No. 99-312

IN THE SUPREME COURT OF THE UNITED STATES

NORFOLK SOUTHERN RAILWAY COMPANY
Petitioners,

v.

DEDRA SHANKLIN, INDIVIDUALLY AND AS
NEXT FRIEND OF JESSIE GUY SHANKLIN,
Respondent.

BRIEF FOR THE RESPONDENT

Filed January 28, 2000

QUESTION PRESENTED

Is a state-law wrongful-death claim alleging that a railroad failed to install adequate warning devices at a railroad grade-crossing preempted by federal law when (a) federally mandated safety devices were not installed at the crossing, and (b) the federal government had funded only "minimum" signage for the crossing without regard to whether that signage was adequate to make the crossing safe?

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STATEMENT OF THE CASE

This case involves the "minimum protection program" created by Congress in 1973 to help fund the installation of standard crossbucks at public railroad crossings around the Nation. Because the federal government did not determine under this program whether the crossbucks would be adequate to protect particular crossings, funding under the program does not preempt Petitioner's settled state-law duty to provide adequate warning devices. The distinction between the "minimum protection program" and the distinct "hazard" program on which Petitioner's argument erroneously rests is evident from both federal railroad regulation and the program applied by the State of Tennessee in this case. The former is designed to warn of the mere presence of a railroad crossing ahead, while the latter uses "diagnostic teams" to assess what warning devices are required at individual crossings.

Part I below sets out the relevant statutory and regulatory structure. Part II reviews this Court's prior encounter with that structure in *CSX Transportation, Inc.* v. *Easterwood*, 507 U.S. 658 (1993). Finally, Parts III and IV describe the facts of this case and the proceedings below.

I. Statutory and Regulatory Background

A. Provisions Governing State "Hazard" and "Minimum Protection" Programs

1. The Federal Programs

Nearly ten times every day, a train collides with a car or truck somewhere in the United States, frequently killing or grievously wounding the vehicle's driver and passengers. National Transportation Safety Board, *Safety Study, Safety at*

Passive Grade Crossings, Vol I: Analysis vii (adopted July 21, 1998). Fully 60% of the fatalities occur at crossings protected only by "passive" warning devices such as standard "crossbucks" (which are the only protection at two-thirds of the nation's 295,000 rail crossings) rather than "active" devices such as flashing lights and automatic gates triggered by the approach of an oncoming train. *Id.* at vii & Appendix A, Table 2.

Congress has provided financial assistance to help alleviate these grave dangers to the public. In 1970, Congress directed the Secretary of Transportation ("Secretary") to study the problem and to propose a plan of federal assistance. Federal Rail Safety Act of 1970, Pub. L. No. 91-458, § 204, 84 Stat. 971, 977. The Secretary's response recognized that conditions at many crossings, such as those with multiple lanes of vehicular traffic and trains traveling at high speeds, merited the advanced protection of flashing lights and automatic gates. But the Secretary also recognized that it would not be feasible for the federal government to pay to install advanced protection at all crossings in need. *See* U.S. D.O.T., *Railroad-Highway Safety, Part I: A Comprehensive Statement of the Problem* v-vi, 32-34 (1971) ("DOT Analysis").

The Secretary also concluded that thousands of rail crossings around the Nation, including many crossings in need of lights and gates, lacked even the minimum level of protection provided by the standard "crossbuck" described in the federal Manual on Uniform Traffic Control Devices ("MUTCD"). Regarding this lack of minimum protection, the Secretary explained that "correct[ing] this deficiency will require installation of an additional sign at those crossings now having only one, and will require installation of two crossbuck signs at the several thousand public crossings reported as having no signs or signals." *Id.* at 67. The Secretary

accordingly recommended that Congress make federal funds available to install crossbucks at *all* crossings to provide minimum protection on an urgent basis. U.S. D.O.T., *Railroad-Highway Safety, Part II: Recommendations for Resolving the Problem* 90 (1972). The Secretary emphasized: "Installation of these signs [crossbucks] would be made without any prior benefit-cost analysis, on the basis that this is a *mandatory minimum requirement for safety.*" *DOT Analysis* at 67 (emphasis added). Installing minimum signage thus presented an inexpensive means to ensure that all crossings had at least some protection. This view was confirmed by a Report to Congress submitted by the Federal Rail Administration:

> If every grade crossing could be protected with an active device, the problems experienced could be reduced to minimum levels. In view of generally limited monetary resources, however, it is, and will continue for many years to be, necessary to protect many grade crossings with devices that only inform the motorist of [the] hazard and place upon him the responsibility for a decision of whether or not it is safe to proceed. As a result, it is believed that the greatest immediate opportunity for the improvement of the motorist's decision making process is in the area of passive protection of grade crossings.

Federal Rail Administration, Report of Acting Administrator Carl V. Lyon 665 (Mar. 30, 1971).

Congress adopted the Secretary's recommendations in the Highway Safety Act of 1973, which authorized the use of federal funds to pay "the entire cost of construction of projects for the elimination of hazards at railway-highway crossings."

23 U.S.C. § 130(a). The statute did not mandate the installation of warning devices with railroad or State funds. Instead, it conditioned the receipt of federal funds on compliance with the two initiatives proposed by the Secretary:

> Each State [(a)] shall conduct and systematically maintain a survey of all highways to identify those railroad crossings which may require separation, relocation, or protective devices, and establish and implement a schedule of projects for this purpose. [(b)] *At a minimum*, such a schedule shall provide signs for all railway-highway crossings.

Id. § 130(d) (emphasis added). In each State, the former requirement came to be known as the "hazard program," while the latter was known as the "minimum protection program."[1]

Memoranda prepared by the Department of Transportation in response to the Highway Safety Act of 1973 emphasize that the "minimum protection program" was a distinct initiative. The Federal Highway Administration ("FHWA") explained in 1974:

> Section 203(a) of the Highway Safety Act of 1973 requires *as a minimum* that each State's schedule of improvements shall provide signs at all crossings. As a first priority each State, in cooperation with the involved railroad and any other agency having jurisdiction, shall identify

[1] The "hazard" program is also sometimes referred to as the "priority" program. *See, e.g.*, JA 98 (testimony of engineer in charge of Tennessee crossing program).

> those grade crossings at which there are either no signs or nonstandard signs and institute an improvement program to provide signing and pavement marking in compliance with [the] Manual on Uniform Traffic Control Devices at all grade crossings.

FHMP 6-8-2-1 (Feb. 3, 1974) (emphasis added) (lodged with this Court); *see also* DOT/FHA Memoranda dated Oct. 8, 1975, June 17, 1977, and Oct. 8, 1978 (lodged with this Court).

2. States' "Hazard" and "Minimum Protection" Programs

States must prepare the schedule of crossing improvements required by Section 130(d) in conformance with 23 C.F.R. Part 924. Under the "hazard" program, States must request federal funds for advanced warning devices pursuant to "[a] process for collecting and maintaining a record of accident, traffic, and highway data," as well as "[a] process for analyzing available data," and "[a] process for establishing priorities for implementing highway safety improvement projects." 23 C.F.R. § 924.9(a)(1), (2), (4). Because the pool of federal funds available is limited, the States annually select what their data suggest are the most dangerous crossings. Those crossings are then studied individually by "diagnostic teams" that recommend particular warning devices. *See, e.g.*, Diagnostic Team Report & Minute Order, *reprinted from* Record in *Bock* v. *St. Louis Southwestern Ry. Co.*, *pet. for cert. pending*, No. 99-538 (lodged with this Court). Based on that recommendation, States submit requests to FHWA for funding to install advanced warning devices.

Regarding the minimum protection program, the regulations direct that "special emphasis shall be given to the

legislative requirement that all public crossings be provided with standard signing." *Id.* § 924.9(b). States have exercised some flexibility in their minimum protection programs. Testimony in this case, for example, suggested that Tennessee required not just crossbucks but also pavement markings and an additional advance warning sign. JA 102, 103.[2]

In identifying crossings in need of minimum protection, States were not required to gather or analyze the more extensive data required to create the schedule of priority improvements mandated by 23 C.F.R. Part 924, and those crossings were not subject to individualized review by a specialized "diagnostic team." *Compare* JA 105, 107, 125, 126 (explaining that diagnostic team was used for evaluation on Tennessee's hazard program). Instead, States simply submitted *en masse* requests to the FHWA for funding, frequently to install minimum protection on hundreds or even thousands of crossings. *See, e.g.*, Pet. for Cert. in No. 99-538, *Bock v. St. Louis Southwestern Ry. Co.*, at 6 (273 crossings); *Shots v. CSX Trans., Inc.*, 38 F.3d 304, 306, 308 (7th Cir. 1994) (2,638 crossings). These requests did not provide the federal government any substantial data to evaluate the conditions at individual crossings. *See infra* at 31-37.

