No. 12-1448

IN THE
Supreme Court of the United States

NORFOLK SOUTHERN CORPORATION,
Petitioner,

v.

ROBERT ZIMMERMAN,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

REPLY BRIEF

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REPLY IN SUPPORT OF PETITION

Respondent does not dispute that the Federal Railroad Administration ("FRA") collects thousands of crossing inventory reports and railroad accident reports each year in a computerized database for states and the U.S. Department of Transportation to use "to analyze information for planning and implementation of crossing improvement programs," including the Railway-Highway Crossings Program codified in § 130 of title 23.[1] In addition, respondent concedes that *Pierce County* v. *Guillen*, 537 U.S. 129, 145 (2003), held that the evidentiary privilege in 23 U.S.C. § 409 protects both "the information an agency generates, *i.e.* compiles, for [§ 130] purposes" and "any information that an agency collects from other sources for [§ 130] purposes." Only "'information compiled or collected for purposes unrelated to [§ 130]'" is unprotected. Opp. 14 (quoting *Guillen*, 537 U.S. at 145-46).

These concessions confirm the importance of the questions presented and the need for this Court's review. Instead of following *Guillen* and holding that all crossing inventory reports and accident reports are privileged because they are compiled and collected for the purpose of planning the safety enhancement of railway-highway crossings pursuant to § 130, the Third Circuit held that only those reports required to be submitted by a specific provision of § 130 itself are protected. Pet. App. 18a-

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[1] Fed. R.R. Admin., U.S. Dep't of Transp., *National Highway-Rail Crossing Inventory, Policies, Procedures and Instructions for States and Railroads* 3 (2007), *available at* http://www.fra.dot.gov/eLib/details/L02866; *see also* 77 Fed. Reg. 64,077, 64,078-79 (Oct. 18, 2012) (discussing purpose and history of the National Crossing Inventory).

19a. Because many of the reports in the FRA database were submitted voluntarily by states or railroads, and others continue to be submitted by railroads pursuant to reporting requirements codified in other sections of Title 23, the Third Circuit's construction has the anomalous effect of affording different protections to reports that are collected by FRA and used by states for the same § 130-related purpose. As the Association of American Railroads explains, that decision is of great concern to the railroad industry because "it potentially renders admissible as evidence in civil litigation a great deal of information that is compiled and collected for the purpose of improving crossing safety," which undermines the purpose of § 409 and "creates a great deal of uncertainty where clarity is demanded." Br. of the Ass'n of Am. RR. as *Amicus Curiae* at 3, 13.

The Brief in Opposition does not refute that fundamental point. Instead, respondent argues that some arguments in the petition were not raised below, the facts of this case are unique, and the Third Circuit's decision is correct. Each of these arguments is wrong, and none provides a basis for denying the petition.

1. Respondent claims that the petition raises issues that were not raised in the courts below. Opp. at 17, 19. That is incorrect. Norfolk Southern argued below what it argued in the petition: All of the crossing inventory reports and accident reports about the crossing at issue are protected by the § 409 privilege, and the accident reports are protected by the accident report privilege in 49 U.S.C. § 20903 as well. The Third Circuit panel majority rejected these arguments, which were largely accepted by the district court and dissenting court of appeals judge. *Compare* Pet. App. 18a-19a, 26a (reversing district

court and rejecting Norfolk Southern's argument that all crossing inventory reports and accident reports are protected by the § 409 privilege); *id.* at 24a-26a (reversing district court and rejecting Norfolk Southern's argument that the accident report privilege covered reports of prior accidents at the crossing), *with id.* at 71a-73a (Aldisert, J., dissenting, because he would affirm the district court's holdings that the inventory crossing reports are privileged under § 409 because "they were collected, generated or compiled for the purposes of § 130" and the accident reports are "privileged pursuant to 49 U.S.C. § 20903").

