



Washington State Inventory of Rail Safety Oversight (Appendices)

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Appendix A – California State Railroad Safety Laws and General Orders¹

Authority	Statutory Specified Tasks (Paraphrased)	CPUC - General Orders
Public Utilities Code Section 309.7(a), (b), & (c)	<p>The Safety and Enforcement Division of the California Public Utilities Commission shall be responsible for inspection, surveillance, and investigation of the rights-of-way, facilities, equipment, and operations of railroads and public mass transit guideways, and for enforcing state and federal laws, regulations, orders, and directives relating to transportation of persons or commodities, or both, of any nature or description by rail. SED shall advise the commission on all matters relating to rail safety, and shall propose to the commission rules, regulations, orders, and other measures necessary to reduce the dangers caused by unsafe conditions on the railroads of the state. SED shall exercise all powers of investigation granted to the commission, including rights to enter upon land or facilities, inspect books and records, and compel testimony.</p> <p>The commission shall employ sufficient federally certified inspectors to ensure at the time of inspection that railroad locomotives and equipment and facilities located in Class I railroad yards in California are inspected not less frequently than every 120 days, and all main and branch line tracks are inspected not less frequently than every 12 months. SED shall, with delegated commission attorneys, enforce safety laws, rules, regulations, and orders, and collect fines and penalties resulting from the violation of any safety rule or regulation. The activities of the consumer protection and safety division that relate to safe operation of common carriers by rail, other than those relating to grade crossing protection, shall also be supported by the fees paid by railroad corporations. (Related: General Order 22-B and the Resolution Railroad Operations and Safety Branch -002)</p>	<p>GO 22-B: Requires that railroads immediately furnish the commission notification of all train collision and derailments resulting in loss of life or injury, all bridge failures, and all highway crossing accidents resulting in loss of life or injury.</p> <p>Resolution ROSB-002 established a civil penalty citation program for enforcing compliance with safety requirements for railroad carriers.</p>

¹ Source: Copied from the 2021 CPUC Annual Railroad Safety Report.

Authority	Statutory Specified Tasks (Paraphrased)	CPUC - General Orders
Section 315	The commission shall investigate the cause of all accidents occurring within this State upon the property of any public utility or directly or indirectly arising from or connected with its maintenance or operation, resulting in loss of life or injury to person or property and requiring, in the judgment of the commission, investigation by it, and may make such order or recommendation with respect thereto as in its judgment seems just and reasonable. (Related: GO 22-B)	
Section 421	The commission shall annually determine a fee and is permitted to expend funds for specified purposes. The commission shall hire four additional operating practices inspectors who shall become federally certified.	
Section 761	Whenever the commission finds that rules, practices, equipment, appliances, facilities or service of any public utility are unjust, unreasonable, unsafe, improper, inadequate or insufficient, the commission shall fix the rules. (Related: GO 27- B)	GO 27-B: Filing and posting of railroad timetables and changes.

Authority	Statutory Specified Tasks (Paraphrased)	CPUC - General Orders
Section 765.5	<p>The purpose of this section is to provide that the commission takes all appropriate action necessary to ensure the safe operation of railroads in the state. The commission shall dedicate sufficient resources necessary to adequately carry out the State Participation Program for the regulation of rail transportation of hazardous materials as authorized by the Hazardous Material Transportation Uniform Safety Act of 1990 (Public Law 101-615). On or before July 1, 1992, the commission shall hire a minimum of six additional rail inspectors who are or shall become federally certified, consisting of three additional motive power and equipment inspectors, two signal inspectors and one operating practices inspector, for the purpose of enforcing compliance by railroads operating in this state with state and federal safety regulations. On or before July 1, 1992, the commission shall establish, by regulation, a minimum inspection standard to ensure, at the time of inspection, that railroad locomotives, equipment and facilities located in Class I railroad yards in California will be inspected not less frequently than every 120 days, and all branch and main line track will be inspected not less frequently than every 12 months. Commencing July 1, 2008, in addition to the minimum inspections undertaken, the commission shall conduct focused inspections of railroad yards and track, either in coordination with the Federal Railroad Administration or as the commission determines to be necessary. The focused inspection program shall target railroad yards and track that pose the greatest safety risk, based on inspection data, accident history and rail traffic density.</p>	

Authority	Statutory Specified Tasks (Paraphrased)	CPUC - General Orders
Section 768	<p>The commission may, after a hearing, require every public utility to construct, maintain and operate its line, plant, system, equipment, apparatus, tracks and premises in a manner so as to promote and safeguard the health and safety of its employees, passengers, customers and the public. The commission may prescribe, among other things, the installation, use, maintenance and operation of appropriate safety or other devices or appliances, including interlocking and other protective devices at grade crossings or junctions and block or other systems of signaling. The commission may establish uniform or other standards of construction and equipment and require the performance of any other act that the health or safety of its employees, passengers, customers or the public may demand. (Related: GO 26-D, GO 72-B, GO 75-D, GO 118-A, GO 126, GO 135)</p>	<p>GO 26-D: Establishes minimum clearances between railroad tracks, parallel tracks, side clearances, overhead clearances, freight car clearances, clearances for obstructions, motor vehicles, and warning devices to prevent injuries and fatalities to rail employees.</p> <p>GO 72-B: Formulates uniform standards for grade crossing construction to increase public safety.</p> <p>GO 75-D: Establishes uniform standards for warning devices for at-grade crossings to reduce hazards associated with persons traversing at-grade crossings.</p> <p>GO 118-A: Provides standards for the construction, reconstruction, and maintenance of walkways adjacent to railroad tracks to provide a safe area for train crews to work.</p> <p>GO 126: Establishes requirements for the contents of First-Aid kits provided by common carrier railroads.</p>

Authority	Statutory Specified Tasks (Paraphrased)	CPUC - General Orders
Section 916	<p>Requires the commission to report to the legislature on its rail safety activities on or by November 30 of each year. In addition, PUC Section 916.3 requires CPUC to report on the actions it has taken to comply with Section 765.5, which requires the commission to take all appropriate action necessary to ensure the safe operation of railroads in the state. This report chronicles the rail safety activities of the Railroad Operations and Safety Branch and identifies the proactive efforts that CPUC’s railroad safety inspectors in the Rail Safety Division have taken to promote the safe operation of railroads during the previous fiscal year.</p>	
Section 916.1	<p>Requires the commission to report annually the results of its investigations of runaway trains or other uncontrolled train movements that threaten public health and safety, as per Section 7661. This is included in this report in Chapter IV.</p> <p>PUC Section 916.2 requires CPUC to report to the legislature on sites on railroad lines in California it finds to be hazardous. The report is to include a list of all derailment accident sites in the state where accidents have occurred within at least the previous five years and a list of all railroad sites in the state that the commission has determined to pose a local safety hazard (called Local Safety Hazard Sites). Section 916.2 permits this report to be combined with the report required by Section 916.</p>	
Section 916.2 (formerly Section 7711)	<p>Requires the commission to provide an annual report to the legislature on hazardous sites. Requires the commission to identify local safety hazards on California railroads and to report on recent California railroad accident history. Specifically, the commission must list all derailment accident sites in the state on which accidents have occurred within at least the past five years and indicate whether the accidents occurred at or near sites that the commission has determined to pose a local safety hazard.</p>	

Authority	Statutory Specified Tasks (Paraphrased)	CPUC - General Orders
Section 916.3	Requires CPUC to report annually on the impact on competition, if any, of the regulatory fees assessed railroad corporations for the support of CPUC's activities.	
Section 7661	The commission shall investigate any incident that results in a notification to the governor's Office of Emergency Services and shall report its findings concerning the cause or causes to the commission.	
Section 7662	Requires a railroad to place appropriate signage to notify an engineer of an approaching grade crossing and establishes standards for the posting of signage and flags, milepost markers and permanent speed signs.	
Section 7665.2	Requires every operator of rail facilities to provide a risk assessment to the commission and the office for each rail facility in the state that is under its ownership, operation, or control, and prescribes the elements of the risk assessment.	
Section 7665.4	Requires the rail operators to develop an infrastructure protection program and requires the commission to review the infrastructure protection program submitted by a rail operator. Permits the commission to conduct inspections to facilitate the review and permits the commission to order a rail operator to improve, modify or change its program to comply with the requirements of this article. Permits the commission to fine a rail operator for failure to comply with the requirements of this article or an order of the commission pursuant to this section.	
Section 7665.6	Requires every rail operator to secure all facilities that handle or store hazardous materials; store hazardous materials only in secure facilities; ensure that the cabs of occupied locomotives are secured from hijacking, sabotage or terrorism; and secure remote-control devices. Precludes every rail operator from leaving locomotive equipment running while unattended or unlocked, and from using remote control locomotives to move hazardous materials over a public crossing, unless under specified circumstances. (Related: GO 161)	GO 161: Establishes safety standards for the rail transportation of hazardous materials.

Authority	Statutory Specified Tasks (Paraphrased)	CPUC - General Orders
Section 7665.8	Requires every rail operator to provide communications capability to alert law enforcement officers, bridge tenders and rail workers in a timely manner of the local or national threat level for the rail industry, that is, sabotage, terrorism or other crimes.	
Section 7673	Requires every railroad that transports hazardous materials to provide a system map showing mileposts, stations, terminals, junction points, road crossings and locations of pipelines in its rights-of-way.	
Section 7711.1	Requires the commission to collect and analyze near-miss data.	

General Orders

General Orders cover regulatory requirements such as the reporting of accidents on railroads, clearances on railroad and street railroads as to side and overhead structures, parallel tracks and crossings, and posting of railroad timetables and changes.

Commission Decisions and Resolutions

The Railroad Citation Program and Appeal Procedure (ROSB-002) establishes a civil penalty citation program for enforcing compliance with safety requirements for railroad carriers throughout California.

Appendix B – California Public Utilities Commission Transit Oversight Background

The California Public Utilities Commission has provided rail transit oversight since the 1950s, much earlier than when the Federal Transit Administration first began to require states to implement a federal oversight program in the 1990s. The California Legislature gave authority to the CPUC to conduct safety oversight of rapid transit systems individually in California in the mid-1950s, and then in the 1970s, the legislature provided the CPUC broad authority that included all transit-related systems. With the enactment of California Public Utilities Code §991521, all fixed guideway public transportation systems in California that are planned, acquired or constructed are subject to the CPUC regulations.

In 1992, the governor of California designated the CPUC the authority to oversee the development and implementation of safety plans for all fixed guideway transit systems in California, which established the commission as the State Safety Oversight Agency. The action by the governor occurred four years before FTA adopted 49 Code of Federal Regulations Part 659. These regulations established oversight obligations that an SSOA, such as the CPUC, was required to comply with on an interim basis until FTA certified the CPUC's safety oversight program in 2013. At that time, the CPUC's program was only one of two programs in the nation that FTA had certified that met all interim certification requirements, which also made it eligible to apply for available grant funding. According to the CPUC, since 2013, it has applied for and received seven federal grants totaling \$27.6 million.

Based on changes that FTA made to 49 CFR Part 674 in 2016, the CPUC made changes to its safety oversight program. These changes were made to attain FTA certification based on new requirements. The CPUC obtained FTA certification six months before the required deadline. FTA changed 49 CFR §674.13(a)(7) and 49 CFR §674.39 (a)(3) to require that every SSOA that oversees rail fixed guideway public transportation systems submit an annual report that summarizes its oversight activities for the preceding 12 months.

Appendix C - New York State Laws and Rules that Relate to Rail Transit and to the Public Transportation Safety Board

The following text is quoted from the Consolidated Laws of New York:

Consolidated Laws of New York Transportation

Article 9-B. State Public Transportation Safety Board

§ 215. Legislative findings

The legislature hereby finds and declares that the state has a responsibility to insure [sic] the safety of public transportation systems. Further, there exists a need for an independent, investigative and advisory body to examine the causes of accidents on public transportation systems and make recommendations in order to prevent the occurrences of accidents and promote the safety of the public. Therefore, this article establishes a public transportation safety board to provide this protection and insure [sic] the health and safety of the citizens of the state who use public transportation facilities.

§ 216. State public transportation safety board

1. There is hereby created in the department a board, to be known as the state public transportation safety board. Such board shall be responsible for the investigation of accidents involving public transportation in the state, including commuter rail, subways, rapid transit and buses. The board shall also be responsible for the presentation of recommendations to all public transportation operators and carriers to prevent the occurrence of future accidents. Such board shall consist of the commissioner and six other members, no more than three of whom shall belong to the same political party. Two of the members of the board shall be selected by the governor from a list submitted by the temporary president of the senate and two from a list submitted by the speaker of the assembly. The remaining two members shall be selected by the governor. One from each category of selected members shall have competence and experience in connection with the operation, design or management of public transportation facilities and systems. Three of the members, other than the commissioner, shall be from the metropolitan transportation authority region and three members shall be from areas of the state outside such region. All appointees to the board other than the commissioner shall be upon the advice and consent of the senate. The metropolitan transportation authority inspector general shall be an ex officio member of the board but shall have no vote on matters arising outside of the operations of the metropolitan transportation authority. Provided, however, that with the exception of the commissioner, no elected or appointed public officer or transportation authority member shall be eligible for membership on such board. The governor shall select a chairman from the members but the chairman shall be someone other than the metropolitan transportation authority

inspector general.

2. The board may be called to investigate any accident by the governor or chairman. Alternatively, any board member may call for an investigation with majority board concurrence.
3. Except for the commissioner and the metropolitan transportation authority inspector general, the term of office of each such member shall be six years, except that the members first selected shall serve for terms of six years, five years, four years, three years, two years and one year, respectively. Any member appointed to fill a vacancy occurring otherwise than by expiration of a term shall be appointed for the remainder of the unexpired term.
4. Members of the board, except the commissioner and the metropolitan transportation authority inspector general, shall receive one hundred fifty dollars per diem, not to exceed ten thousand dollars per annum compensation for their services as members of the board, and each of them shall be allowed the necessary and actual expenses which he shall incur in the performance of his duties under this article.

§ 217. Powers and duties of the board

The board shall have the following powers and duties:

1. To investigate accidents occurring on or involving public transportation facilities or systems whether publicly or privately owned and report on the results of such investigations;
2. To establish within the board an accident reporting procedure and file for the purpose of accurate analysis of public transportation safety and to prepare an annual accident report for the governor and the legislature;
3. To review, in connection with the investigation of accidents the safety, maintenance and training programs of public transportation facilities or systems whether publicly or privately owned and recommend the establishment of equipment and safety standards in connection therewith;
4. To adopt, promulgate, amend and rescind suitable rules and regulations to carry out the provisions and purposes of this article or to enforce any standards established hereunder;
5. To hold hearings, issue reports, administer oaths or affirmations, examine any person under oath or affirmation and to issue subpoenas requiring the attendance and giving of testimony of witnesses and require the production of any books, papers, documentary or other evidence. The powers provided in this subdivision may be delegated by the board to any member of the board or department employee assigned to the board. A subpoena issued under this subdivision shall be regulated by the civil practice law and rules;
6. To take or cause to be taken affidavits or depositions within or without the state;
7. To enter upon any property where a public transportation accident has occurred, or where a vehicle, appurtenance or other item involved in any such accident is located, to

fulfill the requirements of article nine-b of this chapter.

8. To render each year to the governor and to the legislature a written report of its activities.
9. To enforce the requirements of section five thousand three hundred twenty-nine of title forty-nine of the United States Code, as amended from time to time, as it pertains to rail fixed guideway public transportation systems.

§ 218. Periodic review of safety plans and standards

The board may review and recommend to the public transportation operators and carriers changes in safety standards, public transportation operating practices and safety plans. Public transportation operators and carriers shall review such recommendations and inform the board, within ninety days, whether or not the recommendations have been adopted. If the recommendations have not been adopted, the operator or carriers shall set forth in detail the reason or reasons for not adopting the recommendations.

§ 219. Assistance of other agencies

1. To effectuate the purposes of this article, the board may request and receive from any department, division, board, bureau, commission or other agency of the state or any political subdivision thereof or any public authority such assistance, information and data as will enable the office properly to carry out its powers and duties hereunder.
2. The board shall cooperate, consult and coordinate with the metropolitan transportation authority inspector general with regard to any activity concerning the operations of the metropolitan transportation authority. With respect to any accident on the facilities of the metropolitan transportation authority, the primary responsibility for investigation shall be that of the board which shall share its findings with the metropolitan transportation authority inspector general.

§ 219-a. Studies; surveys

In the accomplishment of the purposes of this article, the board may undertake research and studies through its own personnel or in cooperation with any public or private agencies, including educational, safety research organizations, colleges, universities, institutes or foundations.

§ 219-c. Operating authority

As used in this article, the term “metropolitan transportation authority” shall mean the authority and its subsidiaries, the Long Island railroad, metro-north railroad, metropolitan suburban bus authority and Staten Island rapid transit operating authority, of the Triborough bridge and tunnel authority, and of the New York city transit authority and its subsidiary, the Manhattan and Bronx surface transit operating authority, or any other agency that may come under the control of the authority, or within their custody or control.

Consolidated Laws of New York

Transportation

Article 2. Powers, Duties and Jurisdiction of the Department of Transportation

§ 17-b. Public transportation safety plans; filing

1. Notwithstanding the provisions of subdivision eight of section twelve hundred sixty-six and subdivision seven of section twelve hundred ninety-nine-f of the public authorities law or of subdivision seventeen of section one hundred forty-two [FNI] of this chapter, every transportation authority and every other public transportation operator or carrier receiving mass transportation operating assistance pursuant to section eighteen-b of this chapter either directly from the department of transportation or through a county or municipality pursuant to said section, shall prepare and publicize a plan for transportation safety, including but not limited to equipment maintenance procedures, personnel safety training programs, accident reporting systems, passenger safety practices and the persons responsible for the implementation of such practices and programs. Every authority and every other public transportation operator or carrier required herein to file such a plan shall review such plan biennially and amend such plan if amendments are necessary.
2. A plan and any amendment thereto, prepared pursuant to the provisions of this section shall be filed with the department at its Albany office. The commissioner, in consultation with the state public transportation safety board shall examine the plan and determine whether the same is satisfactory and feasible. The plan shall be made available to any and all persons, corporations, departments and agencies necessary to enable timely review and solicitation of comments.
3. If within one hundred eighty days of receipt of notice of the provisions of this section from the commissioner and every two years thereafter, any transportation authority or system shall fail to file a plan as required by this section or shall file a plan or amendment which the commissioner determines in consultation with the state public transportation safety board, is unsatisfactory and shall fail to file a substitute plan or amendment within ninety days of the sending of notice of such determination, the commissioner *shall be authorized and empowered to withhold from such authority or system payment of any and all state moneys* otherwise payable to such authority or system as operating assistance pursuant to section eighteen-b of this chapter in the next occurring quarter of the state fiscal year.

4. For purposes of this section the term transportation authority shall be deemed to mean and include every public benefit corporation constituting a transportation authority which provides or contracts for the provision of mass transportation services or any subsidiary thereof.

Codes, Rules, and Regulations of the State of New York Title 17. Department of Transportation

Chapter VI. Transportation Regulations

Subchapter H. State Public Transportation Safety Board 17 CRR-NY VI H 990 Notes

(Statutory authority: Transportation Law, § 17-b; art. 9-B)

17 CRR-NY 990.1

990.1 Authority.

There has been established within the New York State Department of Transportation (article 9-B of the Transportation Law) an investigative and advisory body to be known as the State Public Transportation Safety Board (Safety Board) which shall be responsible for assuring the health and safety of the citizens of the State who use public transportation systems, services and facilities.

17 CRR-NY 990.2

990.2 Purposes and powers.

In order for the Safety Board to fulfill its responsibility for assuring the health and safety of the citizens of the State who use public transportation systems, services and facilities, the Safety Board:

- (a) shall investigate accidents involving public transportation systems and/or public transportation services and report on the results of such investigations;
- (b) shall establish accident reporting procedures and prepare an annual report for the Governor and the Legislature;
- (c) shall review, among other things, the safety, maintenance and training programs of public transportation systems and public transportation services and recommend the establishment of equipment and safety standards in connection therewith;
- (d) shall review and recommend to public transportation systems and/or public transportation services changes in public transportation system safety program plans and safety standards;
- (e) shall require every public transportation system and public transportation service receiving all of or a portion of statewide mass transportation operating assistance to prepare and publicize a plan for transportation safety;

- (f) shall adopt and from time to time update rules and regulations necessary to carry out the provisions and purposes of article 9-B of the Transportation Law, or to enforce any standards established thereunder;
- (g) shall hold hearings or informational meetings, issue reports, administer oaths or affirmations, examine any person under oath or affirmation, and issue subpoenas requiring the attendance and giving of testimony and the production of books, papers, documentary or other records. A subpoena issued under this subdivision shall be regulated by the Civil Practice Law and Rules;
- (h) shall take or cause to be taken any affidavits or depositions;
- (i) may request and receive from any State agency or any political subdivision, or any public transportation service, or any public transportation system, such assistance, information and data that will enable the Safety Board properly to carry out its powers and duties;
- (j) shall cooperate, consult and coordinate with the Metropolitan Transportation Authority (MTA) Inspector General with regard to any activity concerning the operations of the MTA or its affiliates and subsidiaries. Primary responsibility for investigation of accidents involving the MTA or its affiliates and subsidiaries shall be that of the Safety Board which shall share its findings with the MTA Inspector General;
- (k) shall investigate any public transportation system or service accident as directed by the Governor or Chairman of the Safety Board. Alternatively, any Safety Board member may request an investigation of any public transportation system or service accident subject to concurrence of the Safety Board;
- (l) may propose and recommend legislation in furtherance of the Safety Board's various responsibilities;
- (m) with the approval of the Governor, may accept as an agent of the State any grant, including Federal grants, or any gift for any lawful purpose;
- (n) may undertake research and/or studies through its own staff or in cooperation with any public or private agencies;
- (o) may delegate any of its powers to any committee of the Safety Board, single Safety Board member, Executive Director or staff personnel;
- (p) may authorize staff to assist the department in investigating any other accident involving bus or rail transportation in the State;
- (q) shall investigate unacceptable hazardous conditions involving rail fixed guideway systems pursuant to section 990.16 of this Part;
- (r) shall review annual safety audit plans and annual safety reports involving rail fixed guideway systems pursuant to section 990.17 of this Part; and
- (s) may make such findings and recommendations to public transportation systems and public transportation services as provided by section 990.18 of this Part.

990.3 Definitions.

For the purposes of this Part, the following definitions will apply:

- (a) Safety Board shall be the board created by section 216 of the Transportation Law.
- (b) Chairman shall be the chairman of the Safety Board designated by the Governor as set forth in section 216 of the Transportation Law.
- (c) Executive director shall mean the executive director of the Safety Board.
- (d) Public transportation system shall mean any commuter rail, light rail, subway, rapid transit or bus public transportation system as defined in section 18-b of the Transportation Law, which receives, either directly or indirectly, any statewide mass transportation operating assistance, except that where operating assistance payments are made to a county or municipality which in turn distributes the funds to a bus carrier or carriers, then the term shall mean all of the bus carriers within such system, but not the county or municipality, regardless of whether they are actually allocated assistance initially received by the county or municipality.
- (e) Public transportation service shall mean the bus operator providing revenue service under contract to a county or municipality, exclusive of services provided by subsidiaries used principally to provide school bus services, which receive, either directly or indirectly, statewide mass transportation operating assistance, except that where operating payments are made to a county or municipality which in turn distributes the funds to a carrier or carriers, then the term shall mean the revenue bus services provided by such carriers within such system that are submitted for statewide mass transportation operating assistance regardless of whether they are actually allocated any such assistance received by the county or municipality. Eligible services are those that are available to the public on a regular basis, having predetermined and publicly posted fares and service hours between an origin and destination, one of which is within the boundaries of New York State.
- (f) Public transportation facility shall mean any facility used by a public transportation system or public transportation service in connection with the transportation of persons.
- (g) Commuter rail shall mean mass transportation services operating rail passenger cars on rail guideways within the State, and providing service in more than one county (for purposes of this Part, the City of New York shall be considered as on county), with a substantial portion of the riders using the service to go to and from work between suburbs and their central city, including the MTA Long Island Railroad, Metro-North Railroad, and New Jersey Transit.
- (h) Subway/rapid transit system shall mean the rail system operated by the MTA New York City Transit, including the MTA Staten Island Rapid Transit System.
- (i) Light rail shall mean the Metro-Rail system operated by the Niagara Frontier Transportation Authority (NFTA).

- (j) Bus system shall mean the part of a public transportation system which transports passengers by bus and which receives or whose passenger and service statistics are used as a basis for a public transportation system to receive statewide mass transportation operating assistance.
- (k) Bus service shall mean a public transportation service operated by a bus system.
- (l) Statewide mass transportation operating assistance program shall mean that program described in section 18-b of the Transportation Law. Public transportation systems and public transportation services that participate in the statewide mass transportation operating assistance program, shall submit a public transportation safety plan as described in sections 17-b and 218 of the Transportation Law, as further described in section 990.12 of this Part.
- (m) Public transportation safety plan shall mean the system safety program plan required by sections 17-b and 218 of the Transportation Law, as further described in section 990.12 of this Part.
- (n) Accident shall mean an unexpected event causing property damage or injuries or fatalities, or any combination thereof involving public transportation commuter rail, subway rapid transit, light rail and bus systems or bus services.
- (o) Bus or rail fatal accident shall mean any bus or rail public transportation accident under the jurisdiction of the Safety Board which causes any person involved in the accident to die within 24 hours after the accident.
- (p) Bus or rail injury accident shall mean any bus or rail public transportation accident under the jurisdiction of the Safety Board which causes any person involved in the accident to require either medical treatment by qualified medical personnel at the scene of the accident or to be transported to a hospital and treated at such hospital.
- (q) Bus or rail mechanical failure shall mean any failure of bus components or assemblies that renders or could render the public transportation vehicle unsafe for passenger service.
- (r) Rail evacuation shall mean a condition requiring passengers to disembark from a train to the roadbed or benchwall and then to the adjacent environment.
- (s) Incident report (IR) shall mean an investigative report that determines that an accident does not meet the Safety Board's accident reporting criteria.
- (t) No report (NR), abbreviated report (AR) and staff report (SR) shall mean investigative reports which determine that an accident meets the Safety Board's accident criteria, but such reports do not contain recommendations or actions taken by the public transportation system or service.
- (u) Board report (BR) shall mean an investigative report that determines that an accident meets the Safety Board's accident criteria and such report contains recommendations by the Safety Board.
- (v) Rail highway grade crossing accident shall mean any accident which occurs at the intersection of a roadway and rail track of a public transportation system.

- (w) Rail collision shall mean contact between a rail vehicle of any type and another rail or non-rail vehicle, wayside equipment, infrastructure, or material fouling the rail right-of-way that results in a disruption in operations.
- (x) Rail derailment shall mean a condition in which the wheels of a rail vehicle lose contact with the track on which such vehicle is supposed to be in contact with.
- (y) Rail fixed guideway system shall mean a subway/rapid transit or light rail system that is subject to the Federal Transit Administration's Rail Fixed Guideway Systems; State Safety Oversight Regulations contained in 49 CFR part 659.

17 CRR-NY 990.4

990.4 Organization.

(a) Offices.

The principal office of the Safety Board is located at the NYS Department of Transportation, Governor W. Averill Harriman, New York State Office Campus, 1220 Washington Ave., Albany, NY 12232. The Safety Board may also have offices at such other places within the State as it may determine.