Pursuant to 23 U.S.C. § 130(d), Tennessee adopted both a "hazard" and a "minimum protection" program. Petitioner

[2] It is not clear whether Petitioner is correct in contending that the Tennessee standard "goes far beyond the federal MUTCD minimum," Pet. Br. 19, given that the MUTCD in some circumstances requires the installation of more than merely crossbucks, *e.g.*, MUTCD at 8B-2, 8B-3, and 8B-4, and the trial testimony on the issue was not developed. All that matters for present purposes, however, is that the standard was a "minimum" and that States apparently exercised some degree of flexibility in setting the "minimum."

correctly recognizes that these are two separate programs. Pet. Br. 19; *accord* JA 105 (testimony of engineer in charge of Tennessee's crossing improvement program confirming that the State's hazard program is "not in any way connected with the minimum protection program other than being administered by [the Tennessee Department of Transportation]"). Under the "minimum protection" program, every crossing that "would take it" must be protected by a "minimum" of "two reflectorized crossbucks, two advanced warning signs and two advanced pavement markings." Pet. Br. 20 (citing JA 102-03). The warning devices at issue in this case were installed pursuant to the Tennessee "minimum protection program," *see infra* at 31-32, and accordingly it is that program that is at issue in this case.

B. 23 C.F.R. § 646.214

FHWA regulations govern the "[d]esign" of warning devices on railroad-highway projects. 23 C.F.R. § 646.214. Warning devices for which federal funding is sought must "comply with the latest edition of the Manual on Uniform Traffic Control Devices for Streets and Highways supplemented to the extent applicable by State standards." *Id.* § 646.214(b)(1); *see also* 23 C.F.R. § 655.601-.603 (incorporating MUTCD into federal regulations by reference). The MUTCD sets out uniform requirements for railroad-crossing signs, including size, shape, and color. *See Easterwood*, 507 U.S. at 669. In addition, the MUTCD requires that, at the least, each crossing be protected by a single crossbuck on either side of the track and, in certain circumstances, by additional devices such as pavement markings. *See.* MUTCD at 8B-4.

The regulation also defines the term "adequate warning devices" for purposes of "any project where Federal-aid funds

participate in the installation of the devices." When "(b)(3) conditions" (so-called because they are set forth in 23 C.F.R. § 646.214(b)(3)) exist – such as "[h]igh [s]peed train operation," a "combination of high speeds and moderately high volumes of highway and railroad traffic," "unusually restricted sight distance," and "continuing accident occurrences" – "adequate warning devices" must include flashing lights and lowering gates. 23 C.F.R. § 646.214(b)(3)(i). Alternative devices may be used only "[i]n individual cases where a *diagnostic team* justifies that gates are not appropriate" and the FHWA agrees. *Id.* § 646.214(b)(3)(ii) (emphasis added). When "the requirements of § 646.214(b)(3) are not applicable, the type of warning device to be installed * * * is subject to the approval of FHWA." *Id.* § 646.214(b)(4).

II. This Court's Decision in *CSX Transportation, Inc.* v. *Easterwood*

This Court addressed the preemptive effect of federal railroad regulation in *CSX Transportation, Inc.* v. *Easterwood*, 507 U.S. 658 (1993). The plaintiff's husband in *Easterwood* was killed in an accident at the Cook Street Crossing in Cartersville, Georgia. As required by 23 U.S.C. § 130(d) and 23 C.F.R. Part 924, the State of Georgia had included the crossing in its inventory and had determined to add automatic gates to the flashing lights already protecting the crossing. *Easterwood*, 507 U.S. at 671-72. As required by 23 C.F.R. § 646.214, the State apparently requested and received federal funds for that purpose. The State, however, ultimately decided to spend the funds to install lights and gates at nearby crossings instead and to install, at the Cook Street Crossing, only new circuitry for the existing lights. *Id.*

This Court unanimously held that the plaintiff's inadequate warning device claim was not preempted. The

Court began by emphasizing that, in areas "traditionally governed by state law" such as tort liability, federal courts are "reluctant to find pre-emption" so as to avoid "unintended encroachment on the authority of the States." *Easterwood*, 507 U.S. at 663-64. This "presumption against pre-emption" is heightened under the preemption provision of the FRSA, which provides:

> Laws, regulations, and orders related to railroad safety shall be nationally uniform to the extent practicable. A State may adopt or continue in force a law, regulation, or order related to railroad safety until the Secretary of Transportation prescribes a regulation or issues an order covering the subject matter of the State requirement. A State may adopt or continue in force an additional or more stringent law, regulation, or order related to railroad safety when the law, regulation, or order-(1) is necessary to eliminate or reduce an essentially local safety hazard; (2) is not incompatible with a law, regulation or order of the United States Government; and (3) does not unreasonably burden interstate commerce.

49 U.S.C. § 20106 (then codified at 45 U.S.C. § 434). This Court recognized that, by limiting preemption to federal law that "cover[s] the subject matter of" state law, Congress had used a "restrictive" term that "is in turn employed within a provision that displays considerable solicitude for state law in that its express preemption clause is both prefaced and succeeded by express savings clauses" 507 U.S. at 664, 665. Accordingly, the Court held that "preemption will lie only if the federal regulations *substantially subsume* the subject matter of the relevant state law." *Id.* at 664 (emphasis added).

The Court then rejected the railroad's argument that preemption arose from 23 U.S.C. § 130(d) and 23 C.F.R. Part 924. As explained *supra* at 5, under those provisions, States are entitled to receive federal funds to install warning devices only if they spend those funds in accordance with a priority list of hazard crossings. This requirement, the Court explained, merely "establish[es] the general terms of the bargain between the Federal and State Governments: The States may obtain federal funds if they take certain steps to ensure that the funds are efficiently spent." 507 U.S. at 667. Such a "federal effort to encourage the States to rationalize their decisionmaking has little to say about the subject matter of negligence law." *Id.* "In fact, the scheme of negligence liability could just as easily complement these regulations by encouraging railroads – the entities arguably most familiar with crossing conditions – to provide current and complete information to the state agency responsible for determining priorities for improvement projects in accordance with [23 C.F.R.] § 924.9." *Id.* at 668; *see also id.* ("the regulations provide no affirmative indication of their effect on negligence law").

The Court also rejected the claim that preemption arose from the federal requirement that crossings comply with the MUTCD. Noting the "implausibility" of that theory, the Court explained that this argument assumed "that established state negligence law has been implicitly displaced by means of an elliptical reference in a Government Manual otherwise devoted to describing for the benefit of state employees the proper size, color, and shape of traffic signs and signals." *Easterwood*, 507 U.S. at 669. In reality, the MUTCD "disavows any such pretensions" and "provides a description of, rather than a prescription for, the allocation of responsibility for grade crossing safety between the Federal and State Governments and between States and railroads." *Id.* (citing MUTCD, at 1A-4).

Finally, the Court addressed a third possible basis for preemption not asserted by the railroad or discussed by the lower courts. Under 23 C.F.R. § 646.214(b)(3) and (4), Georgia's request to use federal funds to upgrade a particular crossing's protection with active warning devices was subject to federal approval. "[A] project for the improvement of a grade crossing must either include an automatic gate or receive FHWA approval if federal funds 'participate in the installation of the [warning] devices.'" *Easterwood*, 507 U.S. at 670 (quoting 23 C.F.R. § 646.214(b)(3), (4)). In addition, the regulation sets the terms of railroads' involvement in the selection of warning devices by envisioning "railroad involvement in the selection of warning devices through their participation in diagnostic teams" and by providing that "railroad participation in the initial determination of 'the type of warning device to be installed' at particular crossings is subject to the Secretary's approval." *Id.* at 671. In such a circumstance, a plaintiff's claim would be preempted because "the Secretary has determined the devices to be installed and the means by which railroads are to participate in their selection." *Id.*

The Court concluded that preemption did not apply, however. Although Georgia had requested and received federal funds to install automatic gates at the Cook Street Crossing, it subsequently decided to install the gates at another crossing and to install only new circuitry – which did not, under applicable federal regulations, qualify as a "warning device" – at the Cook Street Crossing. *Id.* at 672.

