No. 98-1511

In the Supreme Court of the United States

CITY OF AUBURN, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

SETH P. WAXMAN
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

HENRI F. RUSH
General Counsel
EVELYN G. KITAY
Attorney
Surface Transportation Board
Washington, D.C. 20423

QUESTION PRESENTED

Whether the Surface Transportation Board reasonably determined that the ICC Termination Act of 1995 preempts state or local regulation that would frustrate or delay the reactivation and operation of a railroad line.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes and regulation:

In the Supreme Court of the United States

No. 98-1511

CITY OF AUBURN, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-21a) is reported at 154 F.3d 1025. The decisions of the Surface Transportation Board (Pet. App. 22a-42a, 43a-53a, 54a-78a) were issued in STB Finance Docket Nos. 33200, 33095, and 32974, respectively. Those decisions are unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 3, 1998, and amended on October 20, 1998. A petition for rehearing was denied on December 22, 1998 (Pet. App. 79a-80a). The petition for a writ of certiorari was filed on March 22, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The ICC Termination Act of 1995 (ICCTA or Act), 49 U.S.C. 701 *et seq.*, abolished the Interstate Commerce Commission, and transferred certain rail functions to the Surface Transportation Board (STB or Board). This litigation involves three separate but related decisions of the Board concerning the reopening of the Stampede Pass railroad line in Washington State.

a. The Stampede Pass line is one of three main lines serving the Seattle-Tacoma area, and it was historically owned and operated by the Burlington Northern and Santa Fe Railway Company (BN). See Pet. App. 9a. In 1986, as BN and other large railroads streamlined their operations by eliminating track that was deemed to constitute excess capacity, a portion of the Stampede Pass line was sold to the Washington Central Railroad Company (WC). After the sale, BN continued to operate the rest of the line, providing limited local service. See *ibid.*; see also *id.* at 23a. By the mid-1990's, however, railroad companies in general, and BN in particular, had begun expanding their infrastructure to meet an anticipated growth in shipper demand. In 1996, as part of that expansion, BN sought STB approval to reacquire the portion of the Stampede Pass line that it had sold to WC and to reestablish the line as a third main line route for certain traffic. BN's request was filed in *Burlington Northern Santa Fe Corp.*, STB Finance Docket No. 32974 (Oct. 24, 1996) (*BNSF Control*) (Pet. App. 54a-78a). See generally 49 U.S.C. 11323-11325 (Supp. II 1996) (addressing STB jurisdiction over mergers and acquisitions).

Because the Stampede Pass line had been subject only to limited use for 12 years, it was in need of modernization and repair. BN initially submitted certain

permit applications for various improvement projects with local authorities. When delays ensued during the permit review process, however, BN contended that federal law preempted local environmental regulation. See Pet. App. 9a, 24a.

In August 1996, King County—one of the localities through which the line passed—filed a petition with the STB seeking a formal declaratory order concerning the extent to which the ICCTA preempted local regulatory authority. On September 25, 1996, the STB determined that the ICCTA preempted the County's requirement that BN obtain local permits before beginning construction related to the reopening and operation of the Stampede Pass line. *Burlington N. R.R.*, STB Finance Docket No. 33095 (*King County*) (Pet. App. 43a-53a). The Board denied the intervention request of petitioner City of Auburn, but it invited petitioner to submit its own petition for a declaratory order (see Pet. App. 44a n.2), which petitioner did. That petition was filed in *Burlington Northern Railroad*, STB Finance Docket No. 33200 (July 1, 1997) (*Preemption*) (Pet. App. 22a-42a).

Meanwhile, on October 24, 1996, the STB decided *BNSF Control* and approved BN's proposed control of WC and its operation of WC's segment of the Stampede Pass line. Pet. App. 54a-78a. To meet its obligations under the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 *et seq.*, and related environmental laws, the STB prepared an Environmental Assessment of BN's proposal and then, after comments were received, a Post Environmental Assessment. The STB found that, subject to implementation of certain environmental mitigation conditions, BN's project posed no potential for significant environmental im-

pacts and that an Environmental Impact Statement was not needed. See Pet. App. 70a-77a.