(b) Delegation.

The Commissioner of Transportation and the MTA Inspector General may delegate all their authority on the Safety Board, including but not limited to their right to vote, to their designees by providing notice to the Executive Director of the Safety Board. No other member of the Safety Board may delegate his or her authority.

(c) Regular meeting.

The Safety Board shall have regular meetings on a bi-monthly basis and usually scheduled on the third Wednesday of every odd numbered month unless changed by the Safety Board. The regular meetings may be held at the Safety Board's principal office, or at such other place as the Safety Board may determine. Additional meetings and an annual workshop may be scheduled by the Safety Board.

(d) Special meetings.

Special meetings of the Safety Board may be called by the chairman upon one day's notice to each member.

(e) Open meetings.

All meetings of the Safety Board shall be conducted in compliance with article 7 of the Public Officers Law. All meetings of the Safety Board shall be open to the public in accordance with such law. The Safety Board may convene in executive session for the following purposes only:

- (1) to consider matters which will imperil the public safety if disclosed;
- (2) to consider matters which may disclose the identity of a law enforcement agent or informer;
- (3) to consider information relating to current or future investigation or prosecution of a criminal offense which would imperil effective law enforcement if disclosed;

- (4) to hold discussions regarding proposed, pending or current litigation; or
- (5) to consider medical, financial, credit or employment history of a particular person or corporation or matters leading to the appointment, employment, promotion, demotion, discipline, suspension, dismissal or removal of a particular person or corporation.

Attendance at an executive session shall be permitted to any member of the Safety Board and any other person authorized by the chairman.

(f) Quorum.

A majority of the members of the Safety Board currently in office shall constitute a quorum for the transaction of any business or the exercise of any power of the Safety Board. However, with respect to matters not involving the MTA, the MTA Inspector General shall not be counted for quorum purposes. If a valid meeting is called but a quorum is not present, the majority of the members of the Safety Board then present may adjourn the meeting without further notice.

(g) Action at a meeting.

All questions before the Safety Board shall be decided by majority vote of the members present at such a meeting or, with respect to the Commissioner of Transportation and the MTA Inspector General, by their designees. On matters arising outside the operations of the MTA, the MTA Inspector General or his or her designee shall have no vote.

(h) Action without a meeting.

The Safety Board may vote on any resolution without a meeting, on the basis of a written approval signed by a majority of members in office. Other items may be addressed in this manner as the Safety Board may decide.

(i) Committees.

The Safety Board may elect committees from its members, and delegate to such committees such powers and duties as it may deem advisable.

(j) Compensation.

Each member of the Safety Board, except the Commissioner of Transportation and the MTA Inspector General, shall receive \$150 per diem, not to exceed \$10,000 per annum, as compensation for their services, and each of them shall be reimbursed for their actual and necessary expenses incurred in the performance of their official duties.

(k) Expenses.

All expenses of the Safety Board will be paid by the State of New York, upon the approval of the Executive Director of the Safety Board or his/her designated representative, from the appropriations made to the Department of Transportation for the operation of the Safety Board.

(l) Indemnification.

Members of the Safety Board shall be deemed officers of the State in connection with the provisions of section 17 of the Public Officers Law.

17 CRR-NY 990.5

990.5 Executive director.

The Executive Director of the Safety Board shall be a Department of Transportation employee appointed by the Commissioner of the Department of Transportation. The Safety Board hereby delegates to the executive director the following authority, and he or she shall be responsible for:

- (a) administrative and investigative functions of the Safety Board;
- (b) appointment, coordination, direction and supervision of the staff and consultants;
- (c) recommendation and development of plans to achieve the Safety Board's program and safety objectives;
- (d) undertaking of investigations of accidents as prescribed by law;
- (e) supervision over preparation by staff of accident reports for submission to the Safety Board, including the attribution of the probable causes of such accidents and, safety-related recommendations as well as preventability of bus accidents;
- (f) preparation of system safety program plan guidelines for submission to the Safety Board;
- (g) monitoring preparation of system safety program plans by public transportation systems and services, and monitoring compliance therewith;
- (h) presentation of safety recommendations to the Safety Board;
- (i) monitoring compliance with final Safety Board actions and recommendations;
- (j) recommendation to the Safety Board as to the need for public hearings or meetings on critical matters;
- (k) providing information to the public, government bodies and other interested persons about Safety Board matters;
- (l) maintenance of Safety Board records; and
- (m) use and expenditure of available funds.

17 CRR-NY 990.6

990.6 Staff services.

Staff services for the Safety Board shall be performed by personnel of the Department of Transportation and such others as the Safety Board may deem appropriate, including but not limited to private consultants. The executive director shall coordinate and direct the activities of the staff, which shall be the primary investigative unit of the Safety Board.

17 CRR-NY 990.7

990.7 General counsel.

The Safety Board hereby delegates to the general counsel the authority to:

- (a) represent and appear on behalf of the Safety Board in matters in which the Safety Board is interested;

- (b) advise the Safety Board on all legal matters, including the legal sufficiency of any proposed Safety Board action; and
- (c) as directed, to provide legal assistance in the performance of any power, including the issuance of subpoenas and correcting orders by making editorial changes or corrections therein.

17 CRR-NY 990.8

990.8 Administrative law judge.

The executive director may delegate on behalf of the Safety Board to an administrative law judge the authority to conduct hearings pursuant to the provisions of the State Administrative Procedure Act.

17 CRR-NY 990.9

990.9 Notification of rail accidents.

- (a) Each public transportation system and/or public transportation service subject to the Safety Board operating a commuter rail, light rail, rapid transit or subway system shall give the Safety Board staff immediate notice and written notice, as further detailed in subdivisions (b) and (c) of this section, of the following accidents:
 - (1) all collisions and derailments except those minor incidents resulting from shifting cars and making up trains in yards;
 - (2) all accidents at highway grade crossings;
 - (3) all fatal accidents and all injury accidents which result in injuries to two or more passengers; and
 - (4) all rail evacuations of passengers to the roadbed or bench wall and then to the adjacent environment;
- (b) Immediate notice of the above occurrences shall be reported by telephone to Safety Board staff at the published numbers for such calls. The list of said numbers shall be distributed to all public transportation systems and public transportation services and periodically updated. Immediate notice of all said accidents is required and such notice shall not be delayed for more than 90 minutes. These notices, at a minimum, shall include the date, time, location of the occurrence and the appropriate number of persons killed or injured. The person making the notification must provide his or her name and title, the public transportation system or service involved, and state where he or she can be reached for further details. In addition, the person must supply any additional information requested. The public transportation system or service must ensure the physical evidence of the accident scene is properly documented prior to the scene being cleared.
- (c) A written notice shall be submitted to Safety Board staff, unless otherwise specified by said staff, within two business days of the occurrence for all fatal accidents and all injury accidents which result in injuries to two or more passengers, on the form entitled "Rail

Transit Operator Accident Report" which is set forth in section 990.20(a) of this Part or, in lieu of this report, a rail system may file a report commonly known as a daily operators report which contains specific accident information regarding unusual occurrences or accidents. All information on either report form shall be fully completed.

17 CRR-NY 990.10

990.10 Notification of bus accidents.

- (a) Every public transportation bus system and/or public transportation bus service subject to the Safety Board shall give the Safety Board staff immediate notice and written notice, as further detailed in subdivisions (b) and (c) of this section, of the following accidents:
- (1) all fatal accidents;
 - (2) any accident which results in five or more injuries to persons involved in the accident; and
 - (3) all accidents caused by mechanical failure, including but not limited to all fires that occur in revenue service that require passenger evacuation and response by a fire department regardless of whether or not injuries were incurred.
- (b) Immediate notice of the above occurrences shall be reported by telephone to Safety Board staff at the published numbers for such calls. The list of said numbers shall be distributed to all public transportation systems and public transportation services and periodically updated. Immediate notice of all said accidents is required, and such notice shall not be delayed for more than 90 minutes. These notices, at a minimum, shall include the date, time and location of the occurrence and the approximate number of persons killed or injured. The person making the notification must provide his or her name and title, the public transportation system or service involved, and state where he or she can be reached for further details. In addition, the person must supply any additional information requested. The public transportation system or service must ensure the physical evidence of the accident scene is properly documented prior to the scene being cleared.
- (c) A written notice shall be submitted to Safety Board staff unless otherwise specified by said staff, within two business days of any of the above occurrences, on the form entitled "Transit Bus Operator Accident Report" which is set forth in section 990.20(b) of this Part. All information on these forms shall be fully completed.

17 CRR-NY 990.11

990.11 Investigation of accidents.

(a) Procedures.

Public transportation system and public transportation service accident investigations are conducted by the Safety Board in order to determine the facts, conditions, and circumstances relating to each accident, the probable cause thereof, and to ascertain measures which will best prevent similar accidents in the future. The investigations, carried out in accordance with

procedures developed by the Safety Board, include field investigation, report preparation, and where ordered, a public hearing. The staff of the Safety Board are authorized to enter upon any property where a public transportation accident has occurred, where wreckage from any such accident is located or where a vehicle involved in any such accident is located, and do all things necessary for a proper accident investigation, including but not limited to interviewing of witnesses and others, examination and/or testing of any vehicle train or facility or any part or appurtenance thereof, which vehicle, train, facility or part or appurtenance thereof shall immediately be made available for inspection and shall be preserved by the public transportation system and/or public transportation service, to the maximum extent feasible, for the purpose of an accident investigation, which accident investigation shall be commenced and completed with reasonable promptness. The Safety Board may order a vehicle or any part or appurtenance thereof impounded for a period which shall not exceed two business days from the time of notification so that a proper investigation including testing may be conducted. The Safety Board staff may inspect all records, files, papers, processes, controls, equipment and facilities of a public transportation system and/or public transportation service and other relevant factors in connection with the investigation of any accident involving such system or service.

(b) Cooperation.

Each public transportation system or service by its officers, directors, owners, members and employees, shall fully cooperate with the Safety Board in the investigation of public transportation accidents. Such cooperation shall include, but shall not be limited to, making the public transportation system's or service's employees available for the purpose of interviews and providing investigators with all information requested, including the names of witnesses and all details of the accident. The failure to cooperate with the investigation as stated herein shall be deemed a violation of these rules and regulations and may be treated as grounds for the withholding of statewide mass transportation operating assistance.

17 CRR-NY 990.12

990.12 Public transportation system safety program plan.

- (a) Every public transportation system and public transportation service subject to section 17-b and article 9-B of the Transportation Law shall initially prepare and publicize a plan detailing their transportation system safety program as well as comply with the appropriate portions of the current Safety Board System Safety Program Plan Guidelines which are incorporated herein by reference.
- (b) Each public transportation system or public transportation service required to file a system safety program plan, shall review its approved plan biennially and make necessary amendments thereto. All safety plans and amendments shall be filed with the Executive Director of the Safety Board on behalf of the Commissioner of Transportation. The commissioner, in consultation with the Safety Board, shall examine each safety plan and amendment to determine whether it is satisfactory. System safety program plans and amendments are public documents and shall be made available by the public transportation system or public transportation service to all interested parties who request a copy, and any interested party may submit comments to the Safety Board. If

any public transportation system or public transportation service fails to file a system safety program plan with the Executive Director of the Safety Board within 180 days from the date the Executive Director of the Safety Board on behalf of the commissioner sends notice of the requirements of the provisions of this section; or fails to file a system safety program plan biennial amendment with the Executive Director of the Safety Board; or files a system safety program plan or system safety program plan biennial amendment with the Executive Director of the Safety Board that the commissioner, in consultation with the Safety Board, determines is unsatisfactory; or fails to file a satisfactory updated plan or amendment within 90 days from the date the Executive Director of the Safety Board on behalf of the commissioner sends notice of such unsatisfactory determination; then the commissioner is authorized to withhold all statewide mass transportation operating assistance.

- (c) System safety program plans shall be subject to periodic compliance reviews, monitoring or auditing by the Safety Board and its staff to determine compliance with the Safety Board System Safety Program Plan Guidelines. The staff of the Safety Board conducting said reviews, monitoring or auditing shall have the same powers and rights as they have in investigating accidents as provided heretofore in section 990.11 of this Part and every public transportation system and every public transportation service shall cooperate with said reviews, monitoring or auditing and any failure to cooperate shall be deemed a violation of these rules and regulations and may be treated as grounds for the withholding of statewide mass transportation operating assistance.
- (d) Each system safety program plan for a public transportation bus system or service as set forth in this section shall include bus Pre- and post-trip inspection procedures based on a written document signed by the bus operator.
- (e) Bus preventive maintenance cycles shall be explicitly stated in the system safety program plans for public transportation bus systems or services that are required under this section and shall be scheduled at maintenance time or mileage intervals that are consistent with the maintenance intervals recommended by the vehicle manufacturers. In the event a public transportation system or service changes its preventive maintenance intervals, Safety Board staff shall be provided with written notice.
- (f) Each system safety program plan for a public transportation bus system or service shall include procedures for determining the preventability of bus accidents, consistent with State and national industry standards.
- (g) Effective January 1, 2005, the system safety program plan for each public transportation bus system or service shall state that such service or system shall have at least one staff person certified in a comprehensive accident investigation training program approved by the Safety Board. A list of approved training programs shall be issued by the executive director within 60 days of the effective date of this provision and shall be updated from time to time as appropriate.
- (h) Federal safety-related waivers and exemptions. Every public transportation system and public transportation service shall give the Executive Director of the Safety Board written notice of the following:

- (1) all requests for exemptions or waivers from Federal safety-related regulations submitted to any Federal agency, Federal authority or other Federal governmental entity; and
 - (2) all final actions or decisions related to such requests. If such a request is approved, the public transportation system or public transportation service shall immediately amend its system safety program plan to reflect the waiver or exemption. This amendment shall be submitted to the Executive Director of the Safety Board for inclusion in the system safety program plan currently on file with the Safety Board for that public transportation system or service.
- (i) Effective January 1, 2005, the system safety program plan of each public transportation system or public transportation service as set forth in this section shall include procedures which require that notice be provided to the Executive Director of the Safety Board of any award or settlement, in which a public transportation system or public transportation service employee who has previously been removed from a safety-sensitive position for safety-related reasons as outlined in the current Safety Board System Safety Program Plan Guidelines is to be returned to duty in a safety-sensitive position.

17 CRR-NY 990.13

990.13 Public hearings.

The Safety Board may convene hearings as it deems proper or necessary. Hearings may be conducted in any manner consistent with the law. The Safety Board may hold the hearing itself, or delegate the function to an administrative law judge, committee, single member, executive director or staff personnel.

17 CRR-NY 990.14

990.14 Public availability of information.

The Safety Board is subject to article 6 of the Public Officers Law. All of the records of the Safety Board are public, except that the Safety Board may deny access to the following categories of records:

- (a) records specifically exempted from disclosure by statute;
- (b) records which, if disclosed, would constitute an unwarranted invasion of personal privacy under section 89(2) of the Public Officers Law;
- (c) records containing trade secrets which, if disclosed, would cause substantial injury to the competitive position of the commercial enterprise;
- (d) records compiled for law enforcement purposes and which, if disclosed, would:
 - (1) interfere with law enforcement investigations or judicial proceedings;
 - (2) deprive a person of a right to a fair trial or impartial adjudication;

- (3) identify a confidential source or disclose confidential data relating to a criminal investigation; or
 - (4) reveal criminal investigative techniques or procedures, except routine techniques and procedures;
- (e) records which, if disclosed, would endanger the life or safety of any person; and
- (f) records which are interagency or intra-agency materials which are not:
- (5) statistical or factual tabulations or data;
 - (6) instructions to staff that affect the public; or
 - (7) final agency policy or determinations.

17 CRR-NY 990.15

990.15 Testimony of Safety Board and staff.

Except as provided in this section, no member of the board or its staff shall be compelled or permitted to testify in any litigation involving any matter which is or was subject to an investigation by the board, either during or subsequent to such investigation, unless the board is a party to such litigation. Testimony of members of the board's staff may be available for use in actions or suits for damages arising out of accidents investigated by the board, through depositions or written interrogatories only. Depositions may only be taken at the board's main office, unless the board agrees to a deposition at another location. Depositions must be on notice to all parties, and must be at a time convenient to the board. Members of the board's staff may be compelled to submit to a deposition only once in connection with any accident investigation, and consequently, when more than one lawsuit arises, it shall be the duty of counsel seeking the deposition to ascertain the identity of all parties and to notify them to afford them opportunity to participate in the deposition.

17 CRR-NY 990.16

990.16 Rail fixed guideway systems' hazard resolution.

(a) Procedures.

Pursuant to the Federal regulations and Safety Board System Safety Program Plan Guidelines referenced in this Part, each rail fixed guideway system shall include in its system safety program plan, as set forth in section 990.12 of this Part, procedures for identifying, assessing and resolving existing safety hazards. Such procedures shall meet the following requirements:

- (1) Hazard classifications. The rail fixed guideway systems shall adopt a hazard classification system that categorizes hazards by severity and frequency consistent with the hazard resolution matrix contained in 49 CFR part 659. In adopting such a classification system, each property shall clearly establish its own definitions for categorizing hazard severity and frequency groupings. Rail fixed guideway systems are encouraged to use plain language definitions to the extent possible in this requirement.

- (2) Hazard reporting. As part of its annual review of the rail fixed guideway system's annual audit plan in accordance with section 990.17(b) of this Part or at such other times as potential safety hazards may be identified the Safety Board or its staff may request special reporting of hazardous conditions and the system's proposed strategy for their resolution or disposition. The form, frequency and duration of such reports shall be prescribed as appropriate for the situation.

(b) Hazard investigation.

Safety Board staff may conduct investigations of reported hazardous conditions, as described in paragraph (a)(2) of this section, following established Safety Board procedures for accident investigations, as set forth in section 990.11 of this Part. The results of such staff investigations and recommendations with regards to concurrence or modification of proposed hazard resolution strategies will be presented to the Safety Board at the earliest, regularly scheduled Safety Board meeting practicable.

17 CRR-NY 990.17

990.17 Rail fixed guideway systems' internal safety audits.

Each rail fixed guideway system shall establish an internal safety audit and review process referred to in 49 CFR part 659. At a minimum, such a process shall include the following:

(a) Safety audit plan.

In January of each year every rail fixed guideway system shall establish an internal safety audit plan for the coming calendar year. The safety audit plan shall: identify those areas of operation that are intended to be reviewed for safety in the coming year; establish objectives for such planned safety reviews; identify organizational responsibilities for participating in such planned safety reviews; and establish a schedule for conducting such planned safety reviews. Safety review may be undertaken to: verify compliance with established safety-related operating procedures; evaluate the effectiveness of existing safety-related operating procedures and training programs; and/or support and assist program managers in implementation of safety-related operating procedures. In developing the annual safety audit plan, rail fixed guideway systems are encouraged to consider the issues arising from any and all recent accident/incident investigations; statistical trends in passenger and employee injuries; and/or corporate safety goals to assist in establishing priorities.

(b) Safety Board review.

The annual safety audit plan shall be submitted to the Director of the Rail Safety Bureau for the Department of Transportation on behalf of the Safety Board (the "director") for review and acceptance on or before January 31st of each calendar year. Safety Board staff are available to assist any rail fixed guideway system in the development of the system's annual safety audit plan and thereby help support the property's safety program and help clarify or resolve complex safety issues.

(c) Annual safety report.

Each property shall prepare and submit to the director each year an annual report summarizing the rail fixed guideway system's safety activities for the prior year. The annual safety report, at a minimum, shall include the results of all internal and external safety audits; highlight safety initiatives taken by the system during the prior year; and present statistics on the system's progress in meeting established objectives for reducing accidents, incidents and hazardous conditions. The annual safety report should be submitted to the director for review and acceptance on or before January 31st of each calendar year.

17 CRR-NY 990.18

990.18 Safety Board recommendations.

(a) Issuing recommendations.

The Safety Board or the executive director on behalf of the Safety Board may make recommendations to public transportation systems and public transportation services as a result of the Safety Board's accident/incident investigations or other special studies or audits. Such recommendations shall be transmitted to the chief executive officer of the system or service involved with a request that the system or service respond to the Safety Board within a specified period, but not less than 30 days, with the system's or service's proposed corrective action plans to address the Safety Board's recommendation(s) or to respond to a Safety Board request. The Safety Board shall either accept these proposed corrective action plans or make a request for revisions to such plans or for other responsive actions.

(b) Tracking and reporting on proposed corrective action plans.

When requested by the Executive Director of the Safety Board, public transportation systems and public transportation services shall provide the executive director with periodic summaries of ongoing efforts to implement corrective action plans. Such summaries shall be in a format as prescribed by the executive director and may include the following: Safety Board case number; date of initial recommendation(s); recitation or abstract of recommendation(s); proposed corrective action plan(s); organization or individual responsible for implementation of plan(s); scheduled implementation and completion date(s); current status; and outstanding issues, if any.

17 CRR-NY 990.19

990.19 Incorporation by reference.

(a) Incorporation of certain Federal regulations by reference.

The provisions of part 659 of title 49 of the Code of Federal Regulations which have been incorporated by reference in this Part have been filed in the Office of the Secretary of State of the State of New York, the publications so filed being contained in the booklet entitled Code of Federal Regulations, title 49, parts 600-999 revised as of October 1, 2003, published by the Office of the Federal Register, National Archives and Records Administration, as a special edition of the *Federal Register*. The regulations incorporated by reference may be examined at the office of the Department of State, 41 State Street, Albany, NY 12231, at the New York State Supreme Court Law Libraries, the Legislative Library, the New York State Department of Transportation, Office

of Legal Affairs or Rail Safety Bureau, State Office Campus, Albany, NY 12232. They may also be purchased from the Superintendent of Documents, Government Printing Office, Washington, DC 20402. Copies of the Code of Federal Regulations are also available at many public libraries and bar association libraries.

(b) Incorporation of Safety Board System Safety Program Plan Guidelines by reference.

The Safety Board System Safety Program Plan Guidelines consist of the following six volumes, three for public transportation rail systems and services: Heavy Rail Transit Systems, dated September 1996; Light Rail Transit Systems, dated September 1996; and Commuter Rail Systems, dated July 31, 1990; and three for public transportation bus systems and services: For Large Size Bus Systems (Bus Fleet Size 200+ buses). dated June 20, 1990; For Medium Size Bus Systems (Bus Fleet Size 26 - 199 buses), dated June 20, 1990; and For Small Size Bus System (Bus Fleet Size 1 - 25 buses), dated June 20, 1990. Copies of said guidelines have been furnished to all current public transportation systems and public transportation services and will be furnished to all new systems and services. These guidelines which have been incorporated by reference in this Part have been filed in the office of the Secretary of State of the State of New York. These guidelines may be examined at the office of the Department of State, 41 State Street, Albany, NY 12231, at the New York State Supreme Court Law Libraries, the Legislative Library, the New York State Department of Transportation, Office of Legal Affairs, Rail Safety Bureau or the Motor Carrier Safety Bureau, State Office Campus, Albany, NY 12232.

17 CRR-NY 990.20

990.20 Appendixes.

(a) Appendix A.

NYS PUBLIC TRANSPORTATION SAFETY BOARD RAIL TRANSIT OPERATOR ACCIDENT REPORT
PROPERTY NAME:

ACCIDENT DATE

—
—
—

TIME OF ACCIDENT _____ ACCIDENT CRITERIA:

—
COLLISION

—
GRADE CROSSING

DERAILMENT

 EVACUATION

 MULTIPLE INJURY

 FATALITY

LOCATION OF ACCIDENT:
LINE

LANDMARK CITY

COUNTY

TRAIN OPERATOR INFORMATION:

NAME: _____ DOB: __/__/

TRAIN VEHICLE INFORMATION:

TRAIN # _____ CAR OR ENGINE # _____ OTHER VEHICLE INFORMATION:

YEAR_MAKE/MODEL _____ WITNESS NAME, PHONE #:

WITNESS NAME, PHONE #:

WITNESS NAME, PHONE #:

ACCIDENT DESCRIPTION:

LAW ENFORCEMENT AGENCY INVESTIGATING ACCIDENT:

—

PROPERTY OFFICIAL FILING THIS REPORT TITLE

PHONE #

DATE OF REPORT: _____

(b) Appendix B.

NYS PUBLIC TRANSPORTATION SAFETY BOARD TRANSIT BUS OPERATOR ACCIDENT REPORT

PROPERTY NAME: ACCIDENT

DATE

—

—

—

TIME OF ACCIDENT _____ ACCIDENT CRITERIA:

__MECHANICAL FAILURE_FIVE OR MORE INJURIES_FATAL_FIRE LOCATION OF
ACCIDENT:

STREET

CITY

COUNTY _____

BUS DRIVER INFORMATION:

NAME: _____ DOB: /_/_

DRIVER'S LICENSE ID# _____ STATE OF REGISTRATION _____ PROPERTY

VEHICLE INFORMATION:

YEAR MAKE/MODEL _____

OF OCCUPANTS IN VEHICLE AT TIME OF ACCIDENT OTHER VEHICLE

INFORMATION:

YEAR_MAKE/MODEL _____

OF OCCUPANTS IN VEHICLE AT TIME OF ACCIDENT

WITNESS NAME, PHONE #

WITNESS NAME, PHONE #:

WITNESS NAME, PHONE #:

ACCIDENT DESCRIPTION:

LAW ENFORCEMENT AGENCY INVESTIGATING ACCIDENT:

—

PROPERTY OFFICIAL FILING THIS REPORT TITLE

PHONE #

DATE OF REPORT: _____

Appendix D – Workshop Summary

TR-210842 – UTC Inventory of Rail Safety Oversight Workshop Overview

Substitute Senate Bill 5165 requires the Washington Utilities and Transportation Commission to prepare an inventory of rail safety oversight conducted by state agencies in other states identified for review by program area as compared to the role of state agencies in Washington. The results of the examination must be reported to the appropriate legislative committees by September 1, 2022, and must include an overview of a workshop with interested parties.

The Commission held the workshop on rail safety oversight inventory on July 6, 2022. Questions from the workshop are included in the attached matrix.

Welcome and introductions

Angie Thomson, facilitator, welcomed the group. She reviewed the agenda, noted that the meeting will be recorded, and shared some Zoom best practices. Commission Chair Danner offered introductory remarks, as did Commissioner Rendahl and Representative Mari Leavitt. Jason Lewis, Commission Legislative Director, followed with an overview of the legislative proviso that guides the inventory of rail safety oversight.

Inventory of Rail Oversight

Jeff Schultz, David Evans and Associates, Inc., introduced the project team and overall approach to the work. He provided an update on the work completed to date and the schedule for the completion of the inventory.

Information Gathered from Other States

Chris Bonanti, Baluster Group, gave an overview of federal oversight of rail safety, as well as oversight in California, New York, Washington, Oregon and Idaho. Chris described some key observations about rail oversight in different states, based on the completed interviews. He discussed differences in state oversight, overhead and revenue costs for oversight, and safety oversight of crude oil by rail.