III. Factual Background And District Court Proceedings

On October 3, 1993, in the darkness before dawn, Eddie Shanklin was driving his car well below the posted speed limit on a local road in Gibson County, Tennessee as he approached

the Oakwood Church Road railroad grade-crossing. JA 54, 70-71. As testimony later established, the crossing was unusually dangerous due to the presence of a variety of hazardous conditions. Despite these hazards, the railroad had never installed any warning devices beyond the existing "passive" signs.

As Mr. Shanklin approached, so did a train operated by Petitioner Norfolk Southern. Mr. Shanklin could not see the train coming, if at all, until it was so close upon him that he could not stop in time. As expert testimony later explained, the Oakwood Church Crossing was "ultrahazardous": even under the "best case situation" Mr. Shanklin "literally had three seconds of time from when the train came into view before the collision, and it takes 3.4 seconds for a motorist to be able to react and brake under those conditions." JA 75-76. Mr. Shanklin was killed when the train struck his car broadside, shoving it violently more than a thousand feet down the track until the train finally came to a stop.

Eddie Shanklin's widow, Respondent Dedra Shanklin, filed this suit alleging claims under Tennessee common law, including that Petitioner had failed to install adequate warning devices at the crossing. On Petitioner's motion for summary judgment, the district court held that this claim was not preempted by the FRSA. Six years prior to the accident, the State had installed warning signs at the Oakwood Church Crossing and 195 other crossings in a "mop up" effort under its "minimum protection program." JA 106, 133. It is undisputed that nothing beyond the minimum, such as automatic gates and lights, was present at the crossing. (As explained *infra* at 20-22, even one of the required minimum protections – advance pavement markings – had not been requested for, or installed at, the crossing.)

As noted *supra*, the minimum protection program does not involve any determination that passive warning devices are adequate to protect a crossing. The district court therefore held that Ms. Shanklin's inadequate warning claim is not preempted because "[a]lthough authorization for the expenditure was given by the FHWA, there is no evidence in the record that there were specific determinations that such passive warning devices were adequate for particular crossings." Cert. App. 34a.

Moreover, the district court explained that the crossing was characterized by a variety of hazardous conditions: "high speed train operations combined with limited sight distance, moderately high railroad and highway traffic, trucks carrying hazardous materials, and a prior collision at the crossing." Cert. App. 35a. Under 23 C.F.R. § 646.214(b)(3), the FHWA could not approve crossbucks as "adequate" in these circumstances without a recommendation to that effect by a diagnostic team that had studied the crossing. The district court accordingly explained that preemption could not apply: "As no diagnostic recommendation was made, there was no basis for FHWA approval or disapproval." Cert. App. 36a.

After the close of evidence at trial, the judge instructed the jury that, as a matter of Tennessee law:

> It's the duty of a railroad company to exercise reasonable care at public highway crossings to warn and to avoid injury to persons traveling upon the highway and crossing the railroad tracks. The amount of caution required by a railroad company in the exercise of reasonable care must be commensurate with the hazards and dangers that are apparent to it or that would be apparent to a reasonably prudent person

under circumstances similar to those shown by the evidence.

JA 53. The judge specifically instructed the jury regarding the implications of this duty on the railroad's responsibilities to provide warnings. Under Tennessee law, "Reasonable care and common prudence may encompass providing additional warning devices if the crossing is more than ordinarily hazardous." *Id.* at 55.

The jury returned a verdict for Ms. Shanklin. It found Norfolk Southern 70 per cent responsible for Eddie Shanklin's death, with the remaining 30 per cent charged to Shanklin, and found that Ms. Shanklin's damages were $615,000. The district court entered judgment for $430,000 based on the jury's allocation of responsibility. Cert. App. 2a.

IV. The Sixth Circuit's Decision

The Sixth Circuit affirmed, rejecting the contention that the FRSA preempts Ms. Shanklin's inadequate warning device claim. The court of appeals noted the split in the lower courts on whether federal approval of funding alone equates with a finding by the federal government that proposed warning devices were "adequate" – what the court termed the "fiction of constructive approval" – thus triggering preemption, Cert. App. 13a, or whether actual compliance with the regulation is also necessary, *i.e.*, "whether the Secretary or one of his agents actually determined that active warnings were needed pursuant to (b)(3) or that only passive warnings were needed pursuant to (b)(4)," *id.* The court of appeals took the latter approach and rejected Petitioner's argument that federal approval of funding alone is sufficient to oust state law.

The Sixth Circuit reasoned that a finding of preemption

based on approval of federal funding alone would relieve the railroad of responsibility for grade-crossing safety in circumstances in which the federal government has not "assumed responsibility by stepping in and making its own determination" of adequacy at a particular crossing. Cert. App. 16a. Such a result not only would "have the effect of removing the protections of state law from large number of crossings which have not yet been analyzed in accordance with subsections (b)(3) and (4)," but also would be inconsistent with the FRSA's preemption provision and the Act's principal goal of increasing railroad safety by reducing the number of deaths and injuries from accidents. *Id.* at 17a. Finally, the court of appeals concluded that 23 U.S.C. § 409 – which bars discovery or use of certain reports, surveys, schedules, and like documents in state or federal litigation – applies only to certain documents compiled by States and in no way affects the discovery or admissibility of an FHWA approval of the use (or non-use) of warning devices at a particular grade crossing. Cert. App. 20a-22a.

SUMMARY OF ARGUMENT

The record below establishes that federal officials did not determine that the warning devices installed at the Oakwood Church Road crossing were adequate to protect the traveling public. Accordingly, no federal requirement "cover[s] the subject matter" of Petitioner's state law duty to provide adequate warning devices within the meaning of 49 U.S.C. § 20106 and Respondent's state law claim based on breach of that duty is not preempted. The contrary assertion of Petitioner and its *amici* misunderstands the operation of the rail-crossing program involved in this case in two important respects.

First, no matter whether the federal standards applicable to this crossing have preemptive effect, those standards *weren't*

complied with: federal regulations require that the Oakwood Church Road crossing be protected by a specific type of warning device – pavement markings – that was not present. Second, neither Tennessee nor the federal government determined that the crossing would be adequately protected by the warning devices that were installed. This case involves a "minimum protection program" that used federal funds to install, without regard to adequacy, passive warning devices as a minimum safety measure for all crossings around the country. The "diagnostic team" required by federal regulations never considered whether the minimum protection devices were adequate to protect the public. Instead, the federal government merely authorized the release of funds in an urgent effort to bring crossings up to a minimum standard, never intending to supplant railroads' state-law obligations to install "adequate" warnings. It is only once the devices chosen through a diagnostic team study and paid for with federal funds are installed and functioning properly that the railroad's state law duty is preempted by federal law.

A finding of preemption on these facts would have devastating consequences for safety. Petitioner has acknowledged that it "consistently has had the highest number of crossing accidents and the worst rate of such incidents among major railroads." JA 124. Petitioner nonetheless would have this Court adopt a proposition that railroads are absolved of their settled common law duties even when a crossing is not protected in compliance with federal minimum safety standards. Petitioner's position, if adopted by this Court, would allow railroads to shirk their duty to protect the traveling public at tens of thousands of crossings at which no official, federal or state, has determined that the existing warning devices are adequate. In fact, because on Petitioner's view the federal government would have preempted all state law obligations at such crossings, States could not even *regulate* the crossings to

require further protection. Congress, which enacted the Federal Rail Safety Act to reduce dangers at grade-crossings, could never have intended such a result. This Court accordingly should affirm the Sixth Circuit's judgment.

ARGUMENT

I. Introduction – Basic Preemption Principles

Several important aspects of this Court's Supremacy Clause jurisprudence converge in this case. First, despite the supremacy of federal law and the importance of interpreting a statute's preemptive scope according to its text and structure, *Easterwood*, 507 U.S. at 664, a party asserting preemption of state law bears a heavy burden. Thus, "[c]onsideration under the Supremacy Clause starts with the basic assumption that Congress did not intend to displace state law." *Maryland* v. *Louisiana*, 451 U.S. 725, 746 (1981). Put differently, "[p]reemption of state law by federal * * * regulation is not favored 'in the absence of persuasive reasons—either that the nature of the regulated subject matter permits no other conclusion, or that Congress has unmistakably so ordained.'" *Chicago & North Western Transp. Co.* v. *Kalo Brick & Tile Co.*, 450 U.S. 311, 317 (1981) (quoting *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U.S. 132, 142 (1963)). This clear statement rule "provides assurance that the 'federal-state balance' will not be disturbed unintentionally by Congress or unnecessarily by the courts." *Jones* v. *Rath Packing Co.*, 430 U.S. 519, 525 (1977) (quoting *United States* v. *Bass*, 404 U.S. 336, 349 (1971)).