No party sought a stay of *King County* or *BNSF Control*. The improvements to the Stampede Pass line have now been completed, and BN has been operating on that line since December 1996. See Pet. App. 31a n.12.

b. In July 1997, the STB issued its declaratory order in *Preemption*. Pet. App. 22a-42a. The Board determined that, under the preemption provisions of 49 U.S.C. 10501(b)(2) and 11321(a) (Supp. II 1996),[1] "a state or local permitting process for prior approval of this project, or of any aspect of it related to interstate transportation by rail, would of necessity impinge upon the federal regulation of interstate commerce and therefore is preempted." Pet. App. 31a; see *id.* at 32a. In particular, the Board found that imposition of such a process could preclude BN from reactivating the Stampede Pass line or delay its efforts to maintain and reactivate the line, thereby "interfer[ing] with the

---

[1] Section 10501(b) gives the STB exclusive jurisdiction over "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." It also provides that 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." Section 11321(a) separately provides that, in a merger or acquisition transaction approved under 49 U.S.C. 11323-11325 (Supp. II 1996), "[a] rail carrier * * * participating in that approved or exempted transaction is exempt from the antitrust laws and from all other law, including State and municipal law, as necessary to let that rail carrier * * * hold, maintain, and operate property * * * acquired through the transaction," and it further provides that "[t]he authority of the Board under this subchapter is exclusive."

federal licensing program and unreasonably burden-[ing] interstate commerce." *Id.* at 35a-36a. The Board added, however, that application of state and local law would *not* be preempted where it would not frustrate the federal scheme governing the construction, acquisition, or operation of railroad tracks or facilities. *Id.* at 33a-36a.

2. Petitioner challenged *King County*, *Preemption*, and *BNSF Control* in separate review proceedings. The court of appeals consolidated the three cases and affirmed. It held that 49 U.S.C. 10501(b) and 11321(a) (Supp. II 1996) "explicitly grant the STB exclusive authority over railway projects like Stampede Pass" and preempt the local preapproval process that petitioner sought to impose here. Pet. App. 13a. That conclusion, the court noted, is consistent with this Court's broad construction of the predecessor to Section 11321(a) in *Norfolk & Western Railway* v. *American Train Dispatchers' Ass'n*, 499 U.S. 117 (1991), and with a variety of lower court decisions broadly interpreting the ICCTA's preemption provisions. Pet. App. 14a-16a.[2] The court of appeals specifically rejected, as contrary to the statutory text and unworkable in practice, petitioner's proposal to confine the scope of those preemption provisions to state and local "economic" regulations. The court explained that, "if local authorities have the ability to

---

[2] See *CSX Transp., Inc.* v. *Georgia Pub. Serv. Comm'n*, 944 F. Supp. 1573, 1581 (N.D. Ga. 1996) ("It is difficult to imagine a broader statement of Congress's intent to preempt state regulatory authority over railroad operations" than 49 U.S.C. 10501(b) (Supp. II 1996).); *Burlington N. Santa Fe Corp.* v. *Anderson*, 959 F. Supp. 1288, 1294-1295 (D. Mont. 1997); *Georgia Pub. Serv. Comm'n* v. *CSX Transp., Inc.*, 484 S.E.2d 799, 801 (Ga. Ct. App. 1997); *In re Burlington N. R.R.*, 545 N.W.2d 749, 751 (Neb. 1996).

impose 'environmental' permitting regulations on the railroad, such power will in fact amount to 'economic regulation' if the carrier is prevented from constructing, acquiring, operating, abandoning, or discontinuing a line." *Id.* at 16a.[3]

ARGUMENT

The decision of the court of appeals was correct and does not conflict with any decision of this Court or of another court of appeals. Further review is therefore not warranted.[4]

1. Sections 10501(b) and 11321(a) grant the STB exclusive authority over all aspects of the Stampede Pass project and, by their terms, preempt the pre-approval requirements that petitioner sought to impose here. As the court of appeals recognized (Pet. App. 12a-16a), that conclusion comports with several district court decisions addressing those provisions (see note 2, *supra*), and with this Court's decision in *Norfolk & Western Railway* v. *American Train Dispatchers' Ass'n*, 499 U.S. 117 (1991) (*Train Dispatchers*). *Train Dispatchers* broadly construed the statutory predecessor to Section 11321(a) to encompass not just traditional economic regulation, but also collective bar-

---

[3] The court of appeals separately upheld the STB's environmental determinations. See Pet. App. 17a-21a. Petitioner does not here challenge that portion of the court's holding.