	Topic	Commenter	Comment/Question
1.	Inventory of Rail Safety Oversight	UTC Chair Danner	Will the inventory also include an analysis of preemption issues?
2.	Information Gathered from Other States	UTC Commissioner Rendahl	Will the inventory be limited to safety oversight, or will it also include a review of operations in each state that operates their own rail system?
		Herb Krohn, Sheet Metal Air Rail & Transportation (SMART) Union	In Washington, various agencies are responsible for elements of rail oversight. How do other states approach and administer the different aspects of rail safety (e.g., environmental issues, occupational safety, passenger safety, operational safety, hazardous materials, catastrophe planning)? Do they convene a multi-agency task force, for example?
		Mike Elliott	Are there enough FRA inspectors in our area providing safety oversight?
		Herb Krohn (SMART)	Is it accurate that there are only six FRA rail bridge inspectors in the country? Are there inspectors for tunnels as well?
		Herb Krohn (SMART)	Are there designated agencies in each state who are authorized to comment on behalf of the state to the Surface Transportation Board?
		Herb Krohn (SMART)	Washington participates in the OSHA program. Are New York, California and Oregon also OSHA-participatory states?
3.	Next Steps	Herb Krohn (SMART)	Will the presentation from the workshop be available online?

Appendix E – State Scoping Interview Questions

Appendix E provides a summary of the questions that were asked of state safety oversight leadership in the areas of railroad safety and fixed guideway safety in California, New York, Oregon and Idaho. The interviews included six different sections of questions, with sub-questions in each section. A supplemental questionnaire was sent to each agency, requesting additional statistical, financial, staffing and background questions, and it is included here as well.

Stakeholder Interview Question Summaries (Outreach Reports)

a. General agency overview questions:

- What agencies have jurisdiction for railroad safety and transit (rail fixed guideway) operations in your state and do they have an implementation plan coordinated with the Federal Railroad Administration? Are there any overlaps or gaps between agency mandates and enforcement? If so, please identify these overlaps or gaps.
- What railroad safety oversight programs exist in your state and are there any quantitative or qualitative evaluations of their effectiveness? For example, does the agency utilize a quantitative model to track noncompliance?
- How does your agency communicate and enforce state and federal laws and regulations that apply to the railroad and transit industries in your state?
- What official coordination efforts currently exist within and between federal, state, and local agencies for railroad, fixed rail guideway, and crude oil oversight in your state?
- Has the influx of additional infrastructure funds from the federal and state government impacted the oversight for railroad and rail fixed guideway systems operations or its infrastructure?
- What responsibility and authority does your agency have for conducting railroad and transit related safety oversight? Does your agency have enough tools at your disposal to act when regulations in either of these sectors are not adhered to?
- Does your agency administer and provide railroad operator safety management practices for the safe transportation of crude oil?
- Does your agency/state have a contact to discuss liability protection for rail safety oversight agencies?

b. New and materially changed railroad operations and infrastructure:

Document any new changes that have taken effect within the oversight of railroad operations and infrastructure that impact the safety of railroad operations.

- Over the last two years, what initiatives has your agency facilitated to improve the operation and infrastructure of operating railroads under your agency's oversight?
 - If so, please provide a list of each recent initiative spearheaded by your agency that correlates to new and materially changes in railroad operations as well as infrastructure related projects.
 - *(if applicable)* Please provide each of the operating initiatives and budgeted allotments for these improvements.
- Please provide any new changes that have taken effect within the agency's approach to oversight of railroad operations and safety.
- What priorities does your agency have for utilizing the funding related to railroad operations, safety, and infrastructure?
- Please provide each infrastructure project, operating railroad and the overall budget for each project.
- What safety oversight initiatives in railroad operations and infrastructure have been or are being considered with new federal and state funding that has been authorized?

c. Operator safety management practices; the safety of transportation of crude oil by rail and enforcement of chapter 90.56 RCW:

Questions will include identifying oversight authorities (e.g., data collection, inspections, or audits, etc.) as well as tools that regulators have at their disposal to act when violations are discovered/regulations are not adhered to.

- What oversight authority does your agency have regarding the transportation of crude oil traveling via railroad in your state? How is this authority administered?
 - Are there any evaluations of the oversight effectiveness?
 - If not your agency, what state agency has safety oversight over the movement of crude oil by rail in your state?
- Does your agency incorporate quantitative and operational scenarios and risk assessments into its oversight of the transportation of crude oil by rail? If so, please provide details.

- Does your agency have a risk management and quality control programs and what are their associated metrics for providing oversight of the transportation of crude oil by railroad?
- What risk assessment tools does your agency utilize to determine severity versus consequence of potential incidents involving the transportation of crude oil via railroad?
 - Has your agency considered population, urban and rural infrastructure differences in the risk assessment tool?
 - If so, how are these different scenarios considered and documented from a qualitative and quantitative perspective?
- What data collection methods are utilized by your agency for recording, corrective action, inspections, and overall safety audits for crude oil transportation by railroad?
- What tools does your agency's inspection personnel have at their disposal to ensure that when violations of safety regulations and laws are discovered that appropriate documentation, data and enforcement actions can be taken?
- What training has your agency's personnel received to ensure they have the necessary knowledge and oversight capabilities to regulate and manage risks associated with the transport of crude oil by railroads in your state?
- What preventive measures has your agency taken to reduce the overall risk for the transportation of crude oil by rail? For example, does your agency complete risk-based planning inspections or surprise inspections without providing railroads notification prior to showing up on property?
- How does your agency monitor, evaluate and provide oversight of railroad operator's safety management practices pertaining to the transport crude oil?
- What actions and coordination does your agency take when a railroad incident occurs which causes the release of crude oil into the environment?

d. The safety and oversight of rail fixed guideway systems as defined in RCW 81.104.015:

Document and provide safety oversight regarding fixed guideways and compare that to RCW 81.104.015. In addition, document how the implementation of the FRA's 49 CFR Part 270 System Safety Program will affect future rail safety oversight on rail fixed guideway systems.

- What actions, approach and oversight programs has your agency taken to ensure rail fixed guideway systems operating in your state have fully developed system safety programs?
- What coordination efforts take place between your agency and the Federal Transit Administration regarding rail fixed guideway oversight in your state?
- What strategic oversight does your agency take to ensure rail fixed guideway operators in your state have set aside appropriate monies for capital improvements to ensure safety is their number one priority?
- What is the frequency of safety improvements and infrastructure of rail fixed guideway operators in your state?
- What qualitative and quantitative tools are used by your agency for oversight and inspection of rail fixed guideway systems in your state?
- What reporting requirements does your agency require of the rail fixed guideway operators and how often do they provide the agency information on their operations?
- Who has the ultimate authority for ensuring that rail fixed guideway systems are maintained, repaired, and modernized to ensure operational safety?

e. Annual reporting practices:

Document the annual reporting differences between states and compare their requirements to ones found in legislation and regulations.

- Please provide an overview of annual reporting practices and requirements within your agency related to railroad safety and state safety oversight of rail fixed guideway systems and what federal agencies these reports are provided to.
- Do you have a flow chart or other visual aid that summarizes your agency's annual reporting practices and procedures? If so, would you kindly share it with us?
- *(Only if not answered above)* What are the frequency and coordination levels that take place between your agency and the FRA and FTA?
- How is the efficiency, accuracy and efficacy associated with annual reporting within your agency determined and achieved?
- What are the annual reporting requirements for your agency regarding railroad infrastructure and operating criteria? Are these mandates consistent with existing legislation and regulations?

- Are the oversight responsibilities and authorization of your agency and current rail safety oversight practices suitable for future services and new rail technologies? (e.g., high-speed rail, precision railroading for freight, positive train control, etc.)

f. Rail safety communication and collaboration efforts, including through the use of a rail safety committee:

Describe the actions agencies take to communicate and collaborate with federal and state regulators while conducting rail safety oversight. In addition, document the methodology and process to incorporate rail safety committee questions to ensure the governing bodies understand the importance of determining if the use of a rail safety committee would make substantial benefits to the overall rail safety oversight model.

- What intra- and inter-agency coordination processes exist within your agency for communicating with organizations and agencies that have a role in railroad safety oversight, fixed rail guideway operations and the transport of crude oil by rail in your state?
- What actions does your agency take to communicate or collaborate with the federal government (FRA, FTA, NTSB, STB), other state agencies and local agencies that may have oversight responsibilities regarding safety oversight for passenger rail, freight rail, the transportation of crude oil and the operation of rail fixed guideway systems?
- What methods does your agency use for documenting these communications and collaborations with outside agencies?
- What process, frequency, methodology and type of communication does your agency utilize when communicating questions and processing information with rail safety committees?
- How does your agency ensure that governing bodies understand the importance of determining the use of rail safety committee work and its benefits to the overall rail safety oversight in your state?

Washington UTC Inventory of Rail Safety Oversight

Supplemental Follow-up Questions:

- **Background**

- 1..1. Could you please provide the statute references, or a copy of the statutes, related to and/or rules promulgated pursuant to your agency's safety oversight authority over railroad operations and infrastructure projects in your state?

- **Staffing, Funding and Revenues**

- 1..1. What number of personnel does your agency have on staff who provide oversight into railroad safety operations occurring throughout your state?

0

- 1..2. *(if applicable)* What number of personnel does your agency have on staff to provide transit (rail fixed guideway) related safety oversight?

- 1..3. What is the budget for each of these oversight organizations per year?

Railroad Safety: \$_____0_____

Rail Fixed Guideway: \$_____

Railroad Crude Oil Oversight *(if applicable)* \$_____0_____

(if available please attach any supporting budget documents)

- 1..4. If contractors are utilized for safety oversight roles, such as safety inspection of the railroads and transit operations and infrastructure, please partition the overall costs and budget breakdowns between:

Railroad Safety Oversight: \$___0_____

Transit Safety Oversight: \$___0_____

Railroad Crude Oil Oversight *(if applicable)* \$_____0_____

(if available please attach any supporting budget documents)

- 1..5. Please provide information on any revenues, fees, etc., that fund your agency's safety program costs. Please include FTA grants for SSO activities and other federal or state funding sources.

(if available please attach any supporting revenue documents)

- **Railroad and Transit Network Statistics**

1..1. What is the railroad network size in your state based on track mileage?

_____ n/a _____

1..2. How many track miles does (Amtrak and commuter rail but not transit) passenger rail operate over in your state? _____ n/a _____

1..3. How many track miles of fixed rail guideway systems are there in your in your state? _____

1..4. How many track miles is the railroad network that crude oil is transported on in your state? _____ n/a _____

- **Contact for UTC**

1..1. Please provide a contact for UTC's legal staff to contact in regard to liability protection for rail safety oversight, as well as pre-emption issues.

_____ n/a _____

Thank you again for your assistance with this inventory. If you have any questions, please call Jeff Schultz at 360-890-6976 or Chris Bonanti at 571-334-4807.

Appendix F – Oregon Rail Advisory Committee Charter and Membership List

Rail Advisory Committee Charter Adopted 03/16/2021

Overview

The Oregon Transportation Commission (OTC) created the Rail Advisory Committee (RAC) in December 2005. The RAC replaced the existing Oregon Passenger Rail Advisory Council, which only handled passenger rail issues.

Mission

The mission of the Oregon Rail Advisory Committee is to advise the Oregon Department of Transportation (ODOT), Oregon Transportation Commission and Oregon Legislature on priorities, issues, projects and funding needs to improve rail infrastructure and to advocate for a safe, efficient, and commercially viable rail system to support the economic vitality of the State of Oregon.

Membership and Structure

Membership

- The ODOT Director will appoint no more than 20 members representing the rail industry, both freight and passenger and other appropriate stakeholders.
- Membership is open to any service provider, shipper, trade association, or business directly related to the rail industry. Stakeholders can include but are not limited to Class I, shortline and passenger railroads, rail passenger advocates, ports and industries that transport goods by rail, rail labor unions, local governments, and other groups or individuals that are impacted by RAC policy and funding recommendations.
- Any individual can submit a request for RAC membership through ODOT's Public Transportation Division (PTD) Administrator or by nomination of any current RAC member. The Director reserves the right to add or remove members of the RAC in order to maintain or enhance the functioning of the RAC.
- ODOT staff are not voting members however; their participation will help inform discussions. ODOT staff shall include PTD Administrator, Rail Operations and Statewide Multimodal Network Unit Manager, State Rail Planner, Passenger Rail Program Coordinator and other ODOT and PTD staff as needed.
- Historically and currently underrepresented and underserved communities experience negative impacts from our existing transportation system due to past investment and development patterns. ODOT will strive to engage members of stakeholder groups that are impacted by the committees' policy and funding recommendations.

Terms of Membership

- RAC members actively participate in the business of the RAC.
- Members attend meetings and serve on designated sub-committees or work groups.

- Members may appoint one alternate from their organization to attend in their absence. If neither the member nor the alternate are available, the member will be absent.
 - The RAC Chair or Vice Chair may recommend removal of any member whose attendance within 12 months includes two consecutive absences from regularly scheduled meetings.
 - If any member resigns or no longer works in the membership category for which they were originally appointed, they will be removed as a member and the Director, acting upon recommendations from the RAC and PTD Administrator, will appoint a new representative for that membership category.
- Members are required to successfully complete Department of Administrative Services and ODOT mandatory trainings specific to advisory committee members.

Structure

- There shall be a Chair and Vice-Chair for the RAC.
- The Chair and Vice-Chair shall receive nominations from the RAC members for the Chair and Vice-Chair positions during a regularly scheduled meeting and elected by a simple majority vote of members present.
- The Chair and Vice-Chair will be eligible to serve for two consecutive two-year terms. Terms begin January 1 of even-numbered years and end December 31 of odd-numbered years.
- In the event the Chair has been in office for at least a six-month period and then vacates office for any reason, the Vice-Chair will become the Chair for the remainder of the vacating Chair's two-year term. If the Chair has been in office for less than a six-month period and then vacates office for any reason, an election is required to select a Chair for the remainder of the vacating Chair's term.
- In the event the Vice-Chair vacates office for any reason, an election is required to select a new Vice-Chair for the remainder of the vacating Vice-Chair's term.
- The Chair will conduct the meetings and work with PTD staff to establish the agenda for each meeting.
- In the absence of the Chair, the Vice-Chair will conduct meetings.

Workgroups

- As appropriate, RAC may create workgroups or sub-committees to examine current issues and develop recommendations for the RAC.
- Workgroups will be chaired by a RAC member appointed by the RAC Chair, but may include non-RAC members as co-chair or as workgroup participants.
- Final recommendations from a workgroup will be brought to the RAC Chair and Vice-Chair prior to presenting to the full RAC.
- If a workgroup member is unable to attend, either in person or via telephone conference, the workgroup chair may choose to appoint another member who has knowledge/expertise as needed to support the workgroup's needs. This information and decision should be provided to the RAC.
- Final products produced by workgroups will be posted on PTD's RAC webpage.

Meeting Schedule and Public Notice

- Regular meetings will be held quarterly, at a minimum. Additional meetings may be scheduled
- as needed.
- It is the responsibility of PTD to schedule and staff RAC meetings, in consultation with the RAC Chair and Vice-Chair. The meetings will be held at meeting locations and times that enable full member and public participation in accordance to Oregon Public Meetings Law, ORS 192.630.
- In the event a meeting cannot be held in person, it will be conducted via electronic media technology that enables full member and public participation.
- Public notice of all RAC meeting will be published in accordance to ORS 192.640:
- For regularly scheduled meetings, PTD staff shall provide for and give public notice reasonably calculated to give actual notice to interested persons including news media which have requested notice, of the time and place for holding regular meetings. The notice shall also include a list of the principal subjects anticipated to be considered at the meeting, but this requirement shall not limit the ability of a governing body to consider additional subjects.
- PTD staff to provide at least 24 hour notice to the members of the governing body, the news media which have requested notice and the general public. In case of an actual emergency, a meeting may be held upon such notice as is appropriate to the circumstances, but the minutes for such a meeting shall describe the emergency justifying less than 24 hour notice.

Decision Making

- The RAC will comply with the requirements of the Oregon Public Meetings Law, ORS 192.610 to 192.690. Any general or sub-committee meeting is open to any person and to all that may wish to be heard regarding any agenda item.
- The RAC will strive to achieve consensus in all matters. However, if consensus is not possible, decisions will be made by simple majority vote.
- All members of RAC are eligible to vote.
- A quorum must be present (in-person, or through any other approved meeting format) to vote on issues referred to the OTC and for issues directly relevant to grant programs, funding, regulation or law. A quorum is a simple majority plus one of the voting RAC members. If such number of voting members is not present, voting will be delayed until the following RAC meeting.
- The RAC Chair or PTD staff may call a special meeting, as needed, to address pertinent issues in a timely manner. Specially called meetings will have the same quorum and voting requirements as regular RAC meetings.

Conflicts of Interest

- RAC members shall discharge their duties in good faith with the care a prudent person in a like position would exercise under similar circumstances, and in a manner which the member reasonably believes to be in the best interests of the public.

- RAC members will disclose real and perceived conflicts of interest prior to participating in a vote and recuse themselves from voting as appropriate.
- Potential personal conflicts of interest identified by members will be resolved as allowed by state law.
- A RAC member with a conflict of interest may participate in a vote if the vote is approved or ratified by an affirmative vote of a majority of the RAC members who have no direct or indirect interest (conflict of interest) in the transaction. The presence of, or a vote cast by, a RAC member with a direct or indirect interest in the transaction does not affect the validity of any action taken.



Oregon Department of Transportation Public Transportation Division Rail Advisory Committee Members

The Rail Advisory Committee (RAC) represents diverse interests in rail transportation statewide. The committee is chaired by Bruce Carswell, representing shortline railroads. Former Oregon Department of Transportation, Director Matt Garrett, and current Director Kristopher Strickler appointed committee members.

First Name	Last Name	Organization Name	RAC Representation
Gary	Cardwell	Northwest Container Services	Businesses
Glenn	Carey	SMART Union	Labor Unions
Bruce	Carswell	Oregon Eastern Division	Shortline Railroads
Robert	Eaton	Amtrak	Class I Passenger Rail Lines
Johan	Hellman	BNSF Railway	Class I Rail Lines
Aaron	Hunt	Union Pacific	Class I Rail Lines
Paul	Langner	Teevin Brothers	Businesses
Chris	Myron	Brotherhood of Locomotive Engineers & Trainmen	Labor Unions
Ivo	Trummer	Port of Portland	Ports

Source:

https://www.oregon.gov/odot/RPTD/RPTD%20Document%20Library/RAC_Members_Apr_2022.pdf

Appendix G – Federal Transit Administration Key Definitions for State Safety Oversight: Selections from 49 Code of Federal Regulations §673.5

Accountable Executive means a single, identifiable person who has ultimate responsibility for carrying out the Public Transportation Agency Safety Plan of a public transportation agency; responsibility for carrying out the agency's Transit Asset Management Plan; and control or direction over the human and capital resources needed to develop and maintain both the agency's the Public Transportation Agency Safety Plan, in accordance with 49 U.S.C. 5329(d), and the agency's Transit Asset Management Plan in accordance with 49 U.S.C. 5326.

Chief Safety Officer means an adequately trained individual who has responsibility for safety and reports directly to a transit agency's chief executive officer, general manager, president or equivalent officer. A Chief Safety Officer may not serve in other operational or maintenance capacities, unless the Chief Safety Officer is employed by a transit agency that is a small public transportation provider as defined in this part, or a public transportation provider that does not operate a rail fixed guideway public transportation system.

Equivalent Authority means an entity that carries out duties similar to that of a Board of Directors, for a recipient or subrecipient of FTA funds under 49 U.S.C. Chapter 53, including sufficient authority to review and approve a recipient's or subrecipient's Public Transportation Agency Safety Plan.

National Public Transportation Safety Plan means the plan to improve the safety of all public transportation systems that receive Federal financial assistance under 49 U.S.C. Chapter 53.

Performance measure means an expression based on a quantifiable indicator of performance or condition that is used to establish targets and to assess progress toward meeting the established targets.

Performance target means a quantifiable level of performance or condition, expressed as a value for the measure, to be achieved within a time period required by the FTA.

Public Transportation Agency Safety Plan means the documented comprehensive agency safety plan for a transit agency that is required by 49 U.S.C. 5329 and this part.

Rail fixed guideway public transportation system means any fixed guideway system that uses rail, is operated for public transportation, is within the jurisdiction of a State, and is not subject to the jurisdiction of the Federal Railroad Administration, or any such system in engineering or construction. Rail fixed guideway public transportation systems include but are not limited to rapid rail, heavy rail, light rail, monorail, trolley, inclined plane, funicular and automated guideway.

Safety Assurance means processes within a transit agency's Safety Management System that function to ensure the implementation and effectiveness of safety risk mitigation, and to ensure that the transit agency meets or exceeds its safety objectives through the collection, analysis, and assessment of information.

Safety Management Policy means a transit agency's documented commitment to safety, which defines the transit agency's safety objectives and the accountabilities and responsibilities of its employees in regard to safety.

Safety Management System means the formal, top-down, organization-wide approach to managing safety risk and ensuring the effectiveness of a transit agency's safety risk mitigation. The Safety Management System includes systematic procedures, practices and policies for managing risks and hazards.

Safety Management System Executive means a Chief Safety Officer or an equivalent.

State of good repair means the condition in which a capital asset is able to operate at a full level of performance.

State Safety Oversight Agency, or SSOA, means an agency established by a State that meets the requirements and performs the functions specified by 49 U.S.C. 5329(e) and the regulations set forth in 49 CFR Part 674.

Transit Asset Management Plan means the strategic and systematic practice of procuring, operating, inspecting, maintaining, rehabilitating and replacing transit capital assets to manage their performance, risks and costs over their life cycles, for the purpose of providing safe, cost-effective and reliable public transportation, as required by 49 U.S.C. 5326 and 49 CFR Part 625.

Appendix H – Federal Transit Administration National Public Transportation Safety Plan Topical Areas

The **Public Transportation Safety Program**, created through 49 Code of Federal Regulation Part 670, gives the Federal Transit Administration authority to take over audits and inspections for a State Safety Oversight Agency. The language in Part 670 includes the FTA’s authority to issue Special Directives to a specific state or rail transit agency. According to 49 CFR §670.31,¹ which covers the purpose and contents of the National Public Transportation Safety Plan:

“FTA will periodically issue a National Public Transportation Safety Plan that will improve the safety of all public transportation systems that receive funding under 49 U.S.C. Chapter 53. The National Public Transportation Safety Plan will include the following:

- (a) Safety performance criteria for all modes of public transportation, established through public notice and comment.
- (b) The definition of state of good repair.
- (c) Minimum safety performance standards for vehicles in revenue operations, established through public notice and comment.
- (d) Minimum performance standards for public transportation operations established through public notice and comment.
- (e) The Public Transportation Safety Certification Training Program.
- (f) Safety advisories, directives and reports.
- (g) Best practices, technical assistance, templates and other tools.
- (h) Research, reports, data and information on hazard identification and risk management in public transportation, and guidance regarding the prevention of accidents and incidents in public transportation.
- (i) Any other content as determined by the Federal Transit Administration.”

¹ <https://www.ecfr.gov/current/title-49/subtitle-B/chapter-VI/part-670>

Appendix I – Federal Transit Administration Transit Asset Management Requirements: 49 Code of Federal Regulations §625.25 subsections (a) and (b)

Subsection (a) provides the general criteria for what constitutes a Transit Asset Management Plan and includes the following three requirements: “(1) Each tier I provider must develop and carry out a TAM plan that includes each element under paragraph (b) of this section; (2) Each tier II provider must develop its own TAM plan or participate in a group TAM plan. A tier II provider’s TAM plan and a group TAM plan only must include elements under paragraphs (b)(1) through (4) of this section; and (3) A provider’s Accountable Executive is ultimately responsible for ensuring that a TAM plan is developed and carried out in accordance with this part.”

Subsection (b) provides the elements that must be included in a TAM Plan. The regulations list nine elements a State Safety Oversight Agency and rail transit agency must consider:

1. An inventory of the number and type of capital assets. The inventory must include all capital assets that a provider owns, except equipment with an acquisition value under \$50,000 that is not a service vehicle. An inventory also must include third-party owned or jointly procured exclusive-use maintenance facilities, passenger station facilities, administrative facilities, rolling stock and guideway infrastructure used by a provider in the provision of public transportation. The asset inventory must be organized at a level of detail commensurate with the level of detail in the provider’s program of capital projects.
2. A condition assessment of those inventoried assets for which a provider has direct capital responsibility. A condition assessment must generate information in a level of detail sufficient to monitor and predict the performance of the assets and to inform the prioritization of investments.
3. A description of analytical processes or decision-support tools that a provider uses to estimate capital investment needs over time and develop its investment prioritization.
4. A provider’s project-based prioritization of investments, developed in accordance with 49 CFR § 625.33.
5. A provider’s TAM Plan and State of Good Repair policy.
6. A provider’s TAM Plan implementation strategy.
7. A description of key TAM activities that a provider intends to engage in over the planning horizon of the TAM Plan.
8. A summary or list of the resources, including personnel, that a provider needs to develop and carry out the TAM Plan.
9. An outline of how a provider will monitor, update and evaluate, as needed, its TAM Plan and related business practices, to ensure the continuous improvement of its TAM practices.

Appendix J – California Public Utilities Commission Rail Safety Division Selected Background Information

The California Public Utilities Commission’s 2020 and 2021 annual railroad safety reports provide the number of railroad inspections the commission has completed from 2012 through 2021.

Positive Train Control

The Rail Safety Improvement Act of 2008¹ requires all Class 1 railroads operating in the United States to install an FRA-certified Positive Train Control system on their operating railroad systems, if the railroad provides regularly scheduled intercity or commuter rail passenger service, by December 31, 2015. The Act included additional clarifications stating that Positive Train Control was required if the mainline railroad: (1) had 5 million or more gross tons of annual traffic and poison or toxic-by-inhalation hazardous materials transported over the line or (2) operated regular intercity or commuter rail service over the mainline. The U.S. Congress, however, extended the deadline through the PTC Enforcement and Implementation Act of 2015,² which allowed, under certain conditions, railroads to postpone implementing Positive Train Control systems along their railroad main lines until December 31, 2020. According to the CPUC, Union Pacific Railroad and BNSF Railway Company implemented Positive Train Control along all tracks covered under each of the federal laws by the end of 2020. CPUC Rail Safety Division inspectors are monitoring the overall progress of Positive Train Control in California to ensure that railroads continue to operate and maintain safe and effective systems as part of their operations.

California High-Speed Rail

As the regulatory authority over safe high-speed passenger rail, the CPUC is strategically helping to ensure that the current construction of the California High Speed Rail system considers all regulatory implications. The State of California has been investing in high-speed rail and planning, designing and building the operation of its high-speed rail system. The California High Speed Rail Authority, which is an agency within the California State Transportation Agency, is the agency that initiates all preliminary designs to build out high-speed rail throughout California. The initial segment of the California High Speed Rail system from Merced to Bakersfield will not begin service until 2029.

The Rail Safety Division completes inspections of the high-speed rail construction activities that may endanger railroad workers on adjacent properties and/or potentially interfere with conventional railroad operations. These inspections ensure that building materials and equipment that are in the vicinity of train operations do not create a safety risk for either high-speed rail contractors or railroad workers.

¹ Public Law No. 110-432.

² Public Law No. 114-73.

Appendix K – New York State Department of Transportation: Public Transportation Safety Board Information

New York state has the largest transit system in the United States, especially considering the combination of the different and connecting rail fixed guideway systems in New York City, which were first built and became operational in 1904. It took 80 years of advancements and infrastructure improvements of rail fixed guideways to occur before the New York Legislature established the Public Transportation Safety Board in 1984, which was the first board of its kind in the nation. The board consists of the commissioner of the New York State Department of Transportation and six board members, as well as the inspector general of the Metropolitan Transportation Authority. The governor chooses the chairman of the board, and the director of the Rail Safety Bureau serves as the executive director of the PTSB. Staff from the Rail Safety Bureau support all required duties of the PTSB.