Second, the presumption against preemption is even stronger when, as in this case, "Congress [has] legislated * * * in a field which the States have traditionally occupied, [involving] the historic police powers of the States." *Rice* v.

Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947); *see also Medtronic, Inc.* v. *Lohr*, 518 U.S. 470, 484-86 (1996). This tenet was forcefully advanced by the *Easterwood* majority both in its narrow construction of the FRSA's preemption provision, 507 U.S. at 665, and in its rejection of the railroad's particular preemption arguments concerning the plaintiff's adequate warning claim, *id.* at 664, 668; *see also id.* at 679 (Thomas, J., joined by Souter, J., concurring in part and dissenting in part) (relying on presumption against preemption to reject preemption of excessive speed claim).[3]

Third, in this case (as in *Easterwood*), where the FRSA's allegedly preemptive scheme does not itself provide a damages remedy, the Court has ascribed preemptive intent to Congress only in the most compelling circumstances. *See English* v. *General Electric Co.*, 496 U.S. 72, 87-90 (1990); *Silkwood* v. *Kerr-McGee Corp.*, 464 U.S. 238, 251 (1984).

The foregoing anti-preemption precepts are not mere

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[3] Particularly in light of *Easterwood*'s express invocation of the "presumption against pre-emption," 507 U.S. at 668, the argument put forth by *amicus* Product Liability Advisory Counsel that the presumption does not apply in express preemption cases is, charitably put, misleading. *See* PLAC Br. 3-12. This Court has repeatedly made clear that the presumption applies just as forcefully where the question presented is the scope, rather than the existence, of preemption, and accordingly has invoked the presumption in almost every recent express preemption case. *See Medtronic, Inc.* v. *Lohr*, 518 U.S. 470, 484-85 (1996) (explicitly rejecting argument that presumption does not apply in express preemption cases); *see also, e.g., New York Conference of Blue Cross & Blue Shield Plans* v. *Travelers Ins. Co.*, 514 U.S. 645, 654-55 (1995); *Cipollone* v. *Liggett Group, Inc.*, 505 U.S. 504, 516, 518 (1992) (majority opinion); *id.* at 532-33 (separate opinion); *cf. U.S. Term Limits, Inc.* v. *Thornton*, 514 U.S. 779, 871 n.12 (1995) (Thomas, J., joined by Rehnquist, C.J., O'Connor, J., and Scalia, J., dissenting).

precedential idiosyncrasies, but are deeply embedded in the "federal-state balance" that was fundamental to the constitutional plan. *Hillsborough County, Fla.* v. *Automated Med. Labs., Inc.*, 471 U.S. 707, 717-19 (1984); *Rath Packing Co.*, 430 U.S. at 525. This Court's Supremacy Clause jurisprudence thus is "an acknowledgment that the States retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere." *Gregory* v. *Ashcroft*, 501 U.S. 452, 461 (1991). "[R]equiring that Congress speak clearly will help ensure that its decision to preempt is the product of a deliberate policy choice. Our system of federalism demands that interference with states' policy decisions to give their citizens tort remedies should be the product of judgment and careful balancing, rather than an unintended result of congressional inattention or imprecision." Betsy J. Grey, *Make Congress Speak Clearly: Federal Preemption of State Tort Remedies*, 77 B.U.L. Rev. 559, 627 (1997).

In this regard, the presumption against preemption works in tandem with an analogous subject of this Court's federalism jurisprudence, the Eleventh Amendment, which provides that States are immune from suit in federal court. *See Edelman* v. *Jordan*, 415 U.S. 651 (1974). Congress may override that judgment, pursuant to its legislative powers under the Fourteenth Amendment, *see Fitzpatrick* v. *Bitzer*, 427 U.S. 445 (1976), but the Court has insisted that Congress do so in unmistakably clear terms and has enforced that edict very strictly, *see, e.g., Atascadero State Hosp.* v. *Scanlon*, 473 U.S. 234, 238-46 (1985). Because the same principles of federalism that support the Court's Eleventh Amendment jurisprudence also undergird Supremacy Clause jurisprudence, the plain-statement rule should be just as stringently enforced in the preemption context as it is in the Eleventh Amendment context. *See Gregory*, 501 U.S. at 460-67; *Wisconsin Public Intervenor*

v. *Mortier*, 501 U.S. 597, 607-09 (1991); *accord Cipollone*, 505 U.S. at 533 n.1 (Blackmun, J., joined by Kennedy and Souter, JJ., concurring in part, concurring in the judgment in part, and dissenting in part) (suggesting identity of Eleventh Amendment plain-statement rule and "clear and manifest" preemption standard).

II. Petitioner Cannot Prevail Under Any Theory Of Preemption Because Federally Required Warning Devices Were Not Installed At The Oakwood Church Crossing.

Even under Petitioner's own theory of preemption, it cannot prevail on the facts of this case. As Petitioner acknowledges, the FHWA has provided that "States '*must employ* devices that conform to standards set out in [the MUTCD]'" Pet. Br. 14-15 (quoting *Easterwood*, 507 U.S. at 667) (emphasis in Pet. Br.). The speed limit on the Oakwood Church Road is 55 miles per hour. JA 54. The MUTCD requires that all crossings on roads with speed limits of 55 and above be protected by pavement markings. MUTCD at 8 B-4. Pavement markings, however, *were not present* at the Oakwood Church Crossing. Instead, as Petitioner explains, the State "installed reflectorized crossbucks and three advanced warning signs," not pavement markings. Pet. Br. 20 (citing JA 103-04, 128). Tennessee's request to the federal government for funding for warning devices at the Oakwood Church Crossing omits any request for funds to install pavement markings. JA 134 (line 8). This omission is particularly noteworthy because, according to trial testimony that Petitioner embraces, Tennessee determined that all crossings in the state must be protected by "two reflectorized crossbucks, two advanced warning signs *and two advanced pavement markings* at each crossing, if the road would take it." JA 102-03 (emphasis added); Pet. Br. 20; *see also* JA 93 (testimony confirming that MUTCD "has the force

of regulation in the State of Tennessee"); *id.* at 132 (report stating that project encompassed installation of "signs & *pavement markings* at 196 off-system railroad crossings" (emphasis added)). The Oakwood Church Road is paved, not a gravel road on which pavement markings could not be painted. JA 135.

Petitioner claims that the failure to install pavement markings at the Oakwood Church Crossing "shows that, despite the numerous crossings in the federally funded project, due attention was given by the governmental authorities to the upgrade needs of each individual crossing." Pet. Br. 20. The MUTCD, however, does not permit a deviation from the installation of pavement markings on such a road. Nor does Tennessee. To the contrary, the engineer in charge of the State's crossing program testified that an across-the-board standard applied, and also that the individuals who installed the safety devices had no experience in making railroad safety judgments. JA 105, 106. They accordingly could not give any attention, much less "due attention," to the needs of the Oakwood Church Crossing.

Petitioner fails to explain on what possible theory it can prevail in this case, given that the warning devices at the crossing did not comply with the minimum safety standards of the federal government. Indeed its substantive arguments show that it cannot prevail. Petitioner's position is that federal standards determine what warning devices are adequate for each crossing and accordingly preempt state law duties. Pet. Br. 25-26. But those standards weren't complied with here. Petitioner also argues that FHWA has designated the State of Tennessee as its agent for purposes of determining what warning devices are adequate at rail crossings in the State. *Id.* at 33-42. Although that is not correct, *see infra* at 42-43, even if it were, Petitioner could not prevail because this crossing was

not protected by the warning devices mandated by state policy.

Finding preemption in these extraordinary circumstances would have devastating consequences for rail safety because the mere *existence* of federal or state safety standards would be enough to trump railroads' obligations to maintain safe crossings, even when those minimum standards are not *implemented*. No one would be responsible for ensuring that the crossing was safe. *Easterwood* rejected such a result in refusing to find preemption, notwithstanding that Georgia had requested funds in compliance with federal regulations and FHWA had issued the funds, because the State ultimately failed to install the devices authorized by the federal government. 507 U.S. at 671-72.

III. The Mere "Applicability" Of Federal Regulations Governing Warning Devices Does Not Trigger Preemption.

A. Preemption Applies Under *Easterwood* Only If The Federal Government Determined That The Warning Devices In Question Were Adequate.