[4] Even if the question presented here were otherwise worthy of review, this case would be an inappropriate vehicle for seeking to resolve it. As the STB observed, "the improvements to the Stampede Pass line largely have been completed" (Pet. App. 31a n.12), and it is therefore unclear whether there is a present controversy between petitioner and the Board. As a result, the Court could not reach the merits of petitioner's claims without first addressing substantial mootness concerns.

gaining obligations and, indeed, "*all law* as necessary to carry out [a federally] approved transaction." *Id.* at 129.

Petitioner does not appear to deny that, read according to their plain text, Sections 10501(b) and 11321(a) in fact preempt the preapproval requirements at issue. Relying on the legislative history of the ICCTA, however, petitioner advocates carving out, from the scope of the Act's preemption provisions, an exception for preapproval requirements concerning "environmental" and similar issues. See Pet. 13-20.

As an initial matter, the court of appeals was correct in holding that the plain language of the Act answers the question presented here and that recourse to the legislative history is therefore unnecessary. See Pet. App. 13a-14a; see also *id.* at 40a (determination by STB that same conclusion follows from Congress's total preemption of state regulation of spur and switching tracks); see generally *Connecticut Nat'l Bank* v. *Germain*, 503 U.S. 249, 253-254 (1992) ("We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there."). In any event, even the passages of legislative history upon which petitioner relies do not support petitioner's proposed exception for preapproval requirements on environmental and other issues. Those passages suggest only that States retain certain "police powers" despite the broad scope of exclusive federal railroad regulation. Pet. 7-8 (quoting H.R. Rep. No. 311, 104th Cong., 1st Sess. 95-96 (1995)); see also Pet. 8-10. The passages identify criminal law prohibitions on "bribery and extortion" as examples of the "police powers" that the Act does not preempt (see Pet. 9-10), but they do not suggest any

similar exception for the environmental and permitting requirements that petitioner sought to exercise here.

Moreover, as the court of appeals recognized (Pet. App. 16a), it is not even possible to draw a clear distinction between "economic" regulations—which petitioner acknowledges fall within the preemptive scope of the ICCTA—and the class of "environmental" and permitting regulations that petitioner seeks to remove from that scope. "[I]f local authorities have the ability to impose 'environmental' permitting regulations on the railroad, such power will in fact amount to 'economic regulation' if the carrier is prevented from constructing, acquiring, operating, abandoning, or discontinuing a line." *Ibid.* Here, the STB found, application of the preapproval requirements that petitioner sought to impose would have "interfere[d] with the federal licensing program and unreasonably burden[ed] interstate commerce." *Id.* at 35a. In particular, the STB added, those requirements would have served an unmistakably economic objective, for petitioner's "admitted goal [wa]s to constrain BN's train operations that we have already approved in *BNSF Control* in order to force BN to fund infrastructure improvements related to the line." *Id.* at 36a; see also *id.* at 41a ("[W]e note that none of BN's Stampede Pass construction projects criticized by petitioners is located within their municipal boundaries or jurisdiction.").[5]

---

[5] The STB's preemption of state and local preapproval requirements did not, of course, insulate the Stampede Pass project from environmental review. Petitioner and other affected localities had an adequate opportunity to raise environmental and land use concerns regarding this line. See Pet. App. 20a, 37a. As the court of appeals concluded (*id.* at 19a), "the STB conducted a thorough, independent investigation of the environmental conse-

2. Petitioner contends that the decision below threatens to foreclose *any* application of state and local police power regulations to activities associated with railroads. That is incorrect.