The statutory language made the PTSB responsible for the safety oversight of all public transportation systems operating in New York state that receive State Transit Operating Assistance. This responsibility includes the investigation of accidents involving public transportation operations in commuter rail, subways, rapid transit and buses. Part 990 of subchapter H – State Public Transportation Safety Board, which is within Chapter VI of the Transportation Regulations of Title 17 – Department of Transportation, provides both the authority as well as the purposes and powers of the PTSB.

The PTSB was established to mirror the National Transportation Safety Board; however, because the mission of the PTSB is specifically to reduce the number, rate and severity of public transportation accidents, its mission is not as broad as the mission of the National Transportation Safety Board. The PTSB has legislatively mandated powers to enable it to fulfill its mission, including:

- Establishing accident reporting, investigation, and analysis procedures.
- Conducting comprehensive accident investigations.
- Taking a proactive role in public safety by reviewing, approving and monitoring system safety program plans submitted by each public transportation system.
- Conducting system safety program field audits.
- Analyzing critical safety issues and concerns.
- Recommending the establishment of new safety legislation, rules and regulations, and transportation system procedures based on accident investigations, special studies and audits.

According to the PTSTB, since its inception, it has investigated more than 2,400 bus and rail accidents and issued approximately 2,500 recommendations to bus and rail properties to improve safety. These recommendations have addressed safety issues that affect management oversight, bus driver training, bus and rail vehicle designs, maintenance procedures to ensure supervisory and mechanic accountability, commitment of capital resources to improve safety deficiencies, emergency communications, highway grade crossing gates and approaches, preventative maintenance procedures, rail tracks and signals, subway tunnel ventilation, emergency plans and procedures, and train operator hours of service and fatigue.

Accident Reporting

For accident reporting, the Rail Safety Bureau requires freight, intercity passenger railroads and commuting railroads on the national network to provide immediate notification to the Rail Safety Inspection Section if one of the following events occurs:

- All train and train service accidents involving a passenger train.
- All train and train service accidents that cause delays to passenger train movements of more than 30 minutes.
- All collisions, except those minor collisions that can be repaired without the need to move to a repair facility.
- All freight train derailments that occur on tracks where the maximum authorized track speed exceeds 25 miles per hour, that involve placarded hazardous materials cars, or that derail at least five freight cars.
- Any release or spill of a hazardous material identified in 49 Code of Federal Regulations Part 172.
- All bridge or other track opening failures.
- Any accident involving a steam-powered locomotive.
- All accidents at street or highway/rail grade crossings.
- All train and train service accidents that result in death or an injury that requires immediate hospitalization.

Appendix L – Oregon State Railroad Safety Laws and Regulations

Excerpts from Oregon Revised Statutes Chapter 824 — Railroads 2021 EDITION

RAILROADS

OREGON VEHICLE CODE

FUNDS, ACCOUNTS AND FEES

- 824.010 Annual fees payable by railroads; audit
- 824.012 Failure to pay fees; penalty
- 824.014 Railroad Fund; sources; use
- 824.016 State Rail Rehabilitation Fund; use

GENERAL PROVISIONS

- 824.020 Definitions for ORS 824.020 to 824.042

INSPECTORS; REPORTS

- 824.026 Railway inspectors required; powers and duties
- 824.030 Annual report to department; penalty

ACQUISITION OR ABANDONMENT OF LINES

- 824.040 Government acquisition of lines; permitted actions
- 824.042 Department to participate in contested abandonment proceedings

SAFETY PROGRAM STANDARD

- 824.045 Department establishment of state safety oversight program for rail fixed guideway public transportation system; fee; rules

FACILITIES AND TRACKS

- 824.050 Inspection of, recommendations on and orders concerning railroad equipment and facilities
- 824.052 Track clearances
- 824.054 Cooperation with federal agencies on matters of safety; disclosure of reports if required by federal law
- 824.056 Walkway standards; rules; variances
- 824.058 Track improvement and rehabilitation program

EQUIPMENT

- 824.060 First aid kits and fire extinguishers required on locomotives; temporary exemptions
- 824.062 Equipment required on track motor cars

- 824.064 Self-propelled vehicles used in yards or terminals
- 824.066 Helper unit operation restrictions
- 824.068 Water quality standards for locomotives

HAZARDOUS MATERIALS

- 824.080 "Hazardous materials" defined
- 824.082 Notice of movement of hazardous materials; confidentiality of notice information
- 824.084 Visual external inspections required on cars standing in rail yards or stations more than two hours
- 824.086 Designation of hazardous materials and notice requirements; rules
- 824.088 Notifying Oregon Department of Emergency Management of reportable incident, derailments and fires; radio gear
- 824.090 Department of Transportation to set standards for safe transportation of hazardous wastes; rules; civil penalty
- 824.092 Disclosure of hazardous waste reports and information to Environmental Protection Agency

PASSENGER RAIL

- 824.400 Passenger rail plan
- 824.410 Quarterly report to Legislative Assembly
- 824.420 Cascades Rail Corridor
- 824.430 Annual report to Legislative Assembly

PENALTIES

- 824.990 Civil penalties
- 824.992 Criminal penalties

FUNDS, ACCOUNTS AND FEES

824.010 Annual fees payable by railroads; audit. (1) Subject to the provisions of subsections (3) and (4) of this section, each railroad shall pay to the Department of Transportation in each year, such fee as the department finds and determines to be necessary, with the amount of all other fees paid or payable to the department by such railroads in the current calendar year, to defray the costs of performing the duties imposed by law upon the department in respect to such railroads and to pay such amounts as may be necessary to obtain matching funds to implement the program referred to in ORS 824.058.

- (2) In each calendar year the percentage rate of the fee required to be paid shall be determined by orders entered by the department on or after March 1 of each year, and notice thereof shall be given to each railroad. Such railroad shall pay to the department the fee or portion thereof so computed upon the date specified in such notice, which date shall be at least 15 days after the date of mailing such notice.

- (3) Fifty percent of the cost of carrying out the duties, functions and powers imposed upon the department by ORS 824.200 to 824.256 shall be paid from the Grade Crossing Protection Account.
- (4) The department shall determine the gross operating revenues derived within this state in the preceding calendar year by Class I railroads as a whole and by other railroads individually subject to the following limitations:
 - (a) The total of the fees payable by Class I railroads shall not exceed thirty-five hundredths of one percent of the combined gross operating revenues of Class I railroads derived within this state. The fee paid by each Class I railroad shall bear the same proportion to the total fees paid by Class I railroads as such railroad's share of railroad-highway crossings, track miles and gross operating revenues derived within the state, weighted equally, bears to the total amount of Class I railroad-highway crossings within the state, track miles within the state and gross operating revenues derived within the state.
 - (b) The fees payable by other railroads shall not exceed thirty-five hundredths of one percent of any such railroad's gross operating revenues.
- (5) Payment of each fee or portion thereof provided for in subsections (1) to (4) of this section shall be accompanied by a statement verified by the railroad involved showing its gross operating revenues upon which such fee or portion thereof is computed. This statement shall be in such form and detail as the Department of Transportation shall prescribe and shall be subject to audit by the department. The department may refund any overpayment of any such fee in the same manner as other claims and expenses of the department are payable as provided by law. [1995 c.733 §§29,30]

824.012 Failure to pay fees; penalty. Every person who fails to pay any fees provided for in ORS 824.010 after they are due and payable shall, in addition to such fees, pay a penalty of two percent of such fees for each and every month or fraction thereof that they remain unpaid. If, in the judgment of the Department of Transportation, action is necessary to collect any unpaid fees or penalties, the department shall bring such action or take such proceedings as may be necessary thereon in the name of the State of Oregon in any court of competent jurisdiction, and be entitled to recover all costs and disbursements incurred therein. [1995 c.733 §31]

824.014 Railroad Fund; sources; use. (1) The Railroad Fund is established separate and distinct from the General Fund. Interest earned, if any, shall inure to the benefit of the Railroad Fund. (2) All fees, penalties and other moneys collected by the Department of Transportation under ORS 824.010 and 824.012 shall be paid by the department into the State Treasury within 30 days after the collection thereof, and shall be placed by the State Treasurer to the credit of the Railroad Fund created by subsection (1) of this section. The fees, penalties and other moneys collected from railroads shall be used only for the purpose of paying the expenses of the

department in performing the duties imposed by law upon the department in respect to railroads. [1995 c.733 §§31a,32; 2011 c.597 §307]

824.016 State Rail Rehabilitation Fund; use. (1) The State Rail Rehabilitation Fund is established as an account in the General Fund of the State Treasury. All moneys in the account are appropriated continuously to the Department of Transportation for expenditures for any or all of the following:

- (a) Acquisition of a railroad line.
 - (b) Rehabilitation or improvement of rail properties.
 - (c) Planning for rail services.
 - (d) Any other methods of reducing the costs of lost rail service in this state.
- (2) The program developed by the Department of Transportation under this section to provide funds for rail projects shall include:
- (a) Development of a formula for determining a minimum cost to benefit ratio necessary for project funding;
 - (b) Supervision and monitoring of railroad acquisitions and the awarding of rehabilitation contracts;
 - (c) Continuing inspection of all railroad rehabilitation projects; and
 - (d) Auditing financial records of all railroad acquisition and rehabilitation projects.
- (3) The Department of Transportation shall provide funds for railroad projects under this section only with the approval of the Oregon Transportation Commission. [Formerly 760.620; 2005 c.612 §7]

GENERAL PROVISIONS

Definitions for ORS 824.020 to 824.042. As used in ORS 824.020 to 824.042, unless the context requires otherwise:

- (1) “Class I railroad” has the meaning given that term in rules adopted by the Department of Transportation. The definition of “Class I railroad” in rules adopted by the Department of Transportation shall be consistent, insofar as practicable, with the definition of the term under federal law and regulations.
- (2) “Railroad” means all corporations, municipal corporations, counties, companies, individuals, associations of individuals and their lessees, trustees or receivers, that:
 - (a) Own, operate by steam, electric or other motive power, manage or control all or part of any railroad or interurban railroad as a common or for hire carrier in this state, or cars or other equipment used thereon, or bridges, terminals or sidetracks used in connection therewith, whether owned or operated under a contract, agreement, lease or otherwise.
 - (b) Are engaged in the ownership, management or control of terminals in this state, which corporations, municipal corporations, counties, companies, individuals and

associations hereby are declared to be common and for hire carriers, or the transportation of property within this state by express. [Formerly 760.005]

824.022 Applicability of ORS 824.020 to 824.042, 824.050 to 824.110 and 824.200 to 824.256.

(1) ORS 824.020 to 824.042, 824.050 to 824.110 and 824.200 to 824.256 apply to:

- (a) The transportation of passengers and property.
- (b) The receiving, delivering, switching, storing, elevation and transfer in transit, ventilation, refrigeration and handling of such property, and all charges connected therewith.
- (c) All railroad, terminal, car, tank line, freight and freight line companies.
- (d) All associations of persons, whether incorporated or otherwise, that do business as common or for hire carriers upon or over any line of railroad within this state.
- (e) Any common or for hire carrier engaged in the transportation of passengers or property wholly by rail or partly by rail and partly by water.

(2) ORS 824.020 to 824.042 do not apply to logging or other private railroads not doing business as common carriers.

(3) ORS 824.020 to 824.042 and 824.050 to 824.110 do not apply to corporations, companies, individuals, associations of individuals and their lessees, trustees or receivers that:

- (a) Are primarily involved in a business enterprise other than rail transportation;
- (b) Conduct rail operations 50 percent or more of which are for the purpose of providing transportation to the primary business enterprise;
- (c) Operate on less than 10 miles of track; and
- (d) Provide for hire rail transportation service to no more than five persons. [Formerly 760.010; 2021 c.630 §25]

INSPECTORS; REPORTS

824.026 Railway inspectors required; powers and duties. (1) The Department of Transportation shall employ at least three full-time railroad inspectors to assist the department as the department may prescribe in:

- (a) Inquiring into any neglect or violation of and enforcing any law of this state or any law or ordinance of any municipality thereof relating to railroad safety;
- (b) Inquiring into any neglect or violation of and enforcing any rule, regulation, requirement, order, term or condition issued by the department relating to railroad safety; and
- (c) Conducting any investigative, surveillance and enforcement activities that the department is authorized to conduct under federal law in connection with any federal law, rule, regulation, order or standard relating to railroad safety.

- (2) A railroad inspector may inspect any train and the contents thereof that the railroad inspector reasonably believes is being operated in violation of any law, ordinance, rule, regulation, requirement, order, standard, term or condition referred to in subsection (1) of this section. [Formerly 760.070; 2021 c.630 §26]

824.030 Annual report to department; penalty. (1) Every railroad shall annually, on or before May 1, unless additional time is granted, file with the Department of Transportation a report verified by a duly authorized officer, in such form and containing such information as the department shall prescribe, covering the year ending December 31 next preceding.

(2) Any railroad failing to make such report shall forfeit to the state, for each day's default, a sum not to exceed \$100, to be recovered in a civil action in the name of the State of Oregon. [Formerly 760.305]

SAFETY PROGRAM STANDARD

824.045 Department establishment of state safety oversight program for rail fixed guideway public transportation system; fee; rules. (1) Subject to ORS 479.950, the Department of Transportation, by rule, shall establish a state safety oversight program that applies to all rail fixed guideway public transportation systems in Oregon that are not subject to regulation by the Federal Railroad Administration.

(2) For purposes of 49 U.S.C. 5329(e), the department is designated as the state safety oversight agency to monitor compliance with the program for rail fixed guideway public transportation systems that are not subject to regulation by the Federal Railroad Administration. The state safety oversight agency and rules:

- (a) Shall implement the state safety oversight program in compliance with the requirements of 49 U.S.C. 5329. Shall review, approve, oversee and enforce the implementation, by the owner and operator of a rail fixed guideway public transportation system, of the public transportation agency safety plan adopted pursuant
- (b) to 49 U.S.C. 5329(d).
- (c) Shall inspect, investigate and enforce the safety of rail fixed guideway public transportation systems.
- (d) Shall audit rail fixed guideway public transportation systems for compliance with the public transportation agency safety plan.
- (e) May investigate any hazard or risk that threatens the safety of a rail fixed guideway public transportation system.
- (f) May investigate any event involving a rail fixed guideway public transportation system.
- (g) May investigate any allegation of noncompliance with a transit agency safety plan.

(3) The department shall implement the state safety oversight program for rail fixed guideway public transportation systems that are not subject to regulation by the Federal Railroad Administration and that are not subject to 49 U.S.C. 5329.

- (4) Unless prohibited by federal law, the department shall set an annual fee for owners and operators of rail fixed guideway public transportation systems to defray the costs of the state safety oversight program and the costs associated with department responsibilities under ORS 267.230 (2). The department shall establish by rule the manner and timing of the collection of the fee.
- (5) Fees collected by the department that are in excess of the combined actual cost of the state safety oversight program and the costs associated with department responsibilities under ORS 267.230 (2) shall be refunded to owners and operators of rail fixed guideway public transportation systems within one year following the end of the fiscal year in which the department collected the excess fees. In lieu of a refund, an owner or operator of a rail fixed guideway public transportation system may choose to have the excess fees credited against the subsequent year's fee payment. [1995 c.29 §3; 1997 c.275 §43; 2001 c.522 §11; 2015 c.489 §1; 2017 c.46 §2]

FACILITIES AND TRACKS

824.050 Inspection of, recommendations on and orders concerning railroad equipment and facilities. (1) Except as provided in subsection (2) of this section, the Department of Transportation shall examine and inspect the physical condition of all railroad facilities in the state, including roadbeds, stations and equipment. Whenever it appears from such inspection that the safety of the public or the employees of such railroad may be threatened, notice of the condition or practice under investigation shall be given to the railroad and any person responsible for the maintenance or use of the railroad facility. If such condition or practice is not corrected to the department's satisfaction, the department shall set the matter for hearing. Following such hearing the department shall order the railroad or person responsible for the maintenance or use of the railroad facility to make any repairs, alterations, or changes necessary to correct or eliminate any condition or practice found to threaten the safety of the public or the employees of the railroad. If in the opinion of the Department of Transportation a condition or practice is so hazardous as to place the employees of the railroad in immediate danger the department may issue, after hearing, upon 48 hours' written notice given the railroad, an order prohibiting the use of the facility until such time as necessary repair, alterations or changes are made.

- (2) This section does not apply to a penalty imposed under ORS 824.090 or 824.992 (7) and (8). [Formerly 761.120; 1997 c.275 §12]

824.052 Track clearances. The Department of Transportation, upon own motion or upon application of any person, and with or without hearing:

- (1) May enter an order prescribing standard track clearances for railroads.

- (2) Upon finding good cause, may enter an order granting authority for a railroad to operate at particular points with clearances different from those prescribed as standard track clearances. [Formerly 761.180]

824.054 Cooperation with federal agencies on matters of safety; disclosure of reports if required by federal law. (1) The Department of Transportation may cooperate with, make certifications to, and enter agreements with the Secretary of Transportation of the United States, or any other federal agency with jurisdiction over railroads, under the Federal Railroad Safety Act of 1970, as amended through the effective date of that Act.

- (2) The Department of Transportation may assume responsibility for and carry out on behalf of the Secretary of Transportation of the United States, or any other federal agency with jurisdiction over railroads, regulatory jurisdiction over the safety practices applicable to railroad facilities and operations in Oregon not otherwise subject to the jurisdiction of any other agency of this state.
- (3) Notwithstanding any other provisions of law to the contrary, the Department of Transportation shall make public such reports as are required to be made public under the Federal Railroad Safety Act of 1970, as amended through the effective date of that Act and shall provide such information as is required thereunder to the Secretary of Transportation of the United States. [Formerly 761.190]

824.056 Walkway standards; rules; variances. (1) The Department of Transportation, upon the department's motion or upon application of any person, shall adopt rules that prescribe standards for walkways alongside railroad tracks where necessary for the safety of railroad employees.

- (2) The department may for good cause shown permit variances from the standards so prescribed. [Formerly 761.200; 1997 c.275 §13]

824.058 Track improvement and rehabilitation program. The Department of Transportation may:

- (1) Identify segments of railroad track in this state that:
 - (a) Are abandoned, threatened with abandonment or have physical characteristics that reduce freight service; and
 - (b) Have the potential for providing renewed, continued or improved rail service that would benefit the state or community beyond the cost involved.
- (2) Develop and implement programs to encourage improvement of service over segments of railroad track identified under subsection (1) of this section.
- (3) With the prior approval of the Oregon Transportation Commission, enter into agreements with the United States Government, a political subdivision in this state or any person to:

- (a) Continue existing rail service on a segment of railroad track identified under subsection (1) of this section;
 - (b) Acquire a segment of railroad track identified under subsection (1) of this section to maintain existing or provide for future rail service;
 - (c) Rehabilitate or improve, to the extent necessary to permit more adequate and efficient rail service, railroad property on a segment of railroad track identified under subsection (1) of this section; or
 - (d) Provide funding for less expensive alternatives to rail service over a segment of railroad track identified under subsection (1) of this section.
- (4) Do any act required of this state under rules adopted by the United States Secretary of Transportation under section 1654, title 49, United States Code, for allocation and distribution of funds to any state under section 1654, title 49, United States Code, for preserving or improving rail freight service in this state. [Formerly 761.205]

Note: 824.058 was added to and made a part of ORS chapters 823, 824, 825 and 826 by legislative action but was not added to ORS chapter 824 or any series therein. See Preface to Oregon Revised Statutes for further explanation.

HAZARDOUS MATERIALS

824.080 “Hazardous materials” defined. As used in ORS 824.082 to 824.090 “hazardous materials” means those substances designated by the Department of Transportation pursuant to ORS 824.086 (1). [Formerly 761.370]

824.082 Notice of movement of hazardous materials; confidentiality of notice information. (1)
) Before transporting hazardous materials into this state or from a railroad terminal located within this state, a railroad shall, as soon as reasonably possible after it has notice of such train movement, provide such notification thereof as the Department of Transportation determines pursuant to ORS 824.086. If the information necessary for the notification is not available before beginning the train movement, or if hazardous materials are added to the train while enroute, notification shall be given as soon as the information is available. For the purposes of this subsection, “train movement” does not include a switching or transfer movement.

- (2) Except to the extent that the Department of Transportation determines is necessary to provide for the safe transportation of the hazardous materials, the department, an employee of the department and any person receiving information pursuant to this section shall not divulge or make known the information contained in the notification at any time before or during the transportation of the hazardous materials for which the notification is provided. [Formerly 761.380]

824.084 Visual external inspections required on cars standing in rail yards or stations more than two hours. Each railcar containing hazardous materials for which an “Explosives A,” “Flammable Gas” or “Poison Gas” placard is required by federal regulation, and which remains in a rail yard

or station for more than two hours shall be visually inspected externally by the transporting railroad within two hours of the car's arrival and within two hours prior to the car's departure. [Formerly 761.395]

824.086 Designation of hazardous materials and notice requirements; rules. After consultation with the State Fire Marshal the Department of Transportation shall determine:

- (1) What material and quantity thereof the transportation of which is hazardous to public health, safety or welfare and shall designate by rule such materials and quantities as hazardous materials. In defining hazardous materials the department shall adopt definitions in conformity with the federal rules and regulations. Rules adopted under this subsection shall be applicable to any person who transports, or causes to be transported, any hazardous material.
- (2) What notification required by ORS 824.082 (1) is necessary to provide for the safe transportation of hazardous materials, including but not limited to the time, content and manner of notification. [Formerly 761.400]

824.088 Notifying Oregon Department of Emergency Management of reportable incident, derailments and fires; radio gear. (1) Each railroad that gives notice to the United States Department of Transportation of an incident that occurs during the course of transporting hazardous materials as defined by federal regulations shall also give notice of the incident to the Director of the Oregon Department of Emergency Management.

- (2) As soon as reasonably practicable, each railroad shall notify the director by telephone or similar means of communication of any derailment or fire involving or affecting hazardous material.
- (3) To facilitate expedited and accurate notice to the director under this section, each train transporting hazardous materials in this state shall be equipped with at least two radio transmitter-receivers in good working order. In addition, trains over 2,000 feet in length that are transporting hazardous materials shall be equipped with a radio handset in good working order capable of communicating with the radio transmitter-receivers. If the equipment required under this section does not function while the train is enroute, the train may proceed to the next point of crew change where the equipment shall be replaced or repaired. [Formerly 761.405; 2007 c.740 §40; 2021 c.539 §77; 2021 c.630 §28]

Note: The amendments to 824.088 by section 77, chapter 539, Oregon Laws 2021, become operative July 1, 2022. See section 155, chapter 539, Oregon Laws 2021. The text that is operative until July 1, 2022, including amendments by section 28, chapter 630, Oregon Laws 2021, is set forth for the user's convenience.

824.088. (1) Each railroad that gives notice to the United States Department of Transportation of an incident that occurs during the course of transporting hazardous materials as defined by

federal regulations shall also give notice of the incident to the Director of the Office of Emergency Management.

- (2) As soon as reasonably practicable, each railroad shall notify the director by telephone or similar means of communication of any derailment or fire involving or affecting hazardous material.
- (3) To facilitate expedited and accurate notice to the director under this section, each train transporting hazardous materials in this state shall be equipped with at least two radio transmitter-receivers in good working order. In addition, trains over 2,000 feet in length that are transporting hazardous materials shall be equipped with a radio handset in good working order capable of communicating with the radio transmitter-receivers. If the equipment required under this section does not function while the train is enroute, the train may proceed to the next point of crew change where the equipment shall be replaced or repaired.

824.090 Department of Transportation to set standards for safe transportation of hazardous wastes; rules; civil penalty. (1) The Department of Transportation shall adopt rules setting standards for the safe transportation of hazardous wastes, as defined in ORS 466.005, by all transporters.

(2) The authority granted under this section:

- (a) Is in addition to any other authority granted the department.
- (b) Does not supersede the authority of the Energy Facility Siting Council to regulate the transportation of radioactive materials under ORS 469.550, 469.563, 469.603 to 469.619 and 469.992.

(3) In addition to any other penalty for violation of a rule adopted under this section, the department, in the manner provided in ORS 183.745, may impose a civil penalty of not more than \$10,000 for violation of a rule adopted under this section. Each day of noncompliance with a rule is a separate violation.

As used in this section, “transporter” has the meaning given that term in ORS 466.005. [Formerly 761.415; 1997 c.275 §14]

824.092 Disclosure of hazardous waste reports and information to Environmental Protection Agency. Records, reports and information obtained or used by the Department of Transportation in administering the hazardous waste program under ORS 824.090 shall be available to the United States Environmental Protection Agency upon request. If the records, reports or information has been submitted to the department under a claim of confidentiality, the state shall make that claim of confidentiality to the Environmental Protection Agency for the requested records, reports or information. The federal agency shall treat the records, reports or

information that is subject to the confidentiality claim as confidential in accordance with applicable federal law. [Formerly 761.421]

PASSENGER RAIL

824.400 Passenger rail plan. (1) The Department of Transportation shall develop and implement a passenger rail plan for the purposes of increasing ridership on passenger trains and increasing ticket revenue. The passenger rail plan must include, but is not limited to, the following:

- (a) A marketing strategy.
- (b) Strategies for boosting ridership.
- (c) Strategies for boosting tourism through the use of passenger rail.

(2) The department may coordinate with other state agencies to develop the plan. [2015 c.225 §3]

Note: 824.400 to 824.430 were enacted into law by the Legislative Assembly but were not added to or made a part of the Oregon Vehicle Code or any chapter or series therein by legislative action. See Preface to Oregon Revised Statutes for further explanation.

824.410 Quarterly report to Legislative Assembly. The Department of Transportation shall submit a quarterly report on the performance of passenger rail to the interim committees of the Legislative Assembly related to transportation in the manner provided under ORS 192.245. The report must include a summary of the number of passengers utilizing passenger rail and on-time performance for the previous quarter. [2015 c.225 §5]

Note: See note under 824.400.

824.420 Cascades Rail Corridor. (1) The Department of Transportation may enter into agreements with the Washington State Department of Transportation and the British Columbia Ministry of Transportation and Infrastructure to:

- (a) Develop a plan to document the shared vision, goals and objectives for passenger rail service within the Cascades Rail Corridor.
- (b) Develop a plan to achieve performance goals, manage fleet assets, share costs, prioritize investments and resolve interagency disputes.
- (c) Propose funding options to the respective legislative bodies to support the operation of passenger trains within the corridor.
- (d) Develop a stakeholder outreach program.
- (e) Oversee operations and marketing of daily passenger rail service in the corridor.

(2) The Department of Transportation may enter into agreements with the Washington State Department of Transportation to coordinate state rail plans. [2013 c.112 §1]

Note: See note under 824.400.

824.430 Annual report to Legislative Assembly.

Before January 1 of each odd-numbered year, the Department of Transportation shall report to the Legislative Assembly in the manner provided in ORS 192.245 about the following:

- (1) The status of agreements with the Washington State Department of Transportation and the British Columbia Ministry of Transportation and Infrastructure regarding the Cascades Rail Corridor.
- (2) The performance of passenger rail service within the corridor.
- (3) The financial status of the corridor and financial needs for passenger rail service within the corridor. [2013 c.112 §2]

Note: See note under 824.400.