Petitioner's argument that, under *Easterwood*, Respondent's claim is preempted by the mere "applicability" of 23 C.F.R. § 646.214(b) is incorrect because *Easterwood*'s analysis of 23 C.F.R. § 646.214(b) is inapposite to minimum protection programs. *Easterwood* never stated or suggested that federal funding was both a necessary and a sufficient condition for finding preemption in any, let alone all, circumstances. *Easterwood* involved Georgia's decision, pursuant to the *hazard* rating required by 23 C.F.R. Part 924, to upgrade the warning devices at a crossing to include flashing lights and automatic gates. The minimum protection program

was not involved in *Easterwood* and, in fact, none of the parties or *amici* in *Easterwood* advised the Court that the minimum protection program even existed.

Nor does *Easterwood*'s rationale support Petitioner's view. The federal regulation invoked by Petitioner, 23 C.F.R. § 646.214(b)(3) & (4), was "applicable" to the State's request for funds in *Easterwood* in the sense that the regulation governed the State's request for funds, as well as the federal government's approval of those funds. It was only the subsequent decision by the State to spend the funds on other devices that rendered the regulation "inapplicable." This Court found the plaintiff's claim was not preempted because devices approved by the federal government as adequate to protect the crossing had not been installed. That conclusion was sound because, as Respondent explains, *infra* at 28-29, 35; under the hazard program the federal government *does* in fact use a diagnostic team to determine whether warning devices are adequate before providing funding. *Easterwood* thus explains that preemption arises when the federal government "displace[s] state and private decision-making authority." 507 U.S. at 670. By contrast, if the federal government merely authorizes the release of federal funds, without any assessment of the adequacy of the devices to be installed, "state and private decision-making authority" obviously remain unaffected.

Nor, as *Easterwood* requires in order to find preemption, does the minimum protection program "set the terms under which railroads are to participate in the improvement of [their] crossings." *Id.*. Railroads remain free to install additional warning devices, as the testimony in this case demonstrates. The engineer charged with administering the State's program testified that he would have approved a request by Petitioner to upgrade the Oakwood Church Crossing with its own funds "in a heartbeat." JA 109. Another expert

witness confirmed in response to the same question that "[t]he state will accept candidates that are not on their priority list if they're paid for with other funds than what the state has to pay." *Id.* at 97.[4]

In the terms of the FRSA's preemption provision as interpreted in *Easterwood*, federal regulations "substantially subsume" the subject of Petitioner's state law duty to provide *adequate* warnings at each crossing only if the federal government determined that the crossbucks installed under the minimum protection program were, in fact, *adequate*. If, on the other hand, the federal government provided only "minimum" protection, Petitioner is not excused from its state law duty, which goes well beyond such minimal measures. It "may encompass providing additional warning devices if the crossing is more than ordinarily hazardous." JA 55 (jury instruction). In particular, it is not enough for the railroad to adopt a minimum standard that does not vary with the circumstances. "The amount of caution required by a railroad company in the exercise of reasonable care must be commensurate with the hazards and dangers that are apparent to it or that would be apparent to a reasonably prudent person under circumstances similar to those shown by the evidence." *Id.* at 53. As Chief Judge Posner aptly explained in *Shots* v. *CSX Transportation*, 38 F.3d 304, 308 (7th Cir. 1994), "[m]inimum is not a synonym

[4] Although Petitioner would have had to obtain State approval to upgrade the crossing, that is a matter of state law not federal preemption. In any event, under Tennessee law, "[i]rrespective of a state or local government's authority to place safety devices at a grade crossing, this allocation of authority does not relieve the railroads of their duty to take all reasonable precautions to maintain grade crossing safety." JA 56 (jury instructions).

for optimum, or even adequate." [5]

Petitioner's argument that the mere "applicability" of the federal regulations automatically preempts state law, *see* Pet. Br. 25-30, therefore begs the only relevant question: Did the FHWA in practice make a determination of adequacy in issuing federal funds under the minimum protection program, as it did under the hazard program? If FHWA did not believe it was obligated – and it is not so obligated – under the minimum protection program to determine whether crossbucks were adequate to protect particular crossings, "the Secretary of Transportation [has not] prescribe[d] a regulation or issue[d] an order covering the subject matter of the State requirement." 49 U.S.C. § 20106.

B. Petitioner's View Would Seriously Undermine Safety, Contrary To Congress' Intent.

To hold that preemption applies even if the FHWA did not make a determination of adequacy would, as the Sixth Circuit correctly concluded, absolve railroads of their common law duties contrary to the FRSA's express purpose "to promote safety in every area of railroad operations and reduce railroad-related accidents and incidents," 49 U.S.C. § 20101. Since 1973, the FHWA has issued funds for tens of thousands of crossings under the minimum protection program. If the FHWA did not *actually* conclude that the installation of those crossbucks was adequate to protect the crossings, then it is only common law duties that ensure that railroads will act to protect

[5] Because this common law duty of railroads is an important means of ensuring rail safety, Petitioner is wrong to assert that reductions in rail-crossing fatalities are attributable solely to federal funding for crossing upgrades. Pet. Br. 19.

the traveling public at those crossings. Otherwise, "no one is responsible for the safety of the motorists who use the crossing." Cert. App. 16a.

A finding of preemption would be particularly inappropriate in light of the fact that in response to *Easterwood*, and at the behest of the railroad industry, the Department of Transportation proposed regulations intended to preempt all such claims. *See* Selection and Installation of Grade Crossing Warning Systems; Notice of Proposed Rulemaking, 60 Fed. Reg. 11649 (Mar. 2, 1995). In promulgating the regulation, the Secretary recognized that state law "impose[s] a tort law duty upon railroads to maintain safe crossings," including in some cases "a duty to select and install warning systems at hazardous crossings." *Id.* at 11651. The Secretary proposed, however, to impose on railroads an affirmative federal duty to report conditions at all crossings, *see id.* at 11652 (discussing proposed 49 C.F.R. § 234.301), a requirement that would "'substantially subsume' the subject matter of railroads' selection and installation of highway rail grade crossing warning systems and as such [would] preempt state laws covering the same subject matter, regardless of whether Federal funding of improvements is involved at a particular crossing," *id.* at 11651.

After public comment, however, the Secretary *withdrew the proposed regulation*. *See* Selection and Installation of Grade Crossing Warning Systems; Termination of Rulemaking, 62 Fed. Reg. 42733 (Aug. 8, 1997). Although also critical of comments made in opposition to the proposed regulation, the Secretary recognized that "[a]bsent from virtually all rule comments and testimony * * * were data supporting the conclusions drawn from the rule." *Id.* at 42734. Among other things, the Secretary recognized that the assertion that railroads would retain "powerful incentives to continue" funding

crossing improvements in a regime in which state tort law was preempted had been supported by "only conclusory comments rather than data on past, present or projected levels of participation." *Id.* The Secretary accordingly withdrew the proposal "in light of the lack of supporting hard data in the record," concluding that "*railroad safety will not be best served*" by preempting state law claims. *Id.* at 42733 (emphasis added).

Petitioner nonetheless maintains in this Court that railroads may not be sued for installing inadequate warning devices at any of the tens of thousands of crossings at which federal funds paid for the installation of crossbucks. It would be extraordinary for this Court to find such claims preempted when the Secretary has stated that they remain available under state law and has concluded, as a policy matter, that they should not be preempted. *See Hillsborough County*, 471 U.S. at 714-15 (citing *Chevron U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-45 (1984)) (federal agency's view, expressed in a single sentence in regulatory preamble, that state law was not preempted by federal regulations held "dispositive"); *see also Medtronic*, 518 U.S. at 496-97, 98-99 (according substantial weight to agency's views on preemptive scope of governing statute); *id.* at 505-06 (Breyer, J., concurring) (same). Moreover, even the Secretary's proposal would have imposed on the railroads a federal duty to report crossing conditions, while Petitioner's argument in this Court would not impose even that obligation.

Four further points illustrate that finding preemption based merely on the approval of federal funding would have terrible implications for safety, which Congress did not intend. First, Petitioner's view would interfere with the hazard program established by Congress under 23 U.S.C. § 130(d). According to Petitioner, the federal government has determined that every

crossing protected under the "minimum protection program" has adequate protection. On that logic, given that "adequate" protection already exists, none of the tens of thousands of crossings funded under the minimum protection program ever would be upgraded with further protection through the installation of advanced warning devices. But Congress contemplated to the contrary in establishing the hazard program under 23 U.S.C. § 130(d) and in later years continuing to appropriate funds for crossing improvements. *See, e.g.*, U.S. Department of Transportation, *FHA Notice* (Mar. 20, 1973) ("the purpose of this notice is to encourage increased use of automatic gates at railway-highway grade crossings") (lodged with this Court).