That Norfolk Southern's petition cites additional authorities and arguments in support of its privilege claims is neither unusual nor improper. This Court's "traditional rule" is that if a federal claim is properly presented or passed on below, "'a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below.'" *Lebron* v. *Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995) (quoting *Yee* v. *Escondido*, 503 U.S. 519, 534 (1992)). That principle applies directly here.

2. Respondent also claims that this case presents an unusual factual scenario that is unlikely to recur and that makes it improper to apply the § 409 privilege or the accident report privilege to the reports about the crossing at issue here. Opp. 6, 11-12, 16-17. Specifically, respondent claims that Norfolk Southern provided "false information" about the train speed limit in some of these reports, and that it seeks an evidentiary privilege that "allows it to mislead the FRA with impunity." *Id.* at 6, 12. This argument is a red herring that is based on a misunderstanding of the facts and the law.

As a matter of law, a holding that the crossing inventory reports and accident reports are privileged will not permit Norfolk Southern to mislead the FRA about the speed limit on the track or in any way limit FRA's authority to enforce federal safety regulations. As explained in the petition, the speed limit is set by federal regulation based on the classification of the track. Pet. 6 (citing 49 C.F.R. § 213.9). The track classification, in turn, is based on FRA safety standards relating to the structure and geometry of the track (*e.g.*, the number of crossties, the track gage, track alignment, track curvature, and track surface). See 49 C.F.R. pt. 213, subpts. C & D. Norfolk Southern (like other railroads) is required to conduct regular inspections of its tracks and maintain inspection records that FRA can and does review. *Id.* §§ 213.233, 213.241. FRA also conducts its own inspections and can lower the classification and speed limit of any track that does not comply with federal track classification standards. *Id.* § 216.15. A railroad that fails to comply with these regulations or operates trains in excess of the designated track speed is subject to FRA enforcement actions. *Id.* § 213.15.

Nor is it surprising that there could be differences in the information contained in crossing inventory reports and accident reports filed over the course of decades by states and railroads. As FRA itself acknowledges, federal regulations permit a railroad to "change the class of track (and thus increase or decrease the track speed) whenever it deems appropriate and without prior notification to, or approval by, the FRA" as long the track satisfies the appropriate federal safety standards. Fed. R.R. Admin, *Track Safety Standards Fact Sheet* 1 (2013), http://www.fra.dot.gov/eLib/details/L04308. These

and other characteristics of a crossing can change over time, and no system of records is perfect. FRA and Congress addressed the issue of changed conditions by requiring railroads to keep regular inspection records documenting the condition of the track (*supra*) and requiring states and railroads to submit periodic updates to the National Crossing Inventory,[2] not by rendering the crossing inventory reports and accident reports admissible in individual damages actions.

3. Instead, as *Guillen* held, whether reports are privileged under § 409 depends on the purpose for which they were collected or compiled: reports "compiled or collected for § [130] purposes" are privileged, but reports "compiled or collected for purposes unrelated to § [130]" are not. 537 U.S. at 146. As the petition explains (at 12-18), crossing inventory reports and accident reports fall squarely within this privilege because they are collected by FRA in a database for use by states in identifying, evaluating and planning the safety enhancement of railway-highway crossings with federal funds pursuant to § 130.

Respondent attempts to distinguish *Guillen* on the ground that the party invoking the privilege there was the state, not a railroad. Opp. 15-16. But nothing in § 409 suggests that the privilege applies

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[2] *See* 23 U.S.C. § 130(*l*) (requiring states to submit updated information to the National Crossing Inventory); 49 U.S.C. § 20106(a) & (b) (requiring railroads to submit updated information to the National Crossing Inventory); Letter from Norman Y. Mineta, to J. Dennis Hastert 2 (July 8, 2002) (enclosing a bill entitled the "Federal Railroad Safety Improvement Act" proposing such periodic updates because some information in the Inventory is "missing" or "outdated"), http://testimony.ost.dot.gov/final/railroad.pdf.