PENALTIES

824.990 Civil penalties. (1) In addition to all other penalties provided by law:

- (a) Every person who violates or who procures, aids or abets in the violation of ORS 824.060 (1), 824.084, 824.088, 824.304 (1) or 824.306 (1) or any order, rule or decision of the Department of Transportation shall incur a civil penalty of not more than \$1,000 for every such violation.
 - (b) Every person who violates or who procures, aids or abets in the violation of any order, rule or decision of the department promulgated pursuant to ORS 824.052 (1), 824.056 (1), 824.068, 824.082 (1) or 824.208 shall incur a civil penalty of not more than \$1,000 for every such violation.
- (2) Each such violation shall be a separate offense and in case of a continuing violation every day's continuance is a separate violation. Every act of commission or omission that procures, aids or abets in the violation is a violation under subsection (1) of this section and subject to the penalty provided in subsection (1) of this section.
 - (3) Civil penalties imposed under subsection (1) of this section shall be imposed in the manner provided in ORS 183.745.
 - (4) The department may reduce any penalty provided for in subsection (1) of this section on such terms as the department considers proper if:
 - (a) The defendant admits the violations alleged in the notice and makes timely request for reduction of the penalty; or
 - (b) the defendant submits to the department a written request for reduction of the penalty within 15 days from the date the penalty order is served. [Formerly 824.112; 2021 c.630 §128]

824.992 Criminal penalties. (1) Violation of ORS 824.062 is a Class D violation.

(2) Violation of ORS 824.064 is a Class A misdemeanor.

(3) Violation of ORS 824.082 (1), 824.084 or 824.088 by a railroad is a Class A violation.

(4) Violation of ORS 824.082 (2) is a Class A violation.

(5) As used in subsection (3) of this section, “railroad” means a railroad as defined by ORS 824.020 and 824.022.

(6) Subject to ORS 153.022, violation of ORS 824.060 (2), 824.106 or 824.108 or any rule promulgated pursuant thereto is a Class A violation.

(7) A person is subject to the penalties under subsection (8) of this section if the person knowingly:

(a) Transports by railroad any hazardous waste listed under ORS 466.005 or rules adopted thereunder to a facility that does not have appropriate authority to receive the waste under ORS 466.005 to 466.385 and 466.992.

(b) Disposes of any hazardous waste listed under ORS 466.005 or rules adopted thereunder without appropriate authority under ORS 466.005 to 466.385 and 466.992.

(c) Materially violates any terms of permit or authority issued to the person under ORS 466.005 to 466.385 and 466.992 in the transporting or disposing of hazardous waste.

(d) Makes any false material statement or representation in any application, label, manifest, record, report, permit or other document filed, maintained or used for purposes of compliance with requirements under ORS 824.050 to 824.110 for the safe transportation of hazardous wastes.

(e) Violates any rules adopted by the Department of Transportation concerning the transportation of hazardous wastes.

(8) Subject to ORS 153.022, violation of subsection (7) of this section is a Class B misdemeanor. Each day’s violation is a separate offense.

(9) Violation of ORS 824.300 or 824.302 is a Class D violation.

(10) Violation of ORS 824.304 is a Class A violation.

(11) Violation of ORS 824.306 by any railroad company or officer or agent thereof, or any other person is a Class D violation. Each day’s violation is a separate offense. [Formerly 824.114; 1999 c.1051 §232; 2011 c.597 §109; 2021 c.630 §29]

Appendix M – Federal Preemption: A Legal Primer (2019)



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July 23, 2019

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Federal Preemption: A Legal Primer

The Constitution’s Supremacy Clause provides that federal law is “the supreme Law of the Land” notwithstanding any state law to the contrary. This language is the foundation for the doctrine of federal preemption, according to which federal law supersedes conflicting state laws. The Supreme Court has identified two general ways in which federal law can preempt state law. First, federal law can *expressly* preempt state law when a federal statute or regulation contains explicit preemptive language. Second, federal law can *impliedly* preempt state law when Congress’s preemptive intent is implicit in the relevant federal law’s structure and purpose.

This report begins with an overview of certain general preemption principles. In both express and implied preemption cases, the Supreme Court has made clear that Congress’s purpose is the “ultimate touchstone” of its statutory analysis. The Court’s analysis of Congress’s purpose has at times been informed by a canon of statutory construction known as the “presumption against preemption,” which instructs that federal law should not be read as preempting state law “unless that was the clear and manifest purpose of Congress.” However, the Court has recently applied the presumption somewhat inconsistently, raising questions about its current scope and effect. Moreover, in 2016, the Court held that the presumption no longer applies in express preemption cases.

After reviewing these general themes in the Supreme Court’s preemption jurisprudence, the report turns to the Court’s express preemption case law. In this section, the report analyzes how the Court has interpreted federal statutes that preempt (1) state laws “related to” certain subjects, (2) state laws concerning certain subjects “covered” by federal laws and regulations, (3) state requirements that are “in addition to, or different than” federal requirements, and (4) state “requirements,” “laws,” “regulations,” and “standards.” While preemption decisions depend heavily on the details of particular statutory schemes, the Court has assigned some of these phrases specific meanings even when they have appeared in different statutory contexts.

Finally, the report reviews illustrative examples of the Court’s implied preemption decisions. In these cases, the Court has identified two subcategories of implied preemption: “field preemption” and “conflict preemption.” Field preemption occurs when a pervasive scheme of federal regulation implicitly precludes supplementary state regulation, or where states attempt to regulate a field where there is clearly a dominant federal interest. Applying these principles, the Court has held that federal law occupies a number of regulatory fields, including alien registration, nuclear safety regulation, and the regulation of locomotive equipment.

In contrast, conflict preemption occurs when simultaneous compliance with both federal and state regulations is impossible (“impossibility preemption”), or when state law poses an obstacle to the accomplishment of federal goals (“obstacle preemption”). The Court has extended the scope of impossibility preemption in two recent decisions, holding that compliance with both federal and state law can be “impossible” even when a regulated party can (1) petition the federal government for permission to comply with state law, or (2) avoid violations of the law by refraining from selling a regulated product altogether. In its obstacle preemption decisions, the Court has concluded that state law can interfere with federal goals by frustrating Congress’s intent to adopt a uniform system of federal regulation, conflicting with Congress’s goal of establishing a regulatory “ceiling” for certain products or activities, or by impeding the vindication of a federal right.

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The Constitution's Supremacy Clause provides that “the Laws of the United States . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”¹ This language is the foundation for the doctrine of federal preemption, according to which federal law supersedes conflicting state laws.²

Federal preemption of state law is a ubiquitous feature of the modern regulatory state and “almost certainly the most frequently used doctrine of constitutional law in practice.”³ Indeed, preemptive federal statutes shape the regulatory environment for most major industries, including drugs and medical devices, banking, air transportation, securities, automobile safety, and tobacco.⁴ As a result, “[d]ebates over the federal government’s preemption power rage in the courts, in Congress, before agencies, and in the world of scholarship.”⁵ These debates over federal preemption implicate many of the themes that recur throughout the federalism literature. Proponents of broad federal preemption often cite the benefits of uniform national regulations⁶ and the concentration of expertise in federal agencies.⁷ In contrast, opponents of broad preemption often appeal to the importance of policy experimentation,⁸ the greater democratic

¹ U.S. CONST. art. VI, cl. 2.

² *Gade v. Nat’l Solid Wastes Mgmt. Assn.*, 505 U.S. 88, 108 (1992).

³ Stephen A. Gardbaum, *The Nature of Preemption*, 79 CORNELL L. REV. 767, 768 (1994). *See also* Jamelle C. Sharpe, *Toward (a) Faithful Agency in the Supreme Court’s Preemption Jurisprudence*, 18 GEO. MASON L. REV. 367, 367 (2011) (“Preemption has become one of the most frequently recurring and perplexing public law issues facing the federal courts today.”); Garrick B. Pursley, *Preemption in Congress*, 71 OHIO ST. L. J. 511, 513 (2010) (describing preemption as “the issue of constitutional law that most directly impacts everyday life”); Thomas W. Merrill, *Preemption and Institutional Choice*, 102 NW. U. L. REV. 727, 730 (2008) (noting that “[p]reemption is one of the most widely applied doctrines in public law.”).

⁴ Pursley, *supra* note 3, at 513.

⁵ William W. Buzbee, *Introduction*, in PREEMPTION CHOICE: THE THEORY, LAW, AND REALITY OF FEDERALISM’S CORE QUESTION 1, 1 (William W. Buzbee ed., 2009).

⁶ *See* Alan Untereiner, *The Defense of Preemption: A View From the Trenches*, 84 TUL. L. REV. 1257, 1262 (2010) (arguing that the “multiplicity of government actors below the federal level virtually ensures that, in the absence of federal preemption, businesses with national operations that serve national markets will be subject to complicated, overlapping, and sometimes even conflicting legal regimes.”); Richard B. Stewart, *Regulatory Compliance Preclusion of Tort Liability: Limiting the Dual-Track System*, 88 GEO. L. J. 2167, 2169 (2000) (arguing that state common law “cannot ensure desirable consistency and coordination in legal requirements,” which are “especially important for nationally marketed products”); *Geier v. Am. Honda Motor Co.*, Brief for the Chamber of Commerce of the United States of America as Amicus Curiae, Nov. 19, 1999 at 20 (arguing that “common-law decisionmaking is notoriously ill-suited to the establishment of nationwide standards that strike the proper balance among the multitude of societal interests at stake in a particular regulatory setting”).

⁷ *See* Untereiner, *supra* note 6, at 1262 (“In many cases, Congress’s adoption of a preemptive scheme . . . ensures that the legal rules governing complex areas of the economy or products are formulated by expert regulators with a broad national perspective and needed scientific or technical expertise, rather than by decision makers—such as municipal officials, elected state judges, and lay juries—who may have a far more parochial perspective and limited set of information.”); Scott A. Smith & Duana Grage, *Federal Preemption of State Products Liability Actions*, 27 WM. MITCHELL L. REV. 391, 416 (2000) (“[E]xpert federal regulators, intimately familiar with the products and industries they regulate, are arguably far better suited [than state courts and juries] . . . to ascertain the degree of federal uniformity necessary to assure safety, efficacy, and availability at a reasonable cost.”).

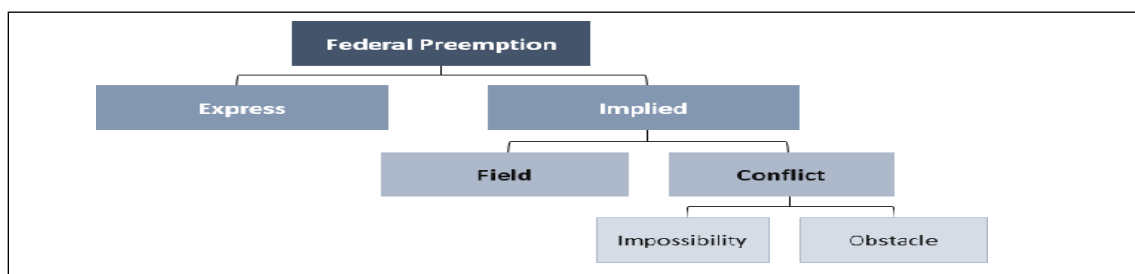
⁸ *See* Ernest A. Young, *Making Federalism Doctrine: Fidelity, Institutional Competence, and Compensating Adjustments*, 46 WM. & MARY L. REV. 1733, 1850 (2004) (“Preemption doctrine . . . goes to whether state governments actually have the opportunity to provide beneficial regulation for their citizens; there can be no experimentation or policy diversity, and little point to citizen participation, if such opportunities are supplanted by federal policy.”).

accountability that they believe accompanies state and local regulation,⁹ and the “gap-filling” role of state common law in deterring harmful conduct and compensating injured plaintiffs.¹⁰

These broad normative disputes occur throughout the Supreme Court’s preemption case law. However, the Court has also identified different ways in which federal law can preempt state law, each of which raises a unique set of narrower interpretive issues. As **Figure 1** illustrates, the Court has identified two general ways in which federal law can preempt state law. First, federal law can *expressly* preempt state law when a federal statute or regulation contains explicit preemptive language. Second, federal law can *impliedly* preempt state law when its structure and purpose implicitly reflect Congress’s preemptive intent.¹¹

The Court has also identified two subcategories of implied preemption: “field preemption” and “conflict preemption.” Field preemption occurs when a pervasive scheme of federal regulation implicitly precludes supplementary state regulation, or when states attempt to regulate a field where there is clearly a dominant federal interest.¹² In contrast, conflict preemption occurs when compliance with both federal and state regulations is a physical impossibility (“impossibility preemption”),¹³ or when state law poses an “obstacle” to the accomplishment of the “full purposes and objectives” of Congress (“obstacle preemption”).¹⁴

Figure 1. Preemption Taxonomy



Source: CRS.

While the Supreme Court has repeatedly distinguished these preemption categories, it has also explained that the presence of an express preemption clause in a federal statute does not preclude implied preemption analysis. In *Geier v. American Honda Motor Co.*, the Court held that

⁹ See Robert R.M. Verchick & Nina Mendelson, *Preemption and Theories of Federalism*, in PREEMPTION CHOICE: THE THEORY, LAW, AND REALITY OF FEDERALISM’S CORE QUESTION 13, 17 (William W. Buzbee ed., 2009) (“[P]reserving state regulatory authority may . . . benefit citizens by prompting greater engagement in government. Citizens are often presumed to be able to participate more directly in policy making at the state level.”); Roderick M. Hills Jr., *Against Preemption: How Federalism Can Improve the National Legislative Process*, 82 N.Y.U. L. REV. 1, 4 (2007) (“Federalism’s value, if there is any, lies in the often competitive interaction between the levels of government. In particular, a presumption against federal preemption of state law makes sense not because states are necessarily good regulators of conduct within their borders, but rather because state regulation makes Congress a more honest and democratically accountable regulator of conduct throughout the nation.”).

¹⁰ Thomas O. McGarity, *THE PREEMPTION WAR: WHEN FEDERAL BUREAUCRACIES TRUMP LOCAL JURIES* 237 (2008) (“The common law provides an effective vehicle for filling regulatory gaps that inevitably arise at the implementation stage because agencies can never anticipate and regulate every potentially socially undesirable aspect of an ongoing business and cannot possibly envision all of the possible ways that regulatees will react to regulatory programs.”).

¹¹ *Gade v. Nat’l Solid Wastes Mgmt. Assn.*, 505 U.S. 88, 98 (1992).

¹² *Id.*

¹³ *Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963).

¹⁴ *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

although a preemption clause in a federal automobile safety statute did not *expressly* displace state common law claims involving automobile safety, the federal statute and associated regulations nevertheless *impliedly* preempted those claims based on conflict preemption principles.¹⁵ Congress must therefore consider the possibility that the laws it enacts may be construed as impliedly preempting certain categories of state law even if those categories do not fall within the explicit terms of a preemption clause.

This report provides a general overview of federal preemption to inform Congress as it crafts laws implicating overlapping federal and state interests. The report begins by reviewing two general principles that have shaped the Court’s preemption jurisprudence: the primacy of congressional intent and the “presumption against preemption.” The report then discusses how courts have interpreted certain language that is commonly used in express preemption clauses. Next, the report reviews judicial interpretations of statutory provisions designed to insulate certain categories of state law from federal preemption (“savings clauses”). Finally, the report discusses the Court’s implied preemption case law by examining illustrative examples of its field preemption, impossibility preemption, and obstacle preemption decisions.

General Preemption Principles

The Primacy of Congressional Intent

The Supreme Court has repeatedly explained that in determining whether (and to what extent) federal law preempts state law, the purpose of Congress is the “ultimate touchstone” of its statutory analysis.¹⁶ The Court has further instructed that Congress’s intent is discerned “primarily” from a statute’s text.¹⁷ However, the Court has also noted the importance of statutory structure and purpose in determining how Congress intended specific federal regulatory schemes to interact with related state laws.¹⁸ Like many of its statutory interpretation cases, then, the Court’s preemption decisions often involve disputes over the appropriateness of consulting extra-textual evidence to determine Congress’s intent.¹⁹

The Presumption Against Preemption

In evaluating congressional purpose, the Court has at times employed a canon of construction commonly referred to as the “presumption against preemption,” which instructs that federal law should not be read to preempt state law “unless that was the clear and manifest purpose of Congress.”²⁰ The Court regularly appealed to this principle in the 1980s and 1990s,²¹ but has

¹⁵ 529 U.S. 861, 881-82 (2000).

¹⁶ *Wyeth v. Levine*, 555 U.S. 555, 565 (2009) (quoting *Retail Clerks v. Schermerhorn*, 375 U.S. 96, 103 (1963)).

¹⁷ *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 486 (1996) (internal quotation marks and citation omitted).

¹⁸ *Id.* (internal quotation marks and citation omitted).

¹⁹ *See, e.g., Wyeth*, 555 U.S. at 583 (Thomas, J., concurring in the judgment) (rejecting the Court’s obstacle preemption jurisprudence as “inconsistent with the Constitution,” while noting that the Court “routinely invalidates state laws based on perceived conflicts with broad federal policy objectives, legislative history, or generalized notions of congressional purpose that are not embodied within the text of federal law”).

²⁰ *Rice v. Sante Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). The presumption against preemption has traditionally been justified on the grounds that it promotes respect for federalism and state sovereignty. *See Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 533 (1992) (Blackmun, J., concurring in part, concurring in the judgment, and dissenting in part).

²¹ *See, e.g., De Buono v. NYSA-ILA Med. and Clinical Servs. Fund*, 520 U.S. 806, 814 (1997) (“Respondents . . . bear

invoked it inconsistently in recent cases.²² Moreover, in a 2016 decision, the Court departed from prior case law²³ when it held that the presumption no longer applies in express preemption cases.²⁴

The Court’s repudiation of the presumption in express preemption cases can be traced to the growing popularity of textualist approaches to statutory interpretation, as many textualists have expressed skepticism about such “substantive” canons of construction.²⁵ Unlike “semantic” or “linguistic” canons, which express rules of thumb concerning ordinary uses of language,²⁶ substantive canons favor or disfavor particular *outcomes*—even when those outcomes do not follow from the most natural reading of a statute’s text.²⁷ Because of these effects, prominent textualists have expressed suspicion about substantive canons’ legitimacy.²⁸ According to

the considerable burden of overcoming the starting presumption that Congress did not intend to supplant state law.”) (internal quotation marks and citation omitted); *N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 654 (1995). (“[W]e have never assumed lightly that Congress has derogated state regulation, but instead have addressed claims of pre-emption with the starting presumption that Congress does not intend to supplant state law.”); *Bldg. and Const. Trades Council of Metropolitan Dist. v. Assoc. Builders and Contractors of Massachusetts*, 507 U.S. 218, 224 (1993) (“Consideration under the Supremacy Clause starts with the basic assumption that Congress did not intend to displace state law.”) (internal quotation marks and citation omitted); *Cipollone*, 505 U.S. at 518 (“[W]e must construe these provisions in light of the presumption against the pre-emption of state police power regulations.”); *Gade v. Nat’l Solid Wastes Mgmt. Ass’n*, 505 U.S. 88, 116 (1992) (“[Preemption] [a]nalysis begins with the presumption that Congress did not intend to displace state law.”) (internal quotation marks and citation omitted); *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 740 (1985) (“We also must presume that Congress did not intend to pre-empt areas of traditional state regulation.”); *Hillsborough County, Fla. v. Automated Med. Lab., Inc.*, 471 U.S. 707, 715 (1985) (“The second obstacle in appellee’s path is the presumption that state or local regulation of matters related to health and safety is not invalidated under the Supremacy Clause.”); *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981) (“Consideration under the Supremacy Clause starts with the basic assumption that Congress did not intend to displace state law.”).

²² See, e.g., *Mutual Pharmaceutical Co., Inc. v. Bartlett*, 570 U.S. 472 (2013) (holding that federal law preempted state law without mentioning the presumption against preemption); *Kurns v. Ry. Friction Products Corp.*, 565 U.S. 625 (2012) (similar); *PLIVA, Inc. v. Mensing*, 564 U.S. 604, 622 (2011) (similar); *Bruesewitz v. Wyeth LLC*, 562 U.S. 223 (2011) (similar); *Rowe v. New Hampshire Motor Transport Ass’n*, 552 U.S. 364 (2008) (similar); *Geier v. Am. Honda Motor Co., Inc.*, 529 U.S. 861 (2000) (similar); *United States v. Locke*, 529 U.S. 89, 108 (2000) (similar).

²³ See, e.g., *CTS Corp. v. Waldburger*, 573 U.S. 1, 19 (2014) (“[W]hen the text of a pre-emption clause is susceptible of more than one plausible reading, courts ordinarily accept the reading that disfavors preemption.”) (internal quotation marks and citations omitted); *Wyeth v. Levine*, 555 U.S. 555, 565 (2009) (explaining that the presumption against preemption applies “[i]n all preemption cases”); *Altria Group, Inc. v. Good*, 555 U.S. 70, 77 (2008) (explaining that the Court “begin[s] its analysis” with a presumption against preemption “[w]hen addressing questions of *express or implied* pre-emption”) (emphasis added); *Bates v. Dow Agrosciences, LLC*, 544 U.S. 431, 449 (2005) (“Even if [the defendant] had offered us a plausible alternative reading of [the relevant preemption clause]—indeed, even if its alternative were just as plausible as our reading of the text—we would nevertheless have a duty to accept the reading that disfavors preemption.”); *Egelhoff v. Egelhoff ex rel. Breiner*, 532 U.S. 141, 151 (2001) (invoking the presumption against preemption in interpreting ERISA’s preemption clause); *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (explaining that the presumption against preemption applies “[i]n all preemption cases”); *De Buono v. NYSA-ILA Med. and Clinical Servs. Fund*, 520 U.S. 806, 814 (1997) (invoking the presumption against preemption in interpreting ERISA’s preemption clause); *Travelers*, 514 U.S. at 654 (same); *Cipollone*, 505 U.S. at 518 (invoking the presumption against preemption in interpreting the Federal Cigarette Labeling and Advertising Act’s preemption clause).

²⁴ *Puerto Rico v. Franklin Cal. Tax-Free Trust*, 136 S. Ct. 1938, 1946 (2016) (explaining that in express preemption cases, the Court “do[es] not invoke any presumption against pre-emption but instead focus[es] on the plain wording of the clause, which necessarily contains the best evidence of Congress’ pre-emptive intent.”).

²⁵ See CRS Report R45153, *Statutory Interpretation: Theories, Tools, and Trends*, by Valerie C. Brannon.

²⁶ See WILLIAM N. ESKRIDGE JR., PHILIP P. FRICKEY & ELIZABETH GARRETT, *CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY* 819 (3d ed. 2001).

²⁷ JOHN F. MANNING & MATTHEW C. STEPHENSON, *LEGISLATION AND REGULATION: CASES AND MATERIALS* 202 (2d ed. 2013).

²⁸ See Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. REV. 109, 123-24 (2010) (“Substantive

textualist critics of the presumption against preemption, a statute’s inclusion of a preemption clause provides sufficient evidence of Congress’s intent to preempt state law.²⁹ These critics contend that in light of this clear expression of congressional intent, preemption clauses should be given their “ordinary meaning” rather than any narrower constructions that the presumption might dictate.³⁰ The Supreme Court ultimately adopted this position in its 2016 decision in *Puerto Rico v. Franklin California Tax-Free Trust*.³¹

The Court has also endorsed certain narrower exceptions to the presumption against preemption. Specifically, the Court has declined to apply the presumption in cases involving (1) subjects which the states have not traditionally regulated,³² and (2) areas in which the federal government has traditionally had a “significant” regulatory presence.³³ In *Buckman Company v. Plaintiffs’ Legal Committee*, for example, the Court declined to apply the presumption when it held that federal law preempted state law claims alleging that a medical device manufacturer had defrauded the Food and Drug Administration during the pre-market approval process for its device.³⁴ The Court refused to apply the presumption in *Buckman* on the grounds that states have not traditionally policed fraud against federal agencies, reasoning that the relationship between federal agencies and the entities they regulate is “inherently federal in character.”³⁵ Likewise, in *Arizona v. Inter Tribal Council of Arizona, Inc.*, the Court declined to apply the presumption in holding that the National Voter Registration Act preempted a state law requiring voter-registration officials to reject certain registration applications.³⁶ In refusing to apply the presumption, the Court explained that state regulation of congressional elections “has always existed subject to the express qualification that it terminates according to federal law.”³⁷

Similarly, the Court has declined to apply the presumption in cases involving areas in which the federal government has traditionally had a “significant” regulatory presence.³⁸ In *United States v. Locke*, the Court held that the federal Ports and Waterways Safety Act preempted state regulations regarding navigation watch procedures, crew English language skills, and maritime casualty

canons are in significant tension with textualism . . . insofar as their application can require a judge to adopt something other than the most textually plausible meaning of a statute.”); John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 124 (2001) (“If textualists believe . . . that statutes mean what a reasonable person would conventionally understand them to mean, then applying a less natural . . . interpretation is arguably unfaithful to the legislative instructions contained in the statute.”); ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 28 (1997) (arguing that “[t]o the honest textualist,” substantive canons “are a lot of trouble”); *id.* at 28-29 (“ . . . whether these dice-loading rules are bad or good, there is also the question of where the courts get the authority to impose them. Can we really just decree that we will interpret the laws that Congress passes to mean more or less than what they fairly say? I doubt it.”).

²⁹ *Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 548 (1992) (Scalia, J., concurring in the judgment in part and dissenting in part).

³⁰ *Id.* See also ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 293 (2012) (“[T]he [presumption against preemption] . . . ought not to be applied to the text of an explicit preemption provision The reason is obvious: The presumption is based on an assumption of what Congress, in our federal system, would or should normally desire. But when Congress has explicitly set forth its desire, there is no justification for not taking Congress at its word—i.e., giving its words their ordinary, fair meaning.”).

³¹ 136 S. Ct. 1938, 1946 (2016).

³² *Buckman Co. v. Plaintiffs’ Legal Committee*, 531 U.S. 341 (2001).

³³ *United States v. Locke*, 529 U.S. 89, 108 (2000).

³⁴ *Buckman*, 531 U.S. at 347-48.

³⁵ *Id.* at 347.

³⁶ 570 U.S. 1, 14 (2013).

³⁷ *Id.* (internal quotation marks and citation omitted).

³⁸ *United States v. Locke*, 529 U.S. 89, 108 (2000).

reporting based in part on the fact that the state laws concerned maritime commerce—an area in which there was a “history of significant federal presence.”³⁹ In such an area, the Court explained, “there is no beginning assumption that concurrent regulation by the State is a valid exercise of its police powers.”⁴⁰

However, the status of the *Locke* exception to the presumption against preemption is unclear. In its 2009 decision in *Wyeth v. Levine*, the Court invoked the presumption when it held that federal law did not preempt certain state law claims concerning drug labeling.⁴¹ In allowing the claims to proceed, the Court acknowledged that the federal government had regulated drug labeling for more than a century, but explained that the presumption can apply even when the federal government has long regulated a subject.⁴² This reasoning stands in some tension with the Court’s conclusion in *Locke* that the presumption does not apply when states regulate an area where there has been a “history of significant federal presence.”⁴³ Whether the presumption continues to apply in fields traditionally regulated by the federal government accordingly remains unclear.