Second, Petitioner's view would preclude State regulatory agencies from determining that crossings improved under the "minimum protection program" required still further protection. Petitioner therefore has it precisely backwards in suggesting that state agencies will ensure that adequate protection is provided. Pet. Br. 40. Preemption applies not only to state common law claims but to any state "law, regulation, or order related to railroad safety." 49 U.S.C. § 20106. As Chief Judge Posner has explained:

> Indeed, it would have been an extraordinary act of irresponsibility for the Secretary of Transportation, by approving the agreement, to preclude tort liability for the railroad's failing to have active warning devices at any of the thousands of crossings covered by the agreement, or *otherwise to prevent the state from requiring adequate safety devices at the busiest or most dangerous of these crossings*, when no one in the federal government had made a determination that the improvements to

> be made would bring all the crossings up to a level of safety adequate to satisfy federal standards.

Shots, 38 F.3d at 309 (emphasis added). To strip States of the ability to protect their citizens through state law in this manner, without any corresponding determination of safety by the federal government, would run contrary to the settled presumption against preemption and this Court's repeated recognition of States' powers as sovereigns. *Accord* DOT Analysis at A31 (confirming that States can "legally and constitutionally require the railroads to bear the entire responsibility" for the costs of crossing improvements) (citing *Atchison, Topeka & Santa Fe Ry. Co v. Public Utility Comm'n..*, 346 U.S. 346, 352 (1953). Petitioner, in fact, trumpets its view that Tennessee has gone beyond the federal minimum standard, an approach which (whether or not true) would be impossible under Petitioner's view of preemption.

Third, the installation of warning devices can be a slow process. After a State applies for and obtains federal funding to upgrade warning devices at a crossing, it may take years for the railroad to respond to the state's request for a proposed budget and to complete the construction. If preemption arises from the mere "applicability" of federal regulations, as opposed to actual installation of warning devices protecting the crossing, then railroads are relieved of their common law duties to protect the public before there is any corresponding safety benefit. *Easterwood* requires more, holding that preemption does not apply, and that railroads must comply with common law duties, until devices required by federal regulations and approved by the federal government as adequate under the circumstances are actually installed and operating. The Sixth Circuit correctly followed this precept when it rejected Petitioner's argument that preemption followed from the mere

approval of federal funding.

Fourth, the conditions at many railroad crossings change over time. For example, a crossing initially characterized by low traffic volumes and sufficient "sight distances" (*i.e.*, an ability for a motorist to see a train far down the track) may later become heavily traveled and may become overgrown with vegetation. U.S. Department of Transportation, *FHA Instruction Manual 21-1-68* (Jan. 5, 1968) (lodged with this Court). If the mere federal funding of crossbucks is deemed to preempt state law, then the railroad will assert that it has no common law duties at the crossing and therefore no obligation to install more advanced warnings notwithstanding changed conditions. That was precisely the position taken by the railroad, and accepted by the Eighth Circuit, in *Bock* v. *St. Louis Southwestern Ry. Co.*, 181 F.3d 920, 923-24 (1999), *pet. for cert. pending*, No. 99-538. Under *Easterwood*, by contrast, preemption arises only when the FHWA determines that lights and gates – the most advanced warning devices that the federal government funds – or their equivalent are installed, providing protection for the crossing even under changed conditions.

IV. The Federal Government Did Not Make A Determination Of Adequacy Here Under The Minimum Protection Program.

The warning devices in this case were installed under Tennessee's minimum protection program. JA 103, 104, 133 (project documents confirming the purpose of the project was "Installations of Minimum Protection"). The state official responsible for crossing safety specifically confirmed that the "minimum protection" and hazard programs are two separate programs. JA 98. Petitioner acknowledges this point, Pet. Br. 20, yet rests its arguments entirely on FHWA's approval of adequate warning devices under the hazard program,

notwithstanding the unequivocal proof at trial that the hazard and minimum protection programs are "not in any way connected," JA 105.[6]

The uncontradicted record below, the unambiguous position of FHWA, and the clear mandates of federal law all establish that federal funding for the minimum protection program, unlike the hazard program, was *not* tantamount to a determination that those crossings were adequately protected. Instead, the minimum protection program was aptly named: It was created to ensure that every crossing in the country, without regard to individual conditions, was protected at a minimum by a standard crossbuck on each side of the tracks.

In determining whether a crossing should be included in the program, the only relevant consideration was whether the crossing already had "minimum" protection, *i.e.*, in Tennessee, whether it already had "two reflectorized crossbucks, two advanced warning signs and two advanced pavement markings at each crossing, if the road would take it." JA 102-03; *see also* JA 102 (testimony of state official that "we were to put, at a minimum protection, a sign protection [sic] at crossings"). The engineer in charge of the Tennessee program confirmed at trial that "the people that actually went out to do the signing were design engineers *with no railroad experience*." *Id.* at 106 (emphasis added). Instead, the State was merely "[m]aking sure that everything has *some kind of protection*." *Id.* (emphasis added).

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[6] The Association of American Railroads thus is flatly wrong when it asserts, without any citation to the record, that "[i]n this case, the crossing was improved with passive warning devices using federal funds as have thousands of crossings characterized by low traffic volumes in accordance with the ranking and priority assigned by the state under the Grade Crossing Program." AAR Br. 6.

The same official also testified that "there was no engineering judgment in the minimum protection program." Depo. of Terry Cantrell, Vol. II, at 8 (Exh. E to Pl. Memo. in Opp. to Def. Mo. for Summ. J.) (Docket Entry No. 59). He continued:

> It was a, you know, program whereby we wanted every crossing, regardless, to have a certain minimum, and possibly some of these crossings were overprotected *and some of them were underprotected.* But there was no engineering judgment either by ourselves or by the design team.

Id. at 9 (emphasis added).

The facts surrounding the installation of minimum protection at the Oakwood Church Crossing fully support that conclusion. The same official confirmed that there was no "actual engineering judgment done by anyone under [his] control in the state of Tennessee that looked at this crossing and said minimum protection will be enough." JA 105. Instead, that Tennessee Department of Transportation merely

> went out there and removed two crossbucks; apparently, because they were substandard or perhaps the deer hunters had used them for targets. I'm not sure why, but–and replaced them with two reflectorized crossbucks. We [also] installed what they call a W10-1 sign on one approach and then two W10-2 signs on State Route 43.

Id. at 103.

In turn, the federal government did not – and indeed *could not* – make a determination that the minimum protection devices provided adequate safety at the Oakwood Church Crossing. The federal government receives information on local crossings from States, and, as noted, Tennessee did not in the course of its minimum protection program send anyone (much less the required diagnostic team) to determine if the protection at particular crossings was adequate, including with respect to the Oakwood Church Crossing. The official in charge of the state crossing program thus testified that the federal government "merely * * * funded[,] funneled it and signed off on it," Dep. of Terry Cantrell, Vol. II, at 9 (Exh. E to Pl. Memo. in Opp. to Def. Mo. for Summ. J.) (Docket Entry No. 59), rather than "making [a] design judgment," and confirmed that the federal government had never "come back and [said] what [the State has done] is anything more than minimum protection that is satisfactory to protect the crossing." *Id.* at 21.

The federal employee charged with reviewing the project, in turn, explicitly confirmed that the federal government "w[as] *not* making a federal decision as to the adequacy or sufficiency of the protection being installed at the crossings." JA 126 (emphasis added). The federal government's "function was not to act as a diagnostic team, * * * and no engineering decision was being made" by the federal government. *Id.* at 125. Instead, the federal government's goal was merely to see if construction "work had been done properly." *Id.* at 126. In fact, it appears that the Oakwood Church Crossing was never even inspected. *Id.* at 115, 126.

Tennessee provided the federal government with almost no information about the Oakwood Church Crossing, precisely for the reason that the State was seeking to install only minimum protection. The request for approval submitted by

Tennessee, which included a single line item about each of the 196 crossings in the project, states only that the Oakwood Church Crossing has one main line track and no other tracks, and lists various "approach distances" to the crossing. JA 134. Missing from the State's information is any discussion of the *conditions* at the crossing, such as the speed of train traffic, the volume of traffic, whether hazardous materials traveled on the road or rail, the obstructions to view caused by surrounding vegetation and buildings, or the frequency with which trains travel on the track – precisely the conditions that led the jury to conclude that Petitioner had violated its state-law duty of care.