only in litigation against states or is limited to reports compiled or collected by states. Indeed, the only reference to "states" in the statute is the statement that the privilege applies in both "Federal" and "State court proceeding[s]." 23 U.S.C. § 409. That is not surprising because, as the Solicitor General has previously explained, Congress enacted § 409 because it "recognized that state highway departments, as well as private entities such as railroads, are reluctant to compile detailed and accurate information about highway safety problems if there is a significant risk that the information will be used against them in actions for damages arising out of highway accidents." Br. for the United States as *Amicus Curiae*, at 12, *Ala. Highway Dept.* v. *Boone*, No. 90-1412 (Aug. 1991), *cert. denied*, 502 U.S. 937 (1991),

4. Respondent's remaining arguments concern the merits of the case. Opp. 17-20. These arguments are secondary at this stage and are mistaken in any event.

a. Respondent argues that the Third Circuit properly construed § 409 as privileging only reports compiled or collected pursuant to a requirement imposed by § 130 itself. Opp. 18. But respondent's only justification for this interpretation is the assertion that the prepositional phrase "'pursuant to'" "functions as an adverb" and must modify the verbs "'compiled or collected.'" *Id.* As the petition explains (at 15-16), a prepositional phrase is normally read as modifying the clause or phrase immediately antecedent to it, so the more natural reading of the text is that "pursuant to" modifies "identifying, evaluating or planning"—*i.e.*, that § 409 protects reports "compiled or collected for the purpose of identifying, evaluating, or planning the safety

enhancement of . . . railway-highway crossings pursuant to [§ 130]." 23 U.S.C. § 409.

Moreover, respondent's construction has the anomalous effect of privileging reports submitted to the National Crossing Inventory by states after 2008 but not the exact same type of reports submitted by railroads or, as in this case, even reports submitted by the state itself prior to 2008. Pet. App. 19a-24a. Respondent quotes the Third Circuit's explanation that "'Congress may well have had a stronger interest in protecting states, rather than railroads from litigation,'" (Opp. 15 n.15), but does not explain how the Third Circuit's construction would further that interest. It does not. A state sued for an accident at a crossing the plaintiff alleged to be unreasonably dangerous would find little comfort in the exclusion from evidence of a report it submitted to the National Crossing Inventory if the plaintiff could introduce a report containing the same type of information that was submitted by a railroad. *Cf.* Pet. App. 19a (holding that "the 2010 Pennsylvania report is privileged" but "the 2010 Norfolk Southern Report is not").

b. Respondent also argues that the Third Circuit correctly held that the accident report privilege—which bars the use of any part of an accident report "in a civil action for damages resulting from a matter mentioned in the report," 49 U.S.C. § 20903—requires the exclusion of the report of his accident but not reports of other accidents at the same intersection. The Brief in Opposition criticizes (Opp. 19-20) Norfolk Southern's argument that the use of the indefinite article "*a* matter," instead of the definite article "*the* matter," indicates that an accident report encompasses more than one matter, and thus the words "a matter mentioned in the

report" must mean more than "the accident discussed in the report." See Pet. 19-20. But respondent's explanation for why Norfolk Southern's construction is supposedly "nonsensical" (Opp. 20) is entirely devoid of any discussion of the statutory text or purpose. Respondent relies instead on a hypothetical sentence about a motorist approaching a crossing in which the words "'a' train" would be "generally understood" as meaning "'the' train" at the crossing. *Id.* That there may be contexts in which the articles "a" and "the" could be used interchangeably without changing the generally understood meaning of the sentence says nothing about whether that is the case in the accident report privilege statute at issue here. *Cf. Rumsfeld* v. *Padilla*, 542 U.S. 426, 434 (2004) (the "use of the definite article in reference to the custodian" in the federal habeas statute "indicates that there is generally only one proper respondent to a given prisoner's habeas petition"). And there is no serious question that the fundamental purpose of encouraging more comprehensive reporting of accidents by railroads will be jeopardized by the crabbed reading of the scope of the privilege proposed by respondent and embraced by the Third Circuit majority below.

CONCLUSION

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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