552 U.S. at 334-36. In other words, as a basic principle of federalism, the tie should favor the state's enforcement of its own laws. This in combination with the Court of Appeals correct application of the law finding that exercise of traditional police power is permissible indicate that this Court should deny transfer. *Norfolk*, slip op. at 13-14 (citing *Fayus Enterprises v. BNSF Ry. Co.*, 602 F.3d 444 (D.C. Cir. 2010), *cert denied*).

B. The Court of Appeals was correct to find that the FRSA does not preempt state law as it expressly allows for states to regulate traffic at railway crossings.

As with the ICCTA, the Court of Appeals properly found that Indiana's blocked crossing statute is not preempted by the FRSA. Congress enacted FRSA to "promote safety in every area of railroad operations and reduce railroad related accidents and incidents." 49 U.S.C. § 20101. It also provided an express preemption clause, which permitted states to "adopt or continue in force a law, regulation or order related to railroad safety or security" until a regulation or order is prescribed

"covering the subject matter of the State requirement." 49 U.S.C. § 20106 (2007). States may also continue to enforce a more stringent law that "(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." *Id.* The United States Supreme Court has held that the state law must do more than "touch upon" or "relate to" the subject matter, and federal regulations must substantially subsume the subject matter of the state law. *Easterwood*, 507 U.S. at 664-65.

The Court of Appeals adopted this premise and relied upon an Ohio Court of Appeals case in which the Ohio court found that its state blocked-crossing statute was not preempted by FRSA. *Norfolk*, slip op. at 15-16 (citing *State v. Wheeling & Lake Erie Ry. Co.*, 743 N.E.2d 513, 514 (Ohio Ct. App. 2000)). The court in *Wheeling* determined that because no federal regulation governed this issue and there was no evidence that Congress had a clear and manifest purpose to preempt local regulation on how long a stopped train can block an intersection, the state statute was not preempted. *Id.*

Norfolk and the AAR amicus argue that this is a "thin reed" for the Court's reasoning (Appellee's Petition at 21). However, once again they cite to non-controlling law, largely trial court determinations, and rely merely on the "overall structure" as their basis. Additionally, the amicus brief of the Indiana Railroad Company, et al., cite to an unpublished district court decision that found preemption only to grant an injunction against the city's legal director, but to no

other party—even within the same locality. *See CSX Transportation, Inc. v. Williams,* No. 3:16CV2242, 2017 WL 1544958, slip op. at 3 (N.D. Ohio Apr. 28, 2017). However, even this case does not have any extension even in Ohio beyond its limited reach of the locality and does not bind even Ohio courts. Even still, as the State argued below, Indiana's blocked grade crossing statute does not explicitly reference railroad safety—rather, it merely indirectly touches upon it (App. Vol. II p. 199). The chief purpose of the statute is to ensure the flow of traffic and there has been no showing that compliance would substantially interfere with railroad safety. As a result, it cannot be said that the FRSA substantially subsumes all enforcement of the law. *See, e.g., DeHahn v. CSX Transp., Inc.*, 925 N.E.2d 442, 449-50 (Ind. Ct. App. 2010) (FRSA does not preempt law where it does not cover state regulation or claim). The FRSA is concerned with creating a "safe roadbed for trains," not covering the regulation of peripheral areas. *See id.* at 450.

Additionally, no party addresses the fact that the Southern District of Indiana has previously found that even in cases where it is alleged that Indiana's statute may affect areas of federal control, such as speed, length, performance of air-brake tests, et cetera, the law is not preempted where enforcement complies with federal law. *See CSX Transportation, Inc. v. City of Mitchell, Ind.*, 105 F. Supp. 2d 949, 953 (S.D. Ind. 1999). While Norfolk claims that several of its activities may fall within this purview, it has continually failed to show that the implementation of the blocked grade crossing statute inhibits federal law in any specific sense. As the Southern District Court of Indiana observed:

> [W]e perceive situations that may occur in which that statute would warrant enforcement in a manner consistent with federal law, such as, for example, if, after attempting to discern the reasons for the obstruction of rail crossings by trains traveling through its confines, Mitchell officials conclude that the trains were obstructing crossings in excess of ten minute for reasons not attributable to compliance with mandatory federal law, any ensuing decision to effect enforcement of Section 8–6–7.5–1 would likely be consistent with federal law.

Id. (holding that law was not enjoined entirely and was preempted only to the extent the State failed to discern reasons that crossings were blocked, including whether delays were due to compliance with federal regulations); *cf. CSX Trasp. Inc. v. City of Plymouth*, 283 F.3d 812 (6th Cir. 2012).

In contrast to the "considerable solicitude for state law," *Easterwood*, 507 U.S. at 665, Norfolk seeks to have this Court cast aside regulation of the roadways because of the ancillary impact it may have on operations. Norfolk desires an unlimited ability to impose itself across the roads of the community with impunity, regardless of the reason. As was the case below, neither Norfolk nor its amici offer much recourse apart from a lengthy formal complaint leading to mere reporting or an informal process—hardly the clear and express intent of preemption our courts have called for (Mulvey and Nottingham Brief at 20-22). None of the so-called options presented by the former commissioners truly address the harm that may be caused by delaying emergency personnel, the risk posed to drivers, and the strain on the roadways to handle flux of diverted drivers and trucks. In contrast, as the Court of Appeals opinion properly incorporates, Congress knew that it was operating in an area that already had substantial state involvement and was subject to the historical police powers of the state. Against this backdrop, it chose

to not explicitly subsume the ability of states to regulate the length of time grade crossings could block the vital and safe movement of citizens and emergency personnel on the roadways.

CONCLUSION

For the foregoing reasons, the State respectfully requests that this Court deny transfer.

Respectfully submitted,

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WORD COUNT CERTIFICATE

I verify that this Response to Transfer contains no more than 4,200 words.

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CERTIFICATE OF SERVICE

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