Language Commonly Used in Express Preemption Clauses

Congress often relies on the language of existing preemption clauses in drafting new legislation.⁴⁴ Moreover, when statutory language has a settled meaning, courts often look to that meaning to discern Congress’s intent.⁴⁵ This section of the report discusses how the Supreme Court has interpreted federal statutes that preempt (1) state laws “related to” certain subjects, (2) state laws concerning certain subjects “covered” by federal laws and regulations, (3) state requirements that are “in addition to, or different than” federal requirements, and (4) state “requirements,” “laws,” “regulations,” and “standards.” While preemption decisions depend heavily on the details of particular statutory schemes, the Court has assigned some of these phrases specific meanings even when they have appeared in different statutory contexts.

“Related to”

Preemption clauses frequently provide that a federal statute supersedes all state laws that are “related to” a specific matter of federal regulatory concern. The Supreme Court has characterized

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Wyeth v. Levine*, 555 U.S. 555, 565 n.3 (2009).

⁴² *Id.* (explaining that the presumption’s application “does not rely on the absence of federal regulation”).

⁴³ *Locke*, 529 U.S. at 108. The uncertainty surrounding the status of the *Locke* exception to the presumption against preemption is compounded by the fact that the Court did not mention the presumption in two other cases concerning drug labeling decided within four years of *Wyeth*. See *Mutual Pharm. Co., Inc. v. Bartlett*, 570 U.S. 472 (2013); *PLIVA, Inc. v. Mensing*, 564 U.S. 604 (2011).

⁴⁴ ALAN UNTEREINER, *THE PREEMPTION DEFENSE IN TORT ACTIONS: LAW, STRATEGY AND PRACTICE* 77 (2008)

(“Although express preemption provisions cover a wide range of subjects, they also follow certain familiar patterns. They often contain similar if not identical words or phrases, including limitations on or exceptions to the scope of preemption.”).

⁴⁵ See *Bragdon v. Abbott*, 524 U.S. 624, 645 (1998) (“When judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, the intent to incorporate [the same] judicial interpretations as well.”); *Morales v. Trans World Airlines*, 504 U.S. 374, 383-84 (1992) (relying on the Court’s earlier interpretation of a preemption clause in the Employee Retirement Income Security Act to interpret a similarly worded preemption clause in the Airline Deregulation Act).

such provisions as “deliberatively expansive”⁴⁶ and “conspicuous for [their] breadth.”⁴⁷ At the same time, however, the Court has cautioned against strictly literal interpretations of “related to” preemption clauses. Instead of reading such clauses “to the furthest stretch of [their] indeterminacy,”⁴⁸ the Court has relied on legislative history and purpose to cabin their scope.⁴⁹ The following subsections discuss the Court’s interpretation of three statutes that contain “related to” preemption clauses: the Employee Retirement Income Security Act, the Airline Deregulation Act, and the Federal Aviation Administration Authorization Act.

Employee Retirement Income Security Act

The Employee Retirement Income Security Act (ERISA) contains perhaps the most prominent example of a preemption clause that uses “related to” language.⁵⁰ ERISA imposes comprehensive federal regulations on private employee benefit plans, including (1) detailed reporting and disclosure obligations,⁵¹ (2) schedules for the vesting, accrual, and funding of pension benefits,⁵² and (3) the imposition of certain duties of care and loyalty on plan administrators.⁵³ The statute also contains a preemption clause providing that its requirements preempt all state laws that “relate to” regulated employee benefit plans.⁵⁴ In interpreting this provision, the Supreme Court has identified two categories of state laws that are preempted by ERISA because they “relate to” regulated employee benefit plans: (1) state laws that have a “connection with” such plans, and (2) state laws that contain a “reference to” such plans.⁵⁵

The Court has held that state laws have an impermissible “connection with” ERISA plans if they govern or interfere with “a central matter of plan administration.”⁵⁶ In contrast, state laws that *indirectly* affect ERISA plans are not preempted unless the relevant effects are particularly “acute.”⁵⁷ Applying these standards, the Court has held that ERISA preempts state laws governing areas of “core ERISA concern,” like the designation of ERISA plan beneficiaries⁵⁸ and the disclosure of data regarding health insurance claims.⁵⁹ In contrast, the Court has held that ERISA does not preempt state laws imposing surcharges on certain types of insurers⁶⁰ and mandating

⁴⁶ *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 46 (1987).

⁴⁷ *FMC Corp. v. Holliday*, 498 U.S. 52, 58 (1990).

⁴⁸ *N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 655 (1995).

⁴⁹ *See, e.g., Dan’s City Used Cars, Inc. v. Pelkey*, 569 U.S. 251, 265 (2013); *Travelers*, 514 U.S. at 658. *See* *Cal. Div. of Labor Standards Enforcement v. Dillingham Const., N.A., Inc.*, 519 U.S. 316, 335 (1997) (Scalia, J., concurring) (“[A]pplying the ‘relate to’ provision [in the Employee Retirement Income Security Act] according to its terms was a project doomed to failure, since, as many a curbstone philosopher has observed, everything is related to everything else.”).

⁵⁰ Daniel J. Meltzer, *Preemption and Textualism*, 112 MICH. L. REV. 1, 20 (1993) (noting that “[t]he most frequently litigated ‘related to’ preemption clause is found in [ERISA].”).

⁵¹ 29 U.S.C. §§ 1021-1031.

⁵² *Id.* §§ 1051-1086.

⁵³ *Id.* §§ 1101-1114.

⁵⁴ *Id.* § 1144(a).

⁵⁵ *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 96-97 (1983).

⁵⁶ *Egelhoff v. Egelhoff ex rel. Breiner*, 532 U.S. 141, 148 (2001).

⁵⁷ *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 668 (1995).

⁵⁸ *Egelhoff*, 532 U.S. at 147.

⁵⁹ *Gobeille v. Liberty Mut. Ins. Co.*, 136 S. Ct. 936, 945 (2016).

⁶⁰ *Travelers*, 514 U.S. at 651-52.

wage levels for specific categories of employees who work on public projects.⁶¹ The Court has explained that these state laws are permissible because they affect ERISA plans only indirectly, and that ERISA preempts such laws only if the relevant indirect effects are particularly “acute.”⁶²

The Court has also held that ERISA preempts state laws that contain an impermissible “reference to” ERISA plans. Under the Court’s case law, a state law will contain an impermissible “reference to” ERISA plans where it “acts immediately and exclusively upon ERISA plans,” or where the existence of an ERISA plan is “essential” to the state law’s operation.⁶³ In *Mackey v. Lanier Collection Agency & Service, Inc.*, for example, the Court held that ERISA—which does not prohibit creditors from garnishing funds in regulated employee benefit plans—preempted a state statute that prohibited the garnishment of funds in plans “subject to . . . [ERISA].”⁶⁴ Because the challenged state statute expressly referenced ERISA plans, the Court held that it fell within the scope of ERISA’s preemption clause even if it was enacted “to help effectuate ERISA’s underlying purposes.”⁶⁵ Similarly, in *Ingersoll-Rand Company v. McClendon*, the Court held that ERISA—which provides a federal cause of action for employees discharged because of an employer’s desire to prevent a regulated pension from vesting—preempted an employee’s state law claim alleging that he was terminated in order to prevent his regulated pension from vesting.⁶⁶ The Court reasoned that ERISA preempted this state law claim because the action made “specific reference to” and was “premised on” the existence of an ERISA-regulated pension plan.⁶⁷ Finally, in *District of Columbia v. Greater Washington Board of Trade*, the Court held that ERISA preempted a state statute that required employers providing health insurance to their employees to continue providing coverage at existing benefit levels while employees received workers’ compensation benefits.⁶⁸ The Court reached this conclusion on the grounds that ERISA regulated the relevant employees’ existing health insurance coverage, meaning that the state law specifically referred to ERISA plans.⁶⁹

Airline Deregulation Act

The Airline Deregulation Act (ADA) is another example of a statute that employs “related to” preemption language.⁷⁰ Enacted in 1978, the ADA largely deregulated domestic air transportation, eliminating the federal Civil Aeronautics Board’s authority to control airfares.⁷¹ In order to ensure that state governments did not interfere with this deregulatory effort, the ADA prohibited states from enacting laws “relating to a price, route, or service of an air carrier.”⁷² The Supreme Court’s interpretation of the ADA’s preemption clause has largely followed its ERISA decisions in

⁶¹ Cal. Div. of Labor Standards Enforcement v. Dillingham Const., N.A., Inc., 519 U.S. 316, 334 (1997).

⁶² *Travelers*, 514 U.S. at 668. The Court held that such “indirect” effects on ERISA plans were sufficiently “acute” to support a finding of preemption in *Shaw v. Delta Air Lines, Inc.*, where it concluded that ERISA preempted a state law that (1) prohibited discrimination in employee benefit plans based on pregnancy, and (2) required employers to pay sick-leave benefits to employees unable to work because of pregnancy. 463 U.S. 85, 97-99 (1983).

⁶³ *Dillingham*, 519 U.S. at 325.

⁶⁴ 486 U.S. 825, 828 (1988) (quoting Ga. Code Ann. § 18-4-22.1 (1982)).

⁶⁵ *Id.* at 829-30.

⁶⁶ 498 U.S. 133, 139-141 (1990).

⁶⁷ *Id.* at 140.

⁶⁸ *District of Columbia v. Greater Wash. Bd. of Trade*, 506 U.S. 125, 130 (1992).

⁶⁹ *Id.*

⁷⁰ 49 U.S.C. § 1371 (1979).

⁷¹ *Am. Airlines, Inc. v. Wolens*, 513 U.S. 219, 222 (1995).

⁷² 49 U.S.C. § 41713(b)(1) (emphasis added).

applying the “connection with” and “reference to” standards. In *Morales v. Trans World Airlines, Inc.*, for example, the Court relied in part on its ERISA case law to conclude that the ADA preempted state consumer protection statutes prohibiting deceptive airline fare advertisements.⁷³ Specifically, the Court reasoned that because the challenged state statutes expressly referenced airfares and had a “significant effect” on them, they “related to” airfares within the meaning of the ADA’s preemption clause.⁷⁴

Federal Aviation Administration Authorization Act

The Federal Aviation Administration Authorization Act of 1994 (FAAA) is a third example of a statute that utilizes “related to” preemption language.⁷⁵ While the FAAA (as its title suggests) is principally concerned with aviation regulation, it also supplemented Congress’s deregulation of the trucking industry. The statute pursued this objective with a preemption clause prohibiting states from enacting laws “related to a price, route, or service of any motor carrier . . . with respect to the transportation of property.”⁷⁶ In interpreting this language, the Supreme Court has relied on the “connection with” standard from its ERISA and ADA case law. However, the Court has also acknowledged that the clause’s “with respect to” qualifying language significantly narrows the FAAA’s preemptive scope.

In *Rowe v. New Hampshire Motor Transport Association*, the Supreme Court relied in part on its ERISA and ADA case law to hold that the FAAA preempted certain state laws regulating the delivery of tobacco, including a law that required retailers shipping tobacco to employ motor carriers that utilized certain kinds of recipient-verification services.⁷⁷ The Court reached this conclusion for two principal reasons. First, the Court reasoned that the requirement had an impermissible “connection with” motor carrier services because it “focuse[d] on” such services.⁷⁸ Second, the Court concluded that the state law fell within the terms of the FAAA’s preemption clause because of its effects on the FAAA’s deregulatory objectives. Specifically, the Court reasoned that the state law had a “connection with” these objectives because it dictated that motor carriers use certain types of recipient-verification services, thereby substituting the state’s commands for “competitive market forces.”⁷⁹

However, the Court has also held that the FAAA’s “with respect to” qualifying language significantly narrows the statute’s preemptive scope. In *Dan’s City Used Cars, Inc. v. Pelkey*, the Court relied on this language to hold that the FAAA did not preempt state law claims involving the storage and disposal of a towed car.⁸⁰ Specifically, the Court held that the FAAA did not preempt state law claims alleging that a towing company (1) failed to provide the plaintiff with proper notice that his car had been towed, (2) made false statements about the condition and value of the car, and (3) auctioned the car despite being informed that the plaintiff wanted to reclaim it.⁸¹ In allowing these claims to proceed, the Court observed that the FAAA’s preemption clause mirrored the ADA’s preemption clause with “one conspicuous alteration”—the addition of the

⁷³ 504 U.S. 374, 382 (1992).

⁷⁴ *Id.* at 388.

⁷⁵ 49 U.S.C. § 14501.

⁷⁶ *Id.* § 14501(c)(1) (emphasis added).

⁷⁷ 552 U.S. 364, 368 (2008).

⁷⁸ *Id.* at 371.

⁷⁹ *Id.* at 372.

⁸⁰ 569 U.S. 251, 265 (2013).

⁸¹ *Id.* at 259.

phrase “with respect to the transportation of property.”⁸² According to the Court, this phrase “massively” limited the scope of FAAA preemption.⁸³ And because the relevant state law claims involved the *storage* and *disposal* of towed vehicles rather than their *transportation*, the Court held that they did not qualify as state laws that “related to” motor carrier services “with respect to the transportation of property.”⁸⁴

Conclusion

The Supreme Court’s case law concerning “related to” preemption clauses reflects a number of general principles. The Court has consistently held that state laws “relate to” matters of federal regulatory concern when they have a “connection with” or contain a “reference to” such matters.⁸⁵ Generally, state laws have an impermissible “connection with” matters of federal concern when they prescribe rules specifically directed at the same subject as the relevant federal regulatory scheme,⁸⁶ or when their indirect effects on the federal scheme are particularly “acute.”⁸⁷ As a corollary to the latter principle, the Court has made clear that state laws having only “tenuous, remote, or peripheral” effects on an issue of federal concern are not sufficiently “related to” the issue to warrant preemption.⁸⁸ In contrast, a state law contains an impermissible “reference to” a matter of federal regulatory interest (and therefore “relates to” such a matter) when it “acts immediately and exclusively upon” the matter, or where the existence of a federal regulatory scheme is “essential” to the state law’s operation.⁸⁹ Finally, the inclusion of qualifying language can narrow the scope of “related to” preemption clauses. As the Court made clear in *Dan’s City*, the scope of “related to” preemption clauses can be significantly limited by the addition of “with respect to” qualifying language.⁹⁰

“Covering”

The Supreme Court has interpreted a preemption clause that allowed states to enact regulations related to a subject until the federal government adopted regulations “covering” that subject as having a narrower effect than “related to” preemption clauses. The Court reached this conclusion in *CSX Transportation, Inc. v. Easterwood*, where it interpreted a preemption clause in the Federal Railroad Safety Act allowing states to enact laws related to railroad safety until the federal government adopted regulations “covering the subject matter” of such laws.⁹¹ In *Easterwood*, the Court explained that “covering” is a “more restrictive term” than “related to,” and that federal law will accordingly “cover” the subject matter of a state law only if it “substantially subsume[s]” that subject.⁹²

⁸² *Id.* at 261.

⁸³ *Id.* (internal quotation marks and citation omitted).

⁸⁴ *Id.* (emphasis added).

⁸⁵ See, e.g., *Rowe v. N.H. Motor Transport Ass’n*, 552 U.S. 364, 370 (2008); *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 383 (1992); *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 96 (1983).

⁸⁶ *Egelhoff v. Egelhoff ex rel. Breiner*, 532 U.S. 141, 148 (2001).

⁸⁷ *N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 668 (1995).

⁸⁸ *Shaw*, 463 U.S. at 100 n.21.

⁸⁹ *Cal. Div. of Labor Standards Enf’t v. Dillingham Const., N.A., Inc.*, 519 U.S. 316, 325 (1997).

⁹⁰ *Dan’s City Used Cars, Inc. v. Pelkey*, 569 U.S. 251, 261 (2013).

⁹¹ 507 U.S. 658, 664 (1993).

⁹² *Id.*

Applying this standard, the Court held that federal laws and regulations did not preempt state law claims alleging that a train operator failed to maintain adequate warning devices at a grade crossing where a collision had occurred.⁹³ The Court allowed these claims to proceed on the grounds that the relevant federal regulations—which required states receiving federal railroad funds to establish a highway safety program and “consider” the dangers posed by grade crossings—did not “substantially subsume” the subject of warning device adequacy.⁹⁴ Specifically, the Court reasoned that the federal regulations did not “substantially subsume” this subject because they established the “general terms of the bargain” between the federal government and states receiving federal funds, but did not reflect an intent to displace supplementary state regulations.⁹⁵

However, the *Easterwood* Court held that federal law preempted other state law claims alleging that the relevant train traveled at an unsafe speed despite complying with federal maximum-speed regulations. In holding that these claims were preempted, the Court reasoned that federal maximum-speed regulations “substantially subsumed” (and therefore “covered”) the subject of train speeds because they comprehensively regulated that issue, reflecting an intent to preclude additional state regulations.⁹⁶ Accordingly, while the Court has made clear that “covering” preemption clauses of the sort at issue in *Easterwood* have a narrower effect than “related to” clauses, specific determinations that federal law “covers” a subject will depend heavily on the details of particular regulatory schemes.

“In addition to, or different than”

A number of federal statutes preempt state requirements that are “in addition to, or different than” federal requirements.⁹⁷ The Supreme Court has explained that these statutes preempt state law even in cases where a regulated entity can comply with both federal and state requirements. The Court adopted this position in *National Meat Association v. Harris*, where it interpreted a preemption clause in the Federal Meat Inspection Act (FMIA) prohibiting states from imposing requirements on meatpackers and slaughterhouses that are “in addition to, or different than” federal requirements.⁹⁸ In *Harris*, the Court held that certain California slaughterhouse regulations were “in addition to, or different than” federal regulations because they imposed a distinct set of requirements that went beyond those imposed by federal law.⁹⁹ Because the

⁹³ *Id.* at 665-73.

⁹⁴ *Id.* at 667.

⁹⁵ *Id.* at 667.

⁹⁶ *Id.* at 673-76.

⁹⁷ See, e.g., 7 U.S.C. § 136v(b) (providing that states “shall not impose or continue in effect any requirements for labeling and packaging [pesticides] *in addition to or different from* those required under this subchapter.”) (emphasis added); *id.* § 467e (“Marking, labeling, packaging, or ingredient requirements . . . *in addition to, or different than*, those made under this subchapter may not be imposed by any State”) (emphasis added); *id.* § 4817(b) (“The regulation of [promotion and consumer education involving pork and pork products] . . . that is *in addition to or different from* this chapter may not be imposed by a State.”) (emphasis added); 21 U.S.C. § 360k(a) (“[N]o state . . . may establish or continue in effect with respect to a device intended for human use any requirement . . . which is *different from, or in addition to*, any requirement applicable under this chapter to the device, and which relates to the safety and effectiveness of the device or to any other matter included in a requirement applicable to the device under this chapter.”) (emphasis added); *id.* § 1052(b) (“Requirements within the scope of this chapter with respect to premises, facilities, and operations of any official plant which are *in addition to or different than* those made under this chapter may not be imposed by any State”) (emphasis added).

⁹⁸ 565 U.S. 452, 455 (2012).

⁹⁹ *Id.* at 459 (internal quotation marks and citation omitted).

California requirements differed from federal requirements, the Court explained, they fell within the plain meaning of the FMIA’s preemption clause even if slaughterhouses were able to comply with both sets of restrictions.¹⁰⁰

Preemption clauses that employ “in addition to, or different than” language often raise a second interpretive issue involving the status of state requirements that are *identical to* federal requirements (“parallel requirements”). The Supreme Court has interpreted two statutes employing this language to *not* preempt parallel state law requirements.¹⁰¹ In instructing lower courts on how to assess whether state requirements in fact parallel federal requirements, the Court has explained that state law need not explicitly incorporate federal standards in order to avoid qualifying as “in addition to, or different than” federal requirements.¹⁰² Rather, the Court has indicated that state requirements must be “*genuinely* equivalent” to federal requirements in order to avoid preemption under such clauses.¹⁰³ One lower court has interpreted this instruction to mean that state restrictions do not genuinely parallel federal restrictions if a defendant could violate state law without having violated federal law.¹⁰⁴

The Court has also explained that state requirements do not qualify as “in addition to, or different than” federal requirements simply because state law provides injured plaintiffs with different *remedies* than federal law.¹⁰⁵ Accordingly, absent contextual evidence to the contrary, preemption clauses that employ “in addition to, or different than” language will allow states to give plaintiffs a damages remedy for violations of state requirements even where federal law does not offer such a remedy for violations of parallel federal requirements.¹⁰⁶

“Requirements,” “Laws,” “Regulations,” and “Standards”

Federal statutes frequently preempt state “requirements,” “laws,” “regulations,” and/or “standards” concerning subjects of federal regulatory concern.¹⁰⁷ These preemption clauses have required the Supreme Court to determine whether such terms encompass state common law actions (as opposed to state statutes and regulations) involving the relevant subjects.

The Supreme Court has explained that absent evidence to the contrary, a preemption clause’s reference to state “requirements” includes state common law duties.¹⁰⁸ In contrast, the Court has

¹⁰⁰ *Id.* at 459-60.

¹⁰¹ *Bates v. Dow Agrosiences LLC*, 544 U.S. 431, 446 (2005); *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 494-97 (1996).

¹⁰² *Bates*, 544 U.S. at 447.

¹⁰³ *Id.* at 454 (emphasis in original).

¹⁰⁴ *See McMullen v. Medtronic, Inc.*, 421 F.3d 482, 489 (7th Cir. 2005).

¹⁰⁵ *See Bates*, 544 U.S. at 447-48.

¹⁰⁶ *See id.*

¹⁰⁷ *See, e.g.*, 7 U.S.C. § 136v(b) (providing that no state “shall . . . impose or continue in effect any *requirements* for labeling or packaging in addition to or different from those required under this subchapter.”) (emphasis added); 21 U.S.C. § 360k(a) (providing that no state “may establish or continue in effect with respect to a device intended for human use any *requirement* . . . which is different from, or in addition to, any requirement applicable under this chapter to the device.”) (emphasis added); 46 U.S.C. § 4306 (“[A] state . . . may not establish, continue in effect, or enforce a *law or regulation* establishing a recreational vessel or associated equipment performance or other safety standard or imposing a requirement for associated equipment . . . that is not identical to a regulation prescribed under . . . this title.”) (emphasis added); 49 U.S.C. § 30103(b)(1) (“When a motor vehicle standard is in effect under this subchapter, a State . . . may prescribe or continue in effect a *standard* applicable to the same aspect of performance of a motor vehicle or motor vehicle equipment only if the *standard* is identical to the standard prescribed under this subchapter.”) (emphasis added).

¹⁰⁸ *Riegel v. Medtronic, Inc.*, 552 U.S. 312, 324 (2008). *See also* *Medtronic, Inc. v. Lohr*, 518 U.S. 470, (1996);

interpreted one preemption clause’s reference to state “law[s] or regulation[s]” as encompassing only “positive enactments” and not common law actions.¹⁰⁹ The Court reached this conclusion in *Sprietsma v. Mercury Marine*, where it considered the meaning of a preemption clause in the Federal Boat Safety Act of 1971 (FBSA) prohibiting states from enforcing “a law or regulation” concerning boat safety that is not identical to federal laws and regulations.¹¹⁰ The FBSA also includes a “savings clause” providing that compliance with the Act does not “relieve a person from liability at common law or under State law.”¹¹¹ In *Sprietsma*, the Court held that the phrase “a law or regulation” in the FBSA did not encompass state common law claims for three reasons.¹¹² First, the Court reasoned that the inclusion of the article “a” before “law or regulation” implied a “discreteness” that is reflected in statutes and regulations, but not in common law.¹¹³ Second, the Court concluded that the pairing of the terms “law” and “regulation” indicated that Congress intended to preempt only positive enactments. Specifically, the Court reasoned that if the term “law” were given an expansive interpretation that included common law claims, it would also encompass “regulations” and thereby render the inclusion of that latter term superfluous.¹¹⁴ Finally, the Court reasoned that the FBSA’s savings clause provided additional support for the conclusion that the phrase “law or regulation” did not encompass common law actions.¹¹⁵

Lastly, while the Court had the opportunity to determine whether a preemption clause’s use of the term “standard” encompassed state common law actions in *Geier v. American Honda Motor Co., Inc.*, it ultimately declined to take up that question and resolved the case on other grounds discussed in greater detail below.¹¹⁶

Savings Clauses

Many federal statutes contain provisions that purport to restrict their preemptive effect. These “savings clauses” make clear that federal law does not preempt certain categories of state law, reflecting Congress’s recognition of the need for states to “fill a regulatory void” or “enhance protection for affected communities” through supplementary regulation.¹¹⁷ The law regarding savings clauses “is not especially well developed,” and cases involving such clauses “turn very much on the precise wording of the statutes at issue.”¹¹⁸ With these caveats in mind, this section discusses three general categories of savings clauses: (1) “anti-preemption provisions,” (2) “compliance savings clauses,” and (3) “remedies savings clauses.”

Cipollone v. Liggett Group, 505 U.S. 504, 521 (1992).

¹⁰⁹ *Sprietsma v. Mercury Marine*, 537 U.S. 51, 63 (2002).

¹¹⁰ 46 U.S.C. § 4306 (emphasis added).

¹¹¹ *Id.* § 4311(g).

¹¹² *Sprietsma*, 537 U.S. at 63.

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ See “Compliance Savings Clauses” and “Example: Automobile Safety Regulations.”

¹¹⁷ Sandi Zellmer, *When Congress Goes Unheard: Savings Clauses’ Rocky Judicial Reception*, in PREEMPTION CHOICE: THE THEORY, LAW, AND REALITY OF FEDERALISM’S CORE QUESTION 144, 146 (William W. Buzbee, ed., 2009).

¹¹⁸ UNTEREINER, *supra* note 44, at 204-05.

Anti-Preemption Provisions

Some savings clauses contain language indicating that “nothing in” the relevant federal statute “may be construed to preempt or supersede” certain categories of state law,¹¹⁹ or that the relevant federal statute “does not annul, alter, or affect” state laws “except to the extent that those laws are inconsistent” with the federal statute.¹²⁰ Certain statutes containing this “inconsistency” language further provide that state laws are not “inconsistent” with the relevant federal statute if they provide greater protection to consumers than federal law.¹²¹ Some courts and commentators have labeled these clauses “anti-preemption provisions.”¹²²

While the case law on anti-preemption provisions is not well-developed, some courts have addressed such provisions in the context of defendants’ attempts to remove state law actions to federal court. Specifically, certain courts have relied on anti-preemption provisions to reject removal arguments premised on the theory that federal law “completely” preempts state laws concerning the relevant subject. In *Bernhard v. Whitney National Bank*, for example, the U.S. Court of Appeals for the Fifth Circuit relied on an anti-preemption provision in the Electronic Funds Transfer Act to reject a defendant-bank’s attempt to remove state law claims involving unauthorized funds transfers to federal court.¹²³ A number of federal district courts have also adopted similar interpretations of other anti-preemption provisions.¹²⁴

¹¹⁹ See, e.g., 7 U.S.C. § 2910(a) (“Nothing in this chapter may be construed to preempt or supersede any other program relating to beef promotion organized and operated under the laws of the United States or any State.”); *id.* § 6812(c) (“Nothing in this chapter may be construed to preempt or supersede any other program relating to cut flowers or cut greens promotion and consumer information organized and operated under the laws of the United States or a State.”); *id.* § 7811(c) (“Nothing in this chapter may be construed to preempt or supersede any other program relating to Hass avocado promotion, research, industry information, and consumer information organized and operated under the laws of the United States or of a State.”).