These circumstances are readily contrasted with the evaluation of conditions under States' hazard programs, such as occurred in *Easterwood*. When a State seeks federal funding to upgrade a crossing under the hazard program, it dispatches an expert "diagnostic" team to study conditions at the crossing and to determine what devices should be installed. When certain conditions set forth in 23 C.F.R. § 646.214(b)(3)(i) are present, flashing lights and lowering gates presumptively must be installed. These conditions include "[h]igh [s]peed train operation," a "combination of high speeds and moderately high volumes of highway and railroad traffic," "unusually restricted sight distance," and "continuing accident occurrences." *Id.* If such conditions exist, and "a diagnostic team justifies that gates are not appropriate, FHWA may find that the[se] requirements are not applicable." *Id.*

Tennessee specifically has surveyed the crossings in the State under its hazard program, and has compiled the list contemplated by 23 C.F.R. Part 924. *See* Pet. Br. 19 (citing JA 99-100). The survey considers, among other things, the "number of trains a day," the "amount of the traffic," the "percent of [traffic that is] trucks," "what type [of road] it is," the number of "lanes of traffic," "accident history," and

whether the road is "paved or not paved." JA 100. For those crossings that the State determines are the highest priority for the installation of advanced warning devices with federal funds, a diagnostic team studies the crossing and determines which warning devices are appropriate. Pet. Br. 19 (citing JA 100-01).

But none of the data required under the hazard program is collected or analyzed under the *minimum protection program*. The engineer in charge of the Tennessee program confirmed that under the minimum protection program the State *did not* "take into account any of the factors that [it is] required to look at in the priority [hazard] program, such as number of trains a day, speed of trains, maximum timetable speed, truck traffic, hazardous materials, year of last upgrading, the accident history, [or] obstructions to view." Depo. of Terry Cantrell, Vol. II, at 8 (Exh. E to Pl. Memo. in Opp. to Def. Mo. for Summ. J.) (Docket Entry No. 59). Petitioner thus errs in invoking Section 130(d) as envisioning "a system in which the selection of warning devices at crossings would be based on expert technical determinations and extensive data analyses," Pet. Br. 13, 17-18, when that system of indices and diagnostic teams applies to the separate *hazard* program, not the minimum protection program. The five States supporting Petitioner accordingly make an important concession when they acknowledge that "[i]n any given year, a significant number of railroad crossings are not selected [for improvement under the hazard program] and *continue to be maintained by the railroads*." Five States Br. 10 n.6 (emphasis added). The Oakwood Church Crossing was precisely such a crossing because it was never improved under the hazard program. The federal government therefore never supplanted railroad decisionmaking regarding the crossing and Petitioner remained obligated under the common law to provide adequate warning

devices.[7]

In fact, if the federal and state governments had known about the conditions at the Oakwood Church Crossing, they certainly would not have concluded that passive warning devices were adequate. Trial testimony established that a number of hazardous conditions existed at the Oakwood Church Crossing requiring the installation of advance warning devices, including "high speed train operations combined with limited sight distances, moderately high railroad and highway traffic, trucks carrying hazardous materials, and a prior collision at the crossing." Cert. App. 35a. The district court specifically found that the conditions set forth in 23 C.F.R. § 646.214(b)(3) existed at the crossing, requiring the use of lights and gates absent a contrary recommendation by a diagnostic team. Cert. App. 36a. But such active warning devices were not installed despite the absence of any study or recommendation by a diagnostic team.[8]

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[7] *Amicus* AAR buttresses this point when it explains that "[a] *key aspect* of the [hazard] Program is the requirement that in prioritizing crossing improvement projects, states must consider * * * accident *potential*," AAR Br. 20 (first emphasis added), a determination that unquestionably was not made with respect to the minimum protection devices at the Oakwood Church Crossing.

[8] Because no State or federal official considered whether the warning devices are adequate, *amicus* AAR is simply wrong when it asserts that "[w]hether or not such conditions exist at a crossing, warranting active warning devices, is a determination made by the traffic engineering officials at the time of the federally funded project, which may not be second guessed by a jury." AAR Br. 20. The engineer in charge of Tennessee's crossing program specifically testified, regarding the application of the minimum protection program to the Oakwood Church Crossing, that "[t]he State has *no responsibility*. The program as such is a supplement to the

(continued...)

V. The FHWA Was Not Required To Make A Determination Of Adequacy Under The Minimum Protection Program.

Respondent has explained above that the only relevant question for this Court to resolve is whether the federal government, in implementing the minimum protection program, made a determination that the warning devices in this case were adequate under the circumstances. Only if such a determination were made could the federal program be said to have "substantially subsume[d]" Petitioner's state law duty of care to provide adequate warnings. Because no diagnostic team studies crossings under the minimum protection program, no such determination of adequacy is made. Petitioner's argument that FHWA *should have* made a determination of adequacy under various provisions of federal law, Pet. Br. 26-28, accordingly is not relevant. In any event, as we now show, Petitioner's construction of various federal regulations to impose such a duty on FHWA is erroneous.

23 C.F.R. § 646.214. Petitioner misunderstands the relationship between the minimum protection mandate of 23 U.S.C. § 130(d) and FHWA's regulations at 23 C.F.R. § 646.214(b). Congress mandated that in order to receive federal funds States must "[a]t a minimum * * * provide signs for all railway-highway crossings." 23 U.S.C. § 130(d). FHWA implemented that mandate in 23 C.F.R. § 646.214(b)(1), which provides that "[a]ll traffic control devices proposed shall comply with the [MUTCD] supplemented to the extent

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[8](...continued)
individual municipalities, counties and cities, *and railroads*." Depo. of Terry Cantrell, Vol. II, at 17 (Exh. E to Pl. Memo. in Opp. to Def. Mo. for Summ. J.) (Docket Entry No. 59) (emphasis added).

applicable by State standards." In fact, Petitioner's view of preemption conflicts with this Court's holding in *Easterwood* that subsection (b)(1) does not preempt state law. 507 U.S. at 670. Petitioner maintains that federal *funding* for crossbucks preempts state law when this Court already has concluded that the more stringent *mandate* that such crossbucks be installed has no such preemptive effect.

A separate provision invoked by Petitioner, 23 C.F.R. § 646.214(b)(3), is not applicable to the minimum protection program. That provision simply *defines* "adequate warning devices." *Compare, e.g.*, 23 C.F.R. § 646.214(b)(2) (mandating use of "adequate warning devices" on federal highway construction). Subsection (b)(3) is not applicable to the "minimum protection program" because, as described above, FHWA does not make a determination of adequacy under that program, and specifically does not evaluate crossings "[i]n individual cases" and with "diagnostic teams" as subsection (b)(3) contemplates. Nor could it: Congress required the installation of minimum protection devices in all States receiving federal funds, depriving FHWA of any discretion to limit the scope of the program. Subsection (b)(3) applied in *Easterwood*, by contrast, because that case involved the analysis of a particular crossing under the hazard program, which requires a determination of adequacy by FHWA.

Nor is subsection (b)(4) applicable. On its face, that provision applies only to individualized determinations by "a State regulatory agency, State highway agency, and/or the railroad" regarding the warning devices to be installed at a crossing, not Congress' implementation of the broad "minimum protection" mandate. Moreover, subsection (b)(4) is triggered only when a diagnostic team's recommendation "justifies" to FHWA that lights and gates are not required at a particular crossing, which as noted is a process that does not occur under

the minimum protection program. *See* 23 C.F.R. § 646.214(b)(3)(ii) ("In individual cases where a diagnostic team justifies that gates are not appropriate, FHWA may find that the above requirements *are not applicable*" (emphasis added)); *id.* § 646.214(b)(4) ("For crossings where the requirements of § 646.214(b)(3) *are not applicable*, the type of warning device to be installed * * * is subject to the approval of FHWA." (emphasis added)). But even if subsection (b)(4) applied, it would give FHWA authority only over "the *type* of warning device to be installed" (emphasis added), rather than mandating the installation of "adequate warning devices."