In the decision under review, the Board narrowly addressed whether "a state or local permitting process for *prior approval* of *this project*, or of any aspect of it related to interstate transportation by rail," is preempted. Pet. App. 31a (emphasis added); see also *id.* at 32a ("[A]ny state or local statute that requires an interstate railroad like BN to obtain state or local approval before construction or abandonment of a line, or

---

quences of the Stampede Pass line reopening as mandated by law." Petitioner repeatedly suggests (*e.g.*, Pet. 18-19) that the court overlooked concerns that BN would construct an intermodal yard in Auburn without further review by the STB. But, while BN at one time considered a plan to expand the Auburn yard, it subsequently made alternate arrangements and indicated during the *BNSF Control* proceedings that it has *no* plans to expand the yard for the reasonably foreseeable future. Moreover, BN has been filing periodic status reports concerning its plans for that yard with the district court in *City of Auburn* v. *King County*, No. C96-1565Z (W.D. Wash. Jan. 7, 1997). Similarly, the emergency bridge repairs that petitioner criticizes (Pet. 18 & n.3) were properly conducted in consultation with the United States Army Corps of Engineers and the National Marine Fisheries Service. Finally, petitioner is mistaken in contending (Pet. 11-12) that Section 10501(b) must be ambiguous because, if construed to preempt state environmental regulation, it would also preempt federal environmental statutes such as NEPA. The STB has reasonably determined that Section 10501(b) does not somehow nullify the Board's own obligation to follow the requirements of NEPA and similar statutes in contexts where they are applicable. See 49 C.F.R. 1105.1; see also Pet. App. 17a-21a. Because the Board itself conducts the proceedings in which it applies those requirements, there is no risk of interference with the STB's jurisdiction over rail transportation.

a merger or acquisition of control, would appear, on its face, to conflict with ICCTA and is preempted."); *id.* at 49a-51a (similar). The Board found that such preapproval requirements pose a particular threat to the statutory scheme, because they assert a "power to deny authorization, which could frustrate the activity that is subject to federal control." *Id.* at 35a. Such requirements, the Board found, fall squarely within the preemptive scope of the ICCTA.

At the same time, the Board recognized that "not all state and local regulations that affect interstate commerce are preempted" by the ICCTA. Pet. App. 33a. In particular, the Board found, state or local law remains valid when it "can be applied without interfering with the [f]ederal law" or the purposes of the federal scheme. *Id.* at 34a. The Board offered the following examples:

> [E]ven in cases where we approve a construction or abandonment project, a local law prohibiting the railroad from dumping excavated earth into local waterways would appear to be a reasonable exercise of local police power. Similarly * * *, a state or local government could issue citations or seek damages if harmful substances were discharged during a railroad construction or upgrading project. A railroad that violated a local ordinance involving the dumping of waste could be fined or penalized for dumping by the state or local entity. The railroad also could be required to bear the cost of disposing of the waste from the construction in a way that did not harm the health or well being of the local community.

Id. at 35a-36a. The Board's fact-specific approach, which addresses the degree of interference with the

federal scheme, comports with this Court's own preemption analysis in *Train Dispatchers*. See 499 U.S. at 129 (predecessor to Section 11321(a) preempts "all law as necessary to carry out [a federally] approved transaction") (emphasis omitted).

Here, the Board reasonably construed the ICCTA's preemption provisions as they apply to the Stampede Pass line, and its conclusions are entitled to substantial deference. See *Hayfield N. R.R.* v. *Chicago & N.W. Transp. Co.*, 467 U.S. 622, 634 (1984); *Brotherhood of Locomotive Eng'rs* v. *United States*, 101 F.3d 718, 726 (D.C. Cir. 1996); see generally *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). In a future case, the task of construing those provisions may also belong with an appropriate lower court with jurisdiction to review challenges to the application of particular state and local laws. See generally Pet. App. 14a-15a. But the administrative and judicial process of construing the ICCTA and its effect on state and local regulation has only recently begun. On future occasions, the Board and the lower courts will undoubtedly be asked to determine, on a case-by-case basis, the circumstances in which the ICCTA either does or does not preempt state and local regulation. Beyond the general guidance provided by the Court's opinion in *Train Dispatchers*, it would be premature for this Court to review questions about the ICCTA's preemptive scope before the Board and the lower courts have had the opportunity to consider the preemption question in a variety of concrete factual settings.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General

HENRI F. RUSH
General Counsel
EVELYN G. KITAY
Attorney
Surface Transportation Board

MAY 1999