¹²⁰ See, e.g., 12 U.S.C. § 2616 (“This chapter does not annul, alter, or affect, or exempt any person subject to the provisions of this chapter from complying with, the laws of any State with respect to [real estate] settlement practices, except to the extent that those laws are inconsistent with any provision of this chapter, and then only to the extent of the inconsistency.”); 15 U.S.C. § 1693q (“This subchapter does not annul, alter, or affect the laws of any State relating to electronic fund transfers, dormancy fees, inactivity charges or fees, service fees, or expiration dates of gift certificates, store gift cards, or general-use prepaid cards, except to the extent that those laws are inconsistent with the provisions of this subchapter, and then only to the extent of the inconsistency.”); *id.* § 5722 (“This subchapter does not annul, alter, or affect, or exempt any person subject to the provisions of this subchapter from complying with, the laws of any State with respect to telephone billing practices, except to the extent that those laws are inconsistent with any provision of this subchapter, and then only to the extent of the inconsistency.”).

¹²¹ 12 U.S.C. § 2616 (authorizing the Consumer Financial Protection Bureau (CFPB) to determine whether state laws are “inconsistent with” the relevant federal statute, and providing that the CFPB “may not determine that any State law is inconsistent with” the federal statute “if the [CFPB] determines that such law gives greater protection to the consumer.”); 15 U.S.C. § 1693q (“A State law is not inconsistent with this subchapter if the protection such law affords any consumer is greater than the protection afforded by this subchapter.”); *id.* § 5722 (authorizing the Federal Trade Commission (FTC) to determine whether state laws are “inconsistent with” the relevant federal statute, and providing that the FTC “may not determine that any State law is inconsistent with” the federal statute “if the [FTC] determines that such law gives greater protection to the consumer.”).

¹²² See *Bank of Am. v. City and Cty. of San Francisco*, 309 F.3d 551, 565 (9th Cir. 2002); *Bank One v. Gutttau*, 190 F.3d 844, 850 (8th Cir. 1999); UNTEREINER, *supra* note 44, at 20.

¹²³ 523 F.3d 546, 548 (5th Cir. 2008).

¹²⁴ See *Ervin v. JP Morgan Chase Bank NA*, No. GLR-13-2080, 2014 WL 4052895 at *3 (D. Md. Aug. 13, 2014); *Palacios v. IndyMac Bank, FSB*, No. CV 09-04601, 2009 WL 3838274 at *4 (C.D. Cal. Nov. 13, 2009); *Perkins v. Johnson*, 551 F. Supp. 2d 1246, 1255 (D. Colo. 2008).

Compliance Savings Clauses

Some savings clauses provide that compliance with federal law does not relieve a person from liability under state law.¹²⁵ The principal interpretive issue with such clauses is whether they limit a statute’s preemptive effect (a question of *federal* law) or are instead intended to discourage the conclusion that compliance with federal regulations necessarily renders a product nondefective as a matter of *state* tort law.¹²⁶

While the Supreme Court has not adopted a generally applicable rule concerning the meaning of compliance savings clauses, it has concluded that such clauses can support a narrow interpretation of a statute’s preemptive effect. In *Geier v. American Honda Motor Co., Inc.*, the Court relied in part on a compliance savings clause in the National Traffic and Motor Vehicle Safety Act (NTMVSA) to hold that the statute did not expressly preempt state common law claims against an automobile manufacturer.¹²⁷ The NTMVSA contains (1) a preemption clause prohibiting states from enforcing safety standards for motor vehicles that are not identical to federal standards,¹²⁸ and (2) a “savings clause” providing that compliance with federal safety standards does not “exempt any person from any liability under common law.”¹²⁹ In *Geier*, the Court explained that although it was “possible” to read the NTMVSA’s preemption clause standing alone as encompassing the state law claims, that reading of the statute would leave the Act’s savings clause without effect.¹³⁰ The Court accordingly held that the NTMVSA did not expressly preempt the state law claims based in part on the Act’s savings clause.¹³¹ Similarly, in *Sprietsma v. Mercury Marine*, the Court reasoned that a nearly identical savings clause in the FBSA “buttresse[d]” the conclusion that state common law claims did not qualify as “law[s] or regulation[s]” within the meaning of the statute’s preemption clause.¹³² The Court has accordingly relied on compliance savings clauses to inform its interpretation of express preemption clauses, but has not held that such clauses automatically insulate state laws from preemption.

¹²⁵ See, e.g., 15 U.S.C. § 2074(a) (“Compliance with consumer product safety rules or other rules or orders under this chapter shall not relieve any person from liability at common law or under State statutory law to any other person.”); 21 U.S.C. § 360pp(e) (“Except as provided in the first sentence of section 360ss of this title, compliance with this part or any regulations issued thereunder shall not relieve any person from liability at common law or under statutory law.”); 42 U.S.C. § 5409(c) (“Compliance with any Federal manufactured home construction or safety standard issued under this chapter does not exempt any person from any liability under common law.”); 46 U.S.C. § 4311(g) (providing that compliance with federal boat regulations “does not relieve a person from liability at common law or under State law.”).

¹²⁶ See UNTEREINER, *supra* note 44, at 194-96. In many jurisdictions, a defendant’s compliance with government regulations can serve as relevant evidence in products liability litigation, and some courts have further held that compliance with government regulations renders a product nondefective as a matter of law. See RESTATEMENT OF THE LAW (THIRD): PRODUCTS LIABILITY section 4 cmt. (1998).

¹²⁷ 529 U.S. 861, 868 (2000).

¹²⁸ 15 U.S.C. § 1392(d).

¹²⁹ *Id.* § 1397(k).

¹³⁰ *Id.* As discussed in “Example: Automobile Safety Regulations,” the *Geier* Court held that the NTMVSA *impliedly* preempted the relevant common law claims even though it did not *expressly* preempt those claims. Notably, the Court appeared to consider the NTMVSA’s savings clause to be relevant only to its interpretation of the statute’s express preemption clause, reasoning that the savings clause did not create any sort of “special burden” disfavoring *implied* preemption. *Geier*, 529 U.S. at 870-71.

¹³¹ *Id.* at 868.

¹³² *Sprietsma v. Mercury Marine*, 537 U.S. 51, 63 (2002).

Remedies Savings Clauses

Some savings clauses provide that “nothing in” a federal statute “shall in any way abridge or alter the remedies now existing at common law or by statute.”¹³³ While the case law on these “remedies savings clauses” is limited, the Supreme Court has interpreted one such clause as evincing Congress’s intent to disavow field preemption, but not as preserving state laws that conflict with federal objectives.¹³⁴

“State” Versus “State or Political Subdivision Thereof”

Some savings clauses limit a federal statute’s preemptive effect on certain laws enacted by “State[s] or political subdivisions thereof,”¹³⁵ while others by their terms protect only “State” laws.¹³⁶ The Supreme Court has twice held that savings clauses that by their terms applied only to “State” laws also insulated *local* laws from preemption. In *Wisconsin Public Intervenor v.*

¹³³ 47 U.S.C. § 414. *See also* 7 U.S.C. § 209(b) (“[T]his section shall not in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies.”); *id.* § 499e(b) (“[T]his section shall not in any way abridge or alter the remedies now existing at common law or by statute, and the provisions of this chapter are in addition to such remedies.”).

¹³⁴ *See* *Pennsylvania R.R. v. Puritan Coal Mining Co.*, 237 U.S. 121, 129-30 (1915) (“The [savings clause] was added . . . not to nullify other parts of the act, or to defeat rights or remedies given by preceding sections, but to preserve all existing rights which were not inconsistent with those created by the statute . . . But for this proviso . . . , it might have been claimed that, Congress having entered the field, the whole subject of liability of carrier to shippers in interstate commerce had been withdrawn from the jurisdiction of the state courts, and this clause was added to indicate that the commerce act, in giving rights of action in Federal courts, was not intended to deprive the state courts of their general and concurrent jurisdiction.”); *see also* *Am. Tel. and Tel. Co. v. Central Office Tel., Inc.*, 524 U.S. 214, 226 (1998) (holding that a remedies savings clause in the Communications Act of 1934 did not save state laws that were inconsistent with federal law).

¹³⁵ *See, e.g.*, 33 U.S.C. § 1370 (“[N]othing in this chapter shall . . . preclude the right of any *State or political subdivision thereof* . . . to adopt or enforce . . . any standard or limitation respecting discharges of pollutants. . . .”) (emphasis added); 42 U.S.C. § 2018 (“Nothing in this chapter shall be construed to affect the authority or regulations of any Federal, *State, or local agency* with respect to the generation, sale, or transmission of electric power produced through the use of nuclear facilities licensed by the Commission.”) (emphasis added); *id.* § 6929 (“Nothing in this chapter shall be construed to prohibit any *State or political subdivision* thereof from imposing any requirements, including those for site selection, which are more stringent than those imposed by such regulations.”) (emphasis added).

¹³⁶ *See, e.g.*, 7 U.S.C. § 136v(a) (“A *State* may regulate the sale or use of any federally registered pesticide or device in the State, but only if and to the extent that the regulation does not permit any sale or use prohibited by this subchapter.”) (emphasis added); 42 U.S.C. § 9614(a) (“Nothing in this chapter shall be construed or interpreted as preempting any *State* from imposing additional liability or requirements with respect to the release of hazardous substances within such State.”) (emphasis added); 49 U.S.C. § 14501(c)(2)(A) (providing that the Interstate Commerce Act “shall not restrict the safety regulatory authority of a *State* with respect to motor vehicles”) (emphasis added).

Similarly, some *preemption clauses* bar any “State or . . . political subdivision thereof” from regulating a certain subject matter, while others by their terms preempt only “State” laws. *Compare* 42 U.S.C. § 7543(a) (“No *State or any political subdivision thereof* shall adopt or attempt to enforce any standard relating to the control of emissions from new motor vehicles or new motor vehicle engines subject to this part.”) (emphasis added); 49 U.S.C. § 5125(a) (providing that “a requirement of a *State, political subdivision of a State, or Indian tribe* is preempted” under certain circumstances) (emphasis added); *id.* § 14501(a)(1) (“No *State or political subdivision thereof* . . . shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to” certain subjects) (emphasis added), *with* 7 U.S.C. § 136v(b) (“Such *State* shall not impose or continue in effect any requirements for labeling or packaging in addition to or different from those required under this subchapter.”) (emphasis added); 21 U.S.C. § 360eee-4(b)(2) (“No *State* shall regulate third-party logistics providers as wholesale distributors.”) (emphasis added); 42 U.S.C. § 7543(a) (“No *State* shall require certification, inspection, or any other approval relating to the control of emissions from any new motor vehicle or new motor vehicle engine as condition precedent to the initial retail sale, titling (if any), or registration of such motor vehicle, motor vehicle engine, or equipment.”) (emphasis added).

Mortier, the Court held that the Federal Insecticide, Fungicide, and Rodenticide Act did not preempt local ordinances regulating pesticides based in part on a savings clause providing that “State[s]” may regulate federally registered pesticides in certain circumstances.¹³⁷ In concluding that the term “State” included political subdivisions of states, the Court relied on the principle that local governments are “convenient agencies” by which state governments can exercise their powers.¹³⁸ Similarly, in *City of Columbus v. Ours Garage & Wrecker Service*, the Court held that the Interstate Commerce Act (ICA) did not preempt municipal safety regulations governing tow-truck operators based in part on a savings clause providing that the ICA “shall not restrict the safety regulatory authority of a State with respect to motor vehicles.”¹³⁹ Relying in part on its reasoning in *Mortier*, the Court explained that absent a clear statement to the contrary, Congress’s reference to the regulatory authority of a “State” should be read to preserve “the traditional prerogative of the States to delegate their authority to their constituent parts.”¹⁴⁰

Implied Preemption

As discussed, federal law can *impliedly* preempt state law even when it does not do so *expressly*.¹⁴¹ Like its express preemption decisions, the Supreme Court’s implied preemption cases focus on Congress’s intent.¹⁴² The Supreme Court has recognized two general forms of implied preemption. First, “field preemption” occurs when a pervasive scheme of federal regulation implicitly precludes supplementary state regulation, or when states attempt to regulate a field where there is clearly a dominant federal interest.¹⁴³ Second, “conflict preemption” occurs when state law interferes with federal goals.¹⁴⁴

Field Preemption

The Supreme Court has held that federal law preempts state law where Congress has manifested an intention that the federal government occupy an entire field of regulation.¹⁴⁵ Federal law may reflect such an intent through a scheme of federal regulation that is “so pervasive as to make reasonable the inference that Congress left no room for States to supplement it,” or where federal law concerns “a field in which the federal interest is so dominant that the federal system will be

¹³⁷ 501 U.S. 597, 607-08 (1991); 7 U.S.C. § 136v(a).

¹³⁸ *Mortier*, 501 U.S. at 607-08 (internal quotation marks and citation omitted).

¹³⁹ 536 U.S. 424, 429 (2002); 49 U.S.C. § 14501(c)(2)(A) (emphasis added).

¹⁴⁰ *Ours Garage*, 536 U.S. at 429.

¹⁴¹ See *Crosby v. National Foreign Trade Council*, 530 U.S. 363, 372 (2000).

¹⁴² See *Wyeth v. Levine*, 555 U.S. 555, 565 (2009) (“[T]he purpose of Congress is the ultimate touchstone in every pre-emption case.”) (quoting *Retail Clerks v. Schermerhorn*, 375 U.S. 96, 103 (1963)); *Barnett Bank of Marion County, N.A. v. Nelson*, 517 U.S. 25, 31 (1996) (explaining that where “explicit pre-emption language does not appear, or does not directly answer the question . . . courts must consider whether the federal statute’s ‘structure and purpose,’ or nonspecific statutory language, nonetheless reveal a clear, but implicit, pre-emptive intent.”).

¹⁴³ *Gade v. Nat’l Solid Wastes Mgmt. Assn.*, 505 U.S. 88, 98 (1992).

¹⁴⁴ *Id.* The Court has explained that these subcategories of implied preemption are not “rigidly distinct,” and that “field preemption may be understood as a species of conflict preemption” because “[a] state law that falls within a pre-empted field conflicts with Congress’ intent . . . to exclude state regulation.” *English v. General Elec. Co.*, 496 U.S. 72, 79 n.5 (1990). See also LAURENCE TRIBE, *AMERICAN CONSTITUTIONAL LAW* 486 (2d ed. 1988) (noting that when state law “undermin[es] a congressional decision in favor of national uniformity of standards,” it “presents a situation similar in practical effect to that of federal occupation of a field”).

¹⁴⁵ *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

assumed to preclude enforcement of state laws on the same subject.”¹⁴⁶ Applying these principles, the Court has held that federal law occupies a variety of regulatory fields, including alien registration,¹⁴⁷ nuclear safety,¹⁴⁸ aircraft noise,¹⁴⁹ the “design, construction, alteration, repair, maintenance, operation, equipping, personnel qualification, and manning” of tanker vessels,¹⁵⁰ wholesales of natural gas in interstate commerce,¹⁵¹ and locomotive equipment.¹⁵²

Examples

Grain Warehousing

In its 1947 decision in *Rice v. Santa Fe Elevator Corporation*, the Supreme Court held that federal law preempted a number of fields related to grain warehousing, precluding even complementary state regulations of those fields.¹⁵³ In that case, the Court held that the federal Warehouse Act and associated regulations preempted a variety of state law claims brought against a grain warehouse, including allegations that the warehouse had engaged in unfair pricing, maintained unsafe elevators, and impermissibly mixed different qualities of grain.¹⁵⁴ The Court discerned Congress’s intent to occupy the relevant fields from an amendment to the Warehouse Act that made the Secretary of Agriculture’s authorities “exclusive” vis-à-vis federally licensed warehouses.¹⁵⁵ Because the text and legislative history of this amendment reflected Congress’s intent to eliminate overlapping federal and state warehouse regulations, the Court held that federal law occupied a number of fields involving grain warehousing. As a result, the Court concluded that the Warehouse Act preempted certain state law claims that intruded into those federally regulated fields, even if federal law established standards that were “more modest” and “less pervasive” than those imposed by state law.¹⁵⁶

Immigration: Alien Registration

The Court has also held that federal law preempts the field of alien registration.¹⁵⁷ In its 1941 decision in *Hines v. Davidowitz*, the Court held that federal immigration law—which required

¹⁴⁶ *Id.*

¹⁴⁷ See *Arizona v. United States*, 567 U.S. 387 (2012).

¹⁴⁸ See, e.g., *English v. Gen. Elec. Co.*, 496 U.S. 72, 82-85 (1990).

¹⁴⁹ *City of Burbank v. Lockheed Air Terminal Inc.*, 411 U.S. 624, 633 (1973).

¹⁵⁰ *United States v. Locke*, 529 U.S. 89, 111 (2000) (quoting 46 U.S.C. § 3703(a)); see *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 163-65 (1978).

¹⁵¹ *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 300, 305 (1988); *Exxon Corp. v. Eagerton*, 462 U.S. 176, 184 (1983).

¹⁵² *Kurns v. R.R. Friction Prods. Corp.*, 565 U.S. 625, 636 (2012).

¹⁵³ 331 U.S. 218 (1947). The Supreme Court’s mid-century decisions did not always clearly distinguish between field preemption and conflict preemption. See, e.g., *Pennsylvania v. Nelson*, 350 U.S. 497, 501-02 (1956) (noting that “different criteria have furnished touchstones” for the Court’s implied preemption decisions, and that the Court had used a variety of expressions in those decisions, including “conflicting; contrary to; occupying the field; repugnance; difference; irreconcilability; inconsistency; violation; curtailment; and interference”).

¹⁵⁴ *Rice*, 331 U.S. at 221-22.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* The *Rice* Court also held that certain state law claims—for example, an allegation that the warehouse had violated state law by failing to secure state approval for certain construction contracts—survived preemption because they involved fields that the Warehouse Act did not address. *Id.* at 236-37.

¹⁵⁷ See *Arizona v. United States*, 567 U.S. 387 (2012). Under the Immigration and Nationality Act, the term “alien”

aliens to register with the federal government—preempted a Pennsylvania law that required aliens to register with the state, pay a registration fee, and carry an identification card.¹⁵⁸ In reaching this conclusion, the Court explained that because alien regulation is “intimately blended and intertwined” with the federal government’s core responsibilities and Congress had enacted a “complete” regulatory scheme involving that field, federal law preempted the additional Pennsylvania requirements.¹⁵⁹

The Court reaffirmed these general principles from *Hines* in its 2012 decision in *Arizona v. United States*.¹⁶⁰ In *Arizona*, the Court held that the Immigration and Nationality Act (INA), which requires aliens to carry an alien registration document,¹⁶¹ preempted an Arizona statute that made violations of that federal requirement a crime under state law.¹⁶² In holding that federal law preempted this Arizona requirement, the Court explained that like the statutory framework at issue in *Hines*, the INA represented a “comprehensive” regulatory regime that “occupied the field of alien registration.”¹⁶³ Specifically, the Court inferred Congress’s intent to occupy this field from the INA’s “full set of standards governing alien registration,” which included specific penalties for noncompliance.¹⁶⁴ The Court accordingly held that federal law preempted even “complementary” state laws regulating alien registration like the challenged Arizona requirement.¹⁶⁵

However, the Court has also made clear that other types of state laws concerning aliens do not necessarily fall within the preempted field of *alien registration*. In its 1976 decision in *De Canas v. Bica*, the Court held that federal law did not preempt a California law prohibiting the

refers to “any person not a citizen or national of the United States.” 8 U.S.C. § 1101(a)(3).

¹⁵⁸ 312 U.S. 52, 72-74 (1941).

¹⁵⁹ *Id.* at 66. While *Hines* did not hold that federal power over alien regulation was “exclusive,” subsequent Supreme Court cases have characterized it as a field preemption decision. See *Arizona*, 567 U.S. at 401.

¹⁶⁰ *Arizona*, 567 U.S. at 401-02 (“Federal law makes a single sovereign responsible for maintaining a comprehensive and unified system to keep track of aliens within the Nation’s borders.”).

¹⁶¹ 8 U.S.C. § 1304(e).

¹⁶² *Id.* at 401. Even though a violation of the identification card requirement was already punishable as a misdemeanor under federal law, the Arizona statute made violation of the requirement a state misdemeanor. *Id.*

¹⁶³ *Id.* at 401.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* at 402. In *Arizona*, the Court also invalidated two other provisions of the relevant Arizona law because they conflicted with federal law. First, the Court held that federal law preempted a provision in the Arizona law that prohibited unauthorized aliens from seeking work. *Id.* at 406-07. Specifically, the Court reasoned that the federal Immigration Control and Reform Act of 1986 (IRCA)—which made it unlawful for *employers* to hire unauthorized aliens, but did not impose liability on unauthorized aliens themselves—preempted this provision in the Arizona law because it reflected “a deliberate choice” not to penalize unauthorized aliens for seeking work. *Id.* at 405. Second, the Court held that federal law preempted a provision in the Arizona statute that allowed state police to arrest persons who they reasonably believed committed a removable offense without a warrant. *Id.* at 410. The Court reasoned that this provision in the Arizona law “violate[d] the principle that the removal process is entrusted to the discretion of the Federal Government” by allowing state police to “perform[] the functions of an immigration officer” in circumstances not authorized by federal law. *Id.* at 408-09.

In contrast, the Court upheld another provision in the Arizona statute that required state police to make a reasonable attempt to determine the immigration status of any person they stopped, detained, or arrested if an officer had reasonable suspicion that the person was an unlawfully present alien. *Id.* at 413-15. The Court held that this provision did not conflict with federal law, which “[le]ft room for a policy requiring state officials to contact ICE” to verify an individual’s immigration status. *Id.* at 412-13. However, the Court noted that this provision (which had not gone into effect) was still susceptible to as-applied challenges—specifically, in cases where state police prolong a detention solely to verify a person’s immigration status. *Id.* at 413-15.

employment of aliens not entitled to lawful residence in the United States.¹⁶⁶ The Court reached this conclusion on the grounds that nothing in the text or legislative history of the INA—which did not directly regulate the employment of such aliens at the time—suggested that Congress intended to preempt all state regulations concerning the activities of aliens.¹⁶⁷ Instead, the Court reasoned that while the INA comprehensively regulated the immigration and naturalization processes, it did not address employment eligibility for aliens without legal immigration status.¹⁶⁸ As a result, the Court held that the challenged California law fell outside the preempted field of alien registration.¹⁶⁹ The Court has also upheld several state laws regulating the activities of aliens since *De Canas*. In *Chamber of Commerce v. Whiting*, for example, the Court held that federal law did not preempt an Arizona statute allowing the state to revoke an employer’s business license for hiring aliens who did not possess work authorization.¹⁷⁰ The Court has accordingly made clear that the preempted field of *alien registration* does not encompass all state laws concerning aliens.

Nuclear Energy: Safety Regulation

The Supreme Court has also held that federal law preempts the field of nuclear safety regulation. However, the Court has explained this field does not encompass all state laws that affect safety decisions made by nuclear power plants. Instead, the Court has concluded that state laws fall within the preempted field of nuclear safety regulation if they (1) are motivated by safety concerns and implicate a “core federal power,” or (2) have a “direct and substantial” effect on safety decisions made by nuclear facilities.¹⁷¹

This division of authority is the result of a regulatory regime that has changed significantly over the course of the 20th century. Before 1954, the federal government maintained a monopoly over the use, control, and ownership of nuclear technology.¹⁷² However, in 1954, the Atomic Energy Act (AEA) allowed private entities to own, construct, and operate nuclear power plants subject to a “strict” licensing and regulatory regime administered by the Atomic Energy Commission (AEC).¹⁷³ In 1959, Congress amended the AEA to give the states greater authority over nuclear energy regulation. Specifically, the 1959 Amendments allowed states to assume responsibility over certain nuclear materials as long as their regulations were “coordinated and compatible” with federal requirements.¹⁷⁴ While the 1959 Amendments reserved certain key authorities to the federal government, they also affirmed the states’ ability to regulate “activities for purposes other than protection against radiation hazards.”¹⁷⁵ Congress reorganized the administrative framework

¹⁶⁶ 424 U.S. 351 (1976).

¹⁶⁷ *Id.* at 358-59. *De Canas* pre-dated the current federal work-authorization rules for aliens contained in the IRCA. *See* 8 U.S.C. § 1324a(a)(1)(A).

¹⁶⁸ *De Canas*, 424 U.S. at 359.

¹⁶⁹ *Id.*

¹⁷⁰ 563 U.S. 582, 587 (2011). In *Whiting*, the Court also upheld a provision of the Arizona law that required employers use the “E-Verify” program, which allows users to verify a person’s work authorization status. *See id.* at 608-09.

¹⁷¹ *See* *Va. Uranium, Inc. v. Warren*, 587 U.S. __ (2019) (Gorsuch, J., lead opinion) (slip op., at 9); *English v. Gen. Elec. Co.*, 496 U.S. 72, 84-85 (1990).

¹⁷² *English*, 496 U.S. at 80.

¹⁷³ *Id.* at 81; 42 U.S.C. § 2011.

¹⁷⁴ 42 U.S.C. § 2021(g).

¹⁷⁵ *Id.* § 2021(k).

surrounding these regulations in 1974, when it replaced the AEC with the Nuclear Regulatory Commission (NRC).¹⁷⁶

The Supreme Court has held that while this regulatory scheme preempts the field of nuclear *safety* regulation, certain state regulations of nuclear power plants that have a *non-safety* rationale fall outside this preempted field. The Court identified this distinction in *Pacific Gas and Electric Company v. State Energy Resources Conservation & Development Commission*, where it held that federal law did not preempt a California statute regulating the construction of new nuclear power plants.¹⁷⁷ Specifically, the California statute conditioned the construction of new nuclear power plants on a state agency’s determination concerning the availability of adequate storage facilities and means of disposal for spent nuclear fuel.¹⁷⁸ In challenging this state statute, two public utilities contended that federal law made the federal government the “sole regulator of all things nuclear.”¹⁷⁹ However, the Court rejected this argument, reasoning that while Congress intended that the federal government regulate nuclear *safety*, the relevant statutes reflected Congress’s intent to allow states to regulate nuclear power plants for *non-safety* purposes.¹⁸⁰ The Court then concluded that the California law survived preemption because it was motivated by concerns over electricity generation and the economic viability of new nuclear power plants—not a desire to intrude into the preempted field of nuclear safety regulation.¹⁸¹

In addition to holding that the AEA does not preempt all state statutes and regulations concerning nuclear power plants, the Court has upheld certain state tort claims related to injuries sustained by power plant employees. In *Silkwood v. Kerr-McGee Corporation*, the Court upheld a punitive damages award against a nuclear laboratory arising from an employee’s injuries from plutonium contamination.¹⁸² In upholding the damages award, the Court rejected the laboratory’s argument that the award impermissibly punished and deterred conduct related to the preempted field of nuclear safety.¹⁸³ Instead, the Court concluded that federal law did not preempt such damages awards because it found “no indication” that Congress had ever seriously considered such an

¹⁷⁶ *Id.* §§ 5814, 5841.

¹⁷⁷ 461 U.S. 190, 216 (1983).

¹⁷⁸ *Id.*

¹⁷⁹ *Id.* at 205.

¹⁸⁰ *Id.* at 205 (emphasis added).

¹⁸¹ *Id.* at 207. In its 2019 decision in *Virginia Uranium, Inc. v. Warren*, the Court clarified that AEA preemption will depend on this type of inquiry into the motivations of a challenged state law only when the state law implicates a “core federal power” reserved to the NRC. 587 U.S. _ (2019) (Gorsuch, J., lead opinion) (slip op., at 9); (Ginsburg, J., concurring in the judgment) (slip op., at 7, 9-10). In that case, the Court held that federal law did not preempt a Virginia statute banning the mining of uranium—a radioactive metal used in the production of nuclear fuel. *See id.* (Gorsuch, J., lead opinion) (slip op., at 1); (Ginsburg, J., concurring in the judgment) (slip op., at 7). Under the AEA and its subsequent amendments, the NRC has the authority to regulate the milling, transfer, use, and disposal of uranium, but not uranium *mining* conducted on private lands. *See id.* (Gorsuch, J., lead opinion) (slip op., at 1). In upholding the Virginia mining ban, a majority of the Court declined to evaluate the state’s underlying motivation, explaining that such an inquiry is appropriate (if at all) only when state law regulates an activity related to the NRC’s “core federal powers” under the AEA. *See id.* (Gorsuch, J., lead opinion) (slip op., at 9); (Ginsburg, J., concurring in the judgment) (slip op., at 7, 9-10). While the Court interpreted *Pacific Gas* as recognizing that the construction of nuclear power plants involves one of these “core federal powers,” a majority of the Justices agreed that uranium mining does not implicate similar federal authorities because it falls outside the NRC’s jurisdiction. *See id.* (Gorsuch, J., lead opinion) (slip op., at 9); (Ginsburg, J., concurring in the judgment) (slip op., at 7). The Court accordingly relied on this distinction to uphold the Virginia law without evaluating its underlying purpose.

¹⁸² *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 241-42 (1984).

¹⁸³ 9 U.S. 236, 247 (1959).

outcome.¹⁸⁴ Moreover, the Court observed that Congress had failed to provide alternative federal remedies for persons injured in nuclear accidents.¹⁸⁵ According to the Court, this legislative silence was significant because it was “difficult to believe” that Congress would have removed all judicial recourse from plaintiffs injured in nuclear accidents without an explicit statement to that effect.¹⁸⁶ The Court also reasoned that Congress had assumed the continued availability of state tort remedies when it adopted a 1957 amendment to the AEA.¹⁸⁷ Under the relevant amendment, the federal government partially indemnified power plants for certain liabilities for nuclear accidents—a scheme that reflected an assumption that plaintiffs injured in such accidents retained the ability to bring tort claims against the power plants.¹⁸⁸ Based on this evidence, the Court rejected the argument that Congress’s occupation of the field of nuclear safety regulation preempted all state tort claims arising from nuclear incidents.¹⁸⁹

The Court applied this reasoning from *Silkwood* six years later in *English v. General Electric Company*, where it held that federal law did not preempt state tort claims alleging that a nuclear laboratory had retaliated against a whistleblower for reporting safety concerns.¹⁹⁰ In allowing the claims to proceed, the Court rejected the argument that federal law preempts all state laws that affect plants’ nuclear safety decisions. Rather, the Court explained that in order to fall within the preempted field of nuclear safety regulation, a state law must have a “direct and substantial” effect on such decisions.¹⁹¹ While the Court acknowledged that the relevant tort claims may have had “some effect” on safety decisions by making retaliation against whistleblowers more costly than safety improvements, it concluded that such an effect was not sufficiently “direct and substantial” to bring the claims within the preempted field.¹⁹² In making this assessment, the Court relied on *Silkwood*, where it held that the relevant punitive damages award fell outside the field of nuclear safety regulation despite its likely impact on safety decisions.¹⁹³ Because the Court concluded that the type of damages award at issue in *Silkwood* affected safety decisions “more directly” and “far more substantially” than the whistleblower’s retaliation claims, it held that the retaliation claims were not preempted.¹⁹⁴

Conclusion

A determination that federal law preempts a field has powerful consequences, displacing even state laws and regulations that are consistent with or complementary to federal law.¹⁹⁵ However, because of these effects, the Court has cautioned against overly hasty inferences that Congress has occupied a field.¹⁹⁶ Specifically, the Court has rejected the argument that the

¹⁸⁴ *Id.* at 251.

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ *Id.* at 251-52.

¹⁸⁸ *Id.* at 250-52.

¹⁸⁹ *Id.* at 256.

¹⁹⁰ 496 U.S. 72, 90 (1990).

¹⁹¹ *Id.* at 85.

¹⁹² *Id.*

¹⁹³ *Id.* at 85-86.

¹⁹⁴ *Id.* at 86.

¹⁹⁵ See *Arizona v. United States*, 567 U.S. 387, 402 (2012); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 231 (1947).

¹⁹⁶ See *O’Melveny & Myers v. FDIC*, 512 U.S. 79, 85 (1994) (“Nor would we adopt a court-made rule to supplement federal statutory regulation that is comprehensive and detailed; matters left unaddressed in such a scheme are presumably left subject to the disposition provided by state law.”); see also *Bates v. Dow Agrosciences LLC*, 544 U.S.

comprehensiveness of a federal regulatory scheme is sufficient to conclude that federal law occupies a field, explaining that Congress and federal agencies often adopt “intricate and complex” laws and regulations without intending to assume exclusive regulatory authority over the relevant subjects.¹⁹⁷ The Court has accordingly relied on legislative history and statutory structure—in addition to the comprehensiveness of federal regulations—in assessing field preemption arguments.¹⁹⁸

The Court has also adopted a narrow view of the *scope* of certain preempted fields. For example, the Court has rejected the proposition that federal nuclear energy regulations preempt all state laws that affect the preempted field of nuclear safety regulation, explaining that state laws fall within that field only if they have a “direct and substantial” effect on it.¹⁹⁹ As a corollary to this principle, the Court has held that in certain contexts, generally applicable state laws are more likely to fall outside a federally preempted field than state laws that “target” entities or issues within the field. In *Oneok, Inc. v. Learjet, Inc.*, for example, the Court held that state antitrust claims against natural gas pipelines fell outside the preempted field of interstate natural gas wholesaling because the relevant state antitrust law was not “aimed” at natural gas companies and instead applied broadly to all businesses.²⁰⁰

Finally, the Court’s case law underscores that Congress can narrow the scope of a preempted field with explicit statutory language. In *Pacific Gas*, for example, the Court held that the preempted field of nuclear safety regulation did not encompass state laws motivated by nonsafety concerns based in part on a statutory provision disavowing such an intent.²⁰¹ While the Court has subsequently narrowed the circumstances in which it will apply *Pacific Gas*’s purpose-centric inquiry to state laws affecting nuclear energy,²⁰² it has reaffirmed the general principle that Congress can circumscribe a preempted field’s scope with such “non-preemption clauses.”²⁰³

Conflict Preemption

Federal law also impliedly preempts conflicting state laws.²⁰⁴ The Supreme Court has identified two subcategories of conflict preemption. First, federal law impliedly preempts state law when it

431, 459 (2005) (Breyer, J., concurring) (noting “this Court’s increasing reluctance to expand federal statutes beyond their terms through doctrines of implied preemption”); *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 617 (1997) (Thomas, J., dissenting) (“[O]ur recent cases have frequently rejected field pre-emption in the absence of statutory language expressly requiring it.”); *Southland Corp. v. Keating*, 465 U.S. 1, 18 (1984) (Stevens, J., concurring in part and dissenting in part) (“[E]ven where a federal statute does displace State authority, it rarely occupies a field completely, totally excluding all participation by the legal systems of the states.”) (internal quotation marks and citation omitted).

¹⁹⁷ See *N.Y. State Dep’t of Social Servs. v. Dublino*, 413 U.S. 405, 415 (1973). See also *Hillsborough Cty., Fla. v. Automated Med. Lab., Inc.*, 471 U.S. 707, 716 (1985) (explaining that courts should not infer field preemption “whenever an agency deals with a problem comprehensively,” because such an inference would be inconsistent with “the federal-state balance embodied in [the Court’s] Supremacy Clause jurisprudence”).

¹⁹⁸ See, e.g., *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 231-32 (1947).

¹⁹⁹ *English v. Gen. Elec. Co.*, 496 U.S. 72, 85 (1990).

²⁰⁰ 135 S. Ct. 1591, 1600-01 (2015). See also *English*, 496 U.S. at 83 (explaining in dicta that generally applicable criminal laws are not likely to fall within the preempted field of nuclear safety regulation).

²⁰¹ *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm’n*, 461 U.S. 190, 209-10, 213-14 (1983).

²⁰² See note 181 *supra*.

²⁰³ See *Va. Uranium, Inc. v. Warren*, 587 U.S. __ (2019) (Gorsuch, J., lead opinion) (slip op., at 6); (Ginsburg, J., concurring in the judgment) (slip op., at 8).

²⁰⁴ See *Gade v. National Solid Wastes Mgmt. Ass’n*, 505 U.S. 88, 108 (1992).

is impossible for regulated parties to comply with both sets of laws (“impossibility preemption”).²⁰⁵ Second, federal law impliedly preempts state laws that pose an obstacle to the “full purposes and objectives” of Congress (“obstacle preemption”).²⁰⁶ The two subsections below discuss these subcategories of conflict preemption.

Impossibility Preemption

The Supreme Court has held that federal law preempts state law when it is physically impossible to comply with both sets of laws.²⁰⁷ To illustrate this principle, the Court has explained that a hypothetical federal law forbidding the sale of avocados with *more* than 7% oil content would preempt a state law forbidding the sale of avocados with *less* than 8% oil content, because avocado sellers could not sell their products and comply with both laws.²⁰⁸ The Court has characterized impossibility preemption as a “demanding defense,”²⁰⁹ and its case law on the issue is not as well-developed as other areas of its preemption jurisprudence.²¹⁰ However, the Court extended impossibility preemption doctrine in two recent decisions concerning prescription drug labeling.

Example: Generic Drug Labeling

In *PLIVA v. Mensing* and *Mutual Pharmaceutical Co. v. Bartlett*, the Court held that federal regulations of generic drug labels preempted certain state law claims brought against generic drug manufacturers because it was impossible for the manufacturers to comply with both federal and state law.²¹¹ In both cases, plaintiffs alleged that they suffered adverse effects from certain generic drugs and argued that the drugs’ labels should have included additional warnings.²¹² In response, the drug manufacturers argued that the Hatch-Waxman Amendments (Hatch-Waxman) to the Food, Drug, and Cosmetic Act preempted the state law claims.²¹³ Under Hatch-Waxman, drug manufacturers can secure Food and Drug Administration (FDA) approval for generic drugs by demonstrating that they are equivalent to a brand-name drug already approved by the FDA.²¹⁴ In doing so, the generic drug manufacturers need not comply with the FDA’s standard preapproval process, which requires extensive clinical testing and the development of FDA-approved labeling.²¹⁵ However, generic drug makers that use the streamlined Hatch-Waxman process must ensure that the labels for their drugs are the same as the labels for corresponding brand-name drugs, meaning that generic manufacturers cannot unilaterally change their labels.²¹⁶

²⁰⁵ *Fla. Lime & Avocado Growers v. Paul*, 373 U.S. 132, 142-43 (1963).

²⁰⁶ *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

²⁰⁷ *Fla. Lime*, 373 U.S. at 142-43.

²⁰⁸ *Id.*

²⁰⁹ *Wyeth v. Levine*, 555 U.S. 555, 573 (2009).

²¹⁰ See Meltzer, *supra* note 50, at 8 (describing situations in which it is impossible to comply with both state and federal requirements as “rare”).

²¹¹ 570 U.S. 472, 493 (2013); 564 U.S. 604, 610 (2011).

²¹² *Bartlett*, 570 U.S. at 475; *PLIVA*, 564 U.S. at 610.

²¹³ *Bartlett*, 570 U.S. at 475; *PLIVA*, 564 U.S. at 610.

²¹⁴ See *PLIVA*, 564 U.S. at 612.

²¹⁵ *Bartlett*, 570 U.S. at 476-77; *PLIVA*, 564 U.S. at 612-13.

²¹⁶ *Bartlett*, 570 U.S. at 476-77; *PLIVA*, 564 U.S. at 612-13. For further information on the approval and labeling process for generic drugs under Hatch-Waxman and related laws, see CRS Report R44703, *Generic Drugs and GDUFA Reauthorization: In Brief*, by Judith A. Johnson.

In both *PLIVA* and *Bartlett*, the Court held that the Hatch-Waxman Amendments preempted the relevant state law claims because it was impossible for the generic drug manufacturers to comply with both federal and state law.²¹⁷ Specifically, the Court reasoned that it was impossible for the drug makers to comply with both sets of laws because federal law prohibited them from unilaterally altering their labels, while the state law claims depended on the existence of a duty to make such alterations.²¹⁸ In other words, the Court reasoned that it was impossible for the manufacturers to comply with both their state law duty to change their labels and their federal duty to keep their labels the same.²¹⁹ In reaching this conclusion in *PLIVA*, the Court rejected the argument that it was possible for manufacturers to comply with both federal and state law by petitioning the FDA to impose new labeling requirements on the corresponding brand-name drugs.²²⁰ The Court rejected this argument on the grounds that impossibility preemption occurs whenever a party cannot *independently* comply with both federal and state law without seeking “special permission and assistance” from the federal government.²²¹ Similarly, in *Bartlett*, the Court rejected the argument that it was possible for generic drug makers to comply with both federal and state law by refraining from selling the relevant drugs. The Court rejected this “stop- selling” argument on the grounds that it would render impossibility preemption “all but meaningless.”²²² As a result, an evaluation of whether it is “impossible” to comply with both federal and state law must presuppose some affirmative conduct by the regulated party.

Despite its decisions in *PLIVA* and *Bartlett*, the Court has rejected impossibility preemption arguments made by *brand-name* drug manufacturers, who *are* entitled to unilaterally strengthen the warning labels for their drugs. In *Wyeth v. Levine*, the Court held that federal law did not preempt a state law failure-to-warn claim brought against the manufacturer of a brand-name drug, reasoning that it was possible for the manufacturer to strengthen its label for the drug without FDA approval.²²³ However, the *Wyeth* Court noted that an impossibility preemption defense may be available to brand-name drug manufacturers when there is “clear evidence” that the FDA would have rejected a proposed change to a brand-name drug’s label.²²⁴

Obstacle Preemption

Federal law also impliedly preempts state laws that pose an “obstacle” to the “full purposes and objectives” of Congress.²²⁵ In its obstacle preemption cases, the Court has held that state law can interfere with federal goals by frustrating Congress’s intent to adopt a uniform system of federal regulation, conflicting with Congress’s goal of establishing a regulatory “ceiling” for certain products or activities, or by impeding the vindication of a federal right.²²⁶ However, the Court has

²¹⁷ *Bartlett*, 570 U.S. at 486-87; *PLIVA*, 564 U.S. at 617.

²¹⁸ *Bartlett*, 570 U.S. at 487-87; *PLIVA*, 564 U.S. at 610.

²¹⁹ *PLIVA*, 564 U.S. at 618.

²²⁰ *Id.* at 616.

²²¹ *PLIVA*, 564 U.S. at 623-24.

²²² *Bartlett*, 570 U.S. at 488-89.

²²³ 555 U.S. 555, 573 (2009).

²²⁴ *Id.* at 571. The Court further clarified this standard in its 2019 decision in *Merck Sharp & Dohme Corp. v. Albrecht*, explaining that “clear evidence” requires drug manufacturers to demonstrate that they “fully informed” the FDA of the justifications for the warning required by the relevant state law and that the FDA nevertheless rejected the proposed change. 139 S. Ct. 1668, 1672 (2019).

²²⁵ See *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

²²⁶ See *id.*; *Geier v. American Honda Motor Co., Inc.*, 529 U.S. 861, 875 (2000); *Felder v. Casey*, 487 U.S. 131, 153 (1988).

also cautioned that obstacle preemption does not justify a “freewheeling judicial inquiry” into whether state laws are “in tension” with federal objectives, as such a standard would undermine the principle that “it is Congress rather than the courts that preempts state law.”²²⁷ The subsections below discuss a number of cases in which the Court has held that state law poses an obstacle to the accomplishment of federal goals.

Example: Foreign Sanctions

The Supreme Court has concluded that state laws can pose an obstacle to the accomplishment of federal objectives by interfering with Congress’s choice to concentrate decisionmaking in federal authorities. The Court’s decision in *Crosby v. National Foreign Trade Council* illustrates this type of conflict between state law and federal policy goals.²²⁸ In *Crosby*, the Court held that a federal statute imposing sanctions on Burma preempted a Massachusetts statute that restricted state agencies’ ability to purchase goods or services from companies doing business with Burma.²²⁹ The Court identified several ways in which the Massachusetts law interfered with the federal statute’s objectives. First, the Court reasoned that the Massachusetts law interfered with Congress’s decision to provide the President with the flexibility to add or waive sanctions in response to ongoing developments by “imposing a different, state system of economic pressure against the Burmese political regime.”²³⁰ Second, the Court explained that because the Massachusetts statute penalized certain individuals and conduct that Congress explicitly excluded from federal sanctions, it interfered with the federal statute’s goal of limiting the economic pressure imposed by the sanctions to “a specific range.”²³¹ In identifying this conflict, the Court rejected the state’s argument that its law “share[d] the same goals” as the federal act, reasoning that the additional sanctions imposed by the state law would still undermine Congress’s intended “calibration of force.”²³² Finally, the Court concluded that the Massachusetts law undermined the President’s capacity for effective diplomacy by compromising his ability “to speak for the Nation with one voice.”²³³

Example: Automobile Safety Regulations

The Court has concluded that some federal laws and regulations evince an intent to establish both a regulatory “floor” and “ceiling” for certain products and activities. The Court has interpreted certain federal automobile safety regulations, for example, as not only imposing minimum safety standards on carmakers, but as insulating manufacturers from certain forms of *stricter* state regulation as well. In *Geier v. American Honda Motor Co.*, the Court held that the National Traffic and Motor Vehicle Safety Act (NTMVSA) and associated regulations impliedly preempted state tort claims alleging that an automobile manufacturer had negligently designed a

²²⁷ *Chamber of Commerce v. Whiting*, 563 U.S. 582, 607 (quoting *Gade v. Nat’l Solid Wastes Mgmt. Ass’n*, 505 U.S. 88, 111 (1992) (Kennedy, J., concurring)).

²²⁸ *Crosby*, 530 U.S. at 366-67. As the Court noted in *Crosby*, Burma changed its name to Myanmar in 1989. *See id.* at 366 n.1. However, because the parties in *Crosby* referred to the country as Burma, the Court followed suit. *Id.*

²²⁹ *Id.* at 366-67.

²³⁰ *Id.* at 376.

²³¹ *Id.* at 377-79.

²³² *Id.* at 380. After *Crosby*, Congress has included specific language in certain sanctions statutes that explicitly allows states to pass sanctions laws of their own. *See, e.g.*, Comprehensive Iran Sanctions, Accountability and Divestment Act, Pub. L. No. 111-195, 124 Stat. 1312 (July 1, 2010).

²³³ *Crosby*, 530 U.S. at 380-81.

car without a driver’s side airbag.²³⁴ While the Court rejected the argument that the NTMVSA *expressly* preempted the state law claims,²³⁵ it reasoned that the claims interfered with the federal objective of giving car manufacturers the option of installing a “variety and mix” of passive restraints.²³⁶ The Court discerned this goal from, among other things, the history of the relevant regulations and Department of Transportation (DOT) comments indicating that the regulations were intended to lower costs, incentivize technological development, and encourage gradual consumer acceptance of airbags rather than impose an immediate requirement.²³⁷ The Court accordingly held that the NTMVSA impliedly preempted the state law claims because they conflicted with these federal goals.²³⁸

However, the Court has rejected the argument that federal automobile safety standards impliedly preempt all state tort claims concerning automobile safety. In *Williamson v. Mazda Motor of America, Inc.*, the Court held that a different federal safety standard did not preempt a state law claim alleging that a carmaker should have installed a certain type of seatbelt in a car’s rear seat.²³⁹ While the regulation at issue in *Williamson* allowed manufacturers to choose between a variety of seatbelt options, the Court distinguished the case from *Geier* on the grounds that the DOT’s decision to offer carmakers a range of choices was not a “significant” regulatory objective.²⁴⁰ Specifically, the Court reasoned that because the DOT’s decision to offer manufacturers a range of options was based on relatively minor design and cost-effectiveness concerns, the state tort action did not conflict with the purpose of the relevant federal regulation.²⁴¹

Example: Federal Civil Rights

The Court has also held that state law can pose an obstacle to federal goals where it impedes the vindication of federal rights. In *Felder v. Casey*, the Court held that 42 U.S.C. § 1983 (Section 1983)—which provides individuals with the right to sue state officials for federal civil rights violations—preempted a state statute adopting certain procedural rules for bringing Section 1983 claims in state court.²⁴² Specifically, the state statute required Section 1983 plaintiffs to provide government defendants 120 days’ written notice of (1) the circumstances giving rise to their claims, (2) the amount of their claims, and (3) their intent to bring suit.²⁴³ The Court held that federal law preempted these requirements because the “purpose” and “effect” of the requirements conflicted with Section 1983’s remedial objectives.²⁴⁴ Specifically, the Court reasoned that the requirements’ *purpose* of minimizing the state’s liability conflicted with Section 1983’s goal of providing relief to individuals whose constitutional rights are violated by state officials.²⁴⁵ Moreover, the Court concluded that the state statute’s *effects* interfered with federal objectives

²³⁴ 529 U.S. 861, 865 (2000).

²³⁵ See “Compliance Savings Clauses.”

²³⁶ *Geier*, 529 U.S. at 875.

²³⁷ *Id.*

²³⁸ *Id.*

²³⁹ 562 U.S. 323 (2011).

²⁴⁰ *Id.* at 332.

²⁴¹ *Id.*

²⁴² 487 U.S. 131, 153 (1988).

²⁴³ *Id.*

²⁴⁴ *Id.* at 138.

²⁴⁵ *Id.* at 141-42.

because its enforcement would result in different outcomes in Section 1983 litigation based solely on whether a claim was brought in state or federal court.²⁴⁶

Conclusion

The Supreme Court has held that state law can conflict with federal law in a number of ways. First, state law can conflict with federal law when it is physically impossible to comply with both sets of laws. While the Court has characterized this type of impossibility preemption argument as a “demanding defense,”²⁴⁷ its decisions in *PLIVA* and *Bartlett* arguably extended the doctrine’s scope.²⁴⁸ In those cases, the Court made clear that impossibility preemption remains a viable defense even in instances in which a regulated party can petition the federal government for permission to comply with state law²⁴⁹ or stop selling a regulated product altogether.²⁵⁰

State law can also conflict with federal law when it poses an “obstacle” to federal goals. In evaluating congressional intent in obstacle preemption cases, the Court has relied upon statutory text,²⁵¹ structure,²⁵² and legislative history²⁵³ to determine the scope of a statute’s preemptive effect. Relying on these indicia of legislative purpose, the Court has held that state laws can pose an obstacle to federal goals by interfering with a uniform system of federal regulation,²⁵⁴ imposing stricter requirements than federal law (where federal law evinces an intent to establish a regulatory “ceiling”),²⁵⁵ or by impeding the vindication of a federal right.²⁵⁶

While obstacle preemption has played an important role in the Court’s preemption jurisprudence since the mid-20th century, recent developments may result in a narrowing of the doctrine. Indeed, commentators have noted the tension between increasingly popular textualist theories of statutory interpretation—which reject extra-textual evidence as a possible source of statutory meaning—and obstacle preemption doctrine, which arguably allows courts to consult such evidence.²⁵⁷ Identifying this alleged inconsistency, Justice Thomas has categorically rejected the Court’s obstacle preemption jurisprudence, criticizing the Court for “routinely invalidat[ing] state laws based on perceived conflicts with broad federal policy objectives, legislative history, or generalized notions of congressional purposes that are not embodied within the text of federal law.”²⁵⁸

The Court’s recent additions may also presage a narrowing of obstacle preemption doctrine, as some commentators have characterized Justices Gorsuch and Kavanaugh as committed

²⁴⁶ *Id.* at 138.

²⁴⁷ *Wyeth v. Levine*, 555 U.S. 555, 573 (2009).

²⁴⁸ See Ernest A. Young, “*The Ordinary Diet of the Law*”: *The Presumption Against Preemption in the Roberts Court*, 2011 SUP. CT. REV. 253, 327-28 (2011) (characterizing *PLIVA* as an “expansion” of impossibility preemption).

²⁴⁹ *PLIVA, Inc. v. Mensing*, 564 U.S. 604, 623-24 (2011).

²⁵⁰ *Mutual Pharm. Co., Inc. v. Bartlett*, 570 U.S. 472, 488 (2013).

²⁵¹ See *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363, 380 (2000).

²⁵² See *id.* at 377-80.

²⁵³ *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 875 (2000).

²⁵⁴ *Crosby*, 530 U.S. at 374-77.

²⁵⁵ *Geier*, 529 U.S. at 875.

²⁵⁶ *Felder v. Casey*, 487 U.S. 131, 138-142 (1988).

²⁵⁷ Note, *Preemption as Purposivism’s Last Refuge*, 126 HARV. L. REV. 1056, 1065 (2013). See also Meltzer, *supra* note 50, at 35-43 (considering whether obstacle preemption is consistent with textualism).

²⁵⁸ *Wyeth v. Levine*, 555 U.S. 555, 583 (2009) (Thomas, J., concurring in the judgment).

textualists.²⁵⁹ Indeed, the Court’s 2019 decision in *Virginia Uranium, Inc. v. Warren* suggests that Justices Gorsuch and Kavanaugh may share Justice Thomas’s skepticism toward obstacle preemption arguments.²⁶⁰ In that case, Justice Gorsuch authored an opinion joined by Justices Thomas and Kavanaugh in which he rejected the proposition that implied preemption analysis should appeal to “abstract and unenacted legislative desires” not reflected in a statute’s text.²⁶¹ While Justice Gorsuch did not explicitly endorse a wholesale repudiation of what he characterized as the “purposes-and-objectives branch of conflict preemption,” he emphasized that any evidence of Congress’s preemptive purpose must be sought in a statute’s text and structure.²⁶²

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²⁵⁹ See Thomas Jipping, *What Brett Kavanaugh’s Speeches Tell Us About His Judicial Approach*, THE HERITAGE FDN. (July 22, 2018), <https://www.heritage.org/courts/commentary/what-brett-kavanaughs-speeches-tell-us-about-his-judicial-approach> (arguing that Justice Kavanaugh embraces a “textualist” approach to statutory interpretation); Max Alderman & Duncan Pickard, *Justice Scalia’s Heir Apparent?: Judge Gorsuch’s Approach to Textualism and Originalism*, 69 STAN. L. REV. ONLINE 185, 185 (2017) (characterizing Justice Gorsuch as a “rigorous textualist”).

²⁶⁰ See *Va. Uranium, Inc. v. Warren*, 587 U.S. __ (2019) (Gorsuch, J., lead opinion) (slip op., at 14-15).

²⁶¹ *Id.* (Gorsuch, J., lead opinion) (slip op., at 14).

²⁶² *Id.* (Gorsuch, J., lead opinion) (slip op., at 15).