23 U.S.C. § 109(e). FHWA is not required to determine the "adequacy" of warning devices under the minimum protection program by 23 U.S.C. § 109(e). Petitioner had relied heavily on Section 109(e) in seeking certiorari, Pet. for Cert. 12, 19, but now apparently recognizes that argument was erroneous. Section 109(e) expressly applies only to "Federal-aid highway[s]," not local roads such as in this case. *See also* 23 U.S.C.A. § 101(a) (1990) (defining "Federal-aid highways" at the time the devices were installed in this case to mean "highways located on one of the Federal-aid systems"). In fact, the Petition for Certiorari and the merits briefs of Petitioner's *amici* invoke Section 109(e) only by conspicuously omitting the language limiting the statute to "Federal-aid highways." Pet. Cert. 19; Five States Br. 14; PLAC Br. 17; AAR Br. 23.[9]

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[9] Several other facts confirm that Section 109(e) is inapposite. Congress enacted a statute that subjected non-federal-highway construction to Section 109 (although not necessarily Section 109(e) specifically) in 1976, but repealed that statute in 1978. Pet. Br. 10-11 n.7. In addition, a regulation on which Petitioner principally relies, 23 C.F.R. § 646.214(b)(3)(i), expressly distinguishes between federal-aid highways and other federally funded projects.

(continued...)

Petitioner's extensive discussion of Section 109(e) as proof that "Congress has always acted to ensure that warning devices are adequate when federal highway funds are involved in a grade-crossing project," Pet. Br. at 6-7, therefore proves precisely the opposite point. In fact, Congress' mandate that nothing less than "adequate" warning devices may be installed on federal highway projects, 23 U.S.C. § 109(e), readily contrasts with the application of the "minimum protection program" to a non-federal road such as that in this case. Rather than requiring in 29 U.S.C. § 130(d) that crossbucks would be installed only where adequate, Congress mandated that they be installed "[a]t a minimum" without regard to the circumstances. The more stringent mandate of Section 109(e) makes perfect sense, as it is not surprising that Congress would adopt a *per se* rule that all federal, as opposed to state, highway construction provide adequate warning to the traveling public.

23 C.F.R. Part 924. Finally, Petitioner's suggestion that preemption arises from States' efforts to prioritize their crossing improvements as required by 23 C.F.R. Part 924 was flatly rejected in *Easterwood*. Part 924, this Court explained, is simply a "federal effort to encourage the States to rationalize their decisionmaking" with respect to spending federal funds. 507 U.S. at 667. The same conclusion applies here because the federal government restricted only Tennessee's use of federal

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[9](...continued)

Other regulations cited by Petitioner's *amici* as supposedly requiring compliance with Section 109(e), *e.g.*, 23 C.F.R. §§ 646.201-.205, do not reference that statute at all. In addition, 23 C.F.R. § 630.106(a) and its predecessor require compliance with only "applicable" federal law. *See* Pet. Br. 16 n.10 (acknowledging that predecessor to § 630.106(a) had same meaning as current version). Because Section 109(e) expressly is limited to "federal-aid highways," it is not "applicable" to local roads such as the one on which Eddie Shanklin was killed in this case.

funds, not any attempt by Petitioner or the State to improve the crossing with their own money.

Nor is Petitioner correct to suggest that preemption arises because the State *may* have determined through the hazard program that the Oakwood Church Crossing did not require further protection. Petitioner presented no evidence to support such an assertion and accepting Petitioner's claim would impose preemption at every public crossing in America, all of which are included on States' hazard indices. Moreover, Petitioner's argument is simply a variation on the claim rejected in *Easterwood*: The most that can be said is that Tennessee *may* have decided not to spend federal funds on the crossing, which does not give rise to preemption. In particular, any such decision by Tennessee could just as easily have been based on the fact that federal funding was not available to upgrade the crossing, not on a judgment that the crossing was safe.

VI. Any Determination Of Adequacy Must Be Made By The Federal, Not State, Government.

Petitioner argues that requiring the federal government, rather than States, to evaluate the adequacy of crossings would be too burdensome. For the two reasons described above, Respondent's point is irrelevant to this case as a factual matter: (i) the federal government does not require a determination, whether by FHWA or any other entity, that the warning devices installed under the minimum protection program are adequate; and (ii) as a factual matter, States do not make such a determination. But Respondent's legal argument that preemption could arise from such a State determination is flawed in any event because it conflicts with 23 C.F.R. § 646.214 and *Easterwood*.

Subsection 646.214 explicitly requires "*FHWA*" to make any determination that lights and gates are not required under subsection (b)(3) and, when subsection (b)(3) is "not applicable," provides that "the type of warning device to be installed * * * is subject to the approval of *FHWA*." 23 C.F.R. § 646.214(b)(3)(ii), .214(b)(4) (emphasis added). Petitioner itself acknowledges that subsection (b)(3) "expressly requires *an FHWA determination* if the state highway agency seeks a waiver of the automatic-gate requirement." Pet. Br. 32 (emphasis added). Moreover, in *Easterwood*, it was the *State* that ultimately determined not to install lights and gates after the federal government had authorized the requested funding. This Court nonetheless held the plaintiff's claim not preempted.

The five States supporting Petitioner point out that Congress has authorized FHWA to enter into express agreements delegating its authority to the States, but acknowledge that no such agreement governs this case. Five States Br. 13 n.8. For its part, Petitioner errs in relying on the FHWA's practice, prior to adoption of the Highway Safety Act of 1973, of deferring to state-agency determinations of the adequacy of warning conditions, Pet. Br. 36-38, since FHWA ceased its deferential practice after adoption of the 1973 Act, *id.* at 38 n.19 (acknowledging that PPM 21-10 was superceded upon adoption of regulations implementing the 1973 Act). Accordingly, there is no basis for this Court to deputize Tennessee as the federal government's agent when FHWA itself has not done so.

VII. A Federal Statute Governing The Discovery And Admissibility Of Certain Evidence Is Irrelevant.

Petitioner makes the back-door assertion that Ms. Shanklin's claim is preempted because 23 U.S.C. § 409 allegedly makes it impossible to shoulder the evidentiary

"burden" placed on it by the court of appeals. Under Section 409, "reports, surveys, schedules, lists, or data compiled or collected" pursuant to certain provisions of the FRSA or for the purpose of developing a federally-funded highway improvement project may not be considered in federal or state court actions arising from an occurrence at a location mentioned in such documents.

In the first place, the proper construction of Section 409 is irrelevant to this case. Even under Petitioner's reading of Section 409, the statute is implicated only if documents exist confirming that warning devices installed with federal funds were adequate to protect the affected crossings. That certainly is not true with respect to the minimum protection program. As described above, neither the States nor the federal government considered whether devices installed under the minimum protection program would be adequate to protect the public under the circumstances. Thus, no documents exist that could be subject to Section 409 and this Court need not resolve the statute's proper construction.

Even if Section 409 were relevant, it would provide no obstacle to a proper inquiry into preemption. As the Sixth Circuit explained, to gain preemption, Petitioner would have to show "whether the Secretary or one of his agents actually determined that active warnings were needed pursuant to" 23 C.F.R. 646.214(b)(3) "or that only passive warnings were needed pursuant to" 23 C.F.R. 646.214(b)(4). Cert. App. 13a. This determination could take the form of a free-standing FHWA letter or form, without requiring judicial consideration of reports or data referred to in Section 409. Similarly, Section 409 does not bar consideration of documents generated in the process of implementing and installing crossing projects under 23 C.F.R. Part 924. With regard to grade-crossings, Section 409 covers only documents compiled for the purpose of

identifying, evaluating, and planning safety enhancement of those crossings. Implementation and installation documents are conspicuous by their absence from Section 409.[10]

This plain-language result is consistent with the structure of the FRSA and the purpose of Section 409. Section 409 was enacted in 1987, Pub. L. No. 100-17, § 132(a), 101 Stat. 152, 170, a decade-and-a-half *after* the enactment of the FRSA's preemption provision, 45 U.S.C. § 434 (now codified at 49 U.S.C. § 20106). This chronology itself strongly suggests no link between the two, and nothing in the text of Section 409 or its legislative history mentions preemption under the FRSA, let alone supports the reading that Petitioner ascribes to Section 409.

Indeed, the logic of Section 409 is to the contrary. Section 409 is an evidentiary and discovery privilege, whose purpose is to promote the flow of information from the States to the FHWA and, as Petitioner maintains, to "facilitate candor"

[10] This conclusion is underscored by considering the type of information that *is* protected by Section 409. For instance, Section 409 bars the use of documents or data compiled pursuant to 23 U.S.C. § 130, which requires States to issue, among other things, annual reports that compile data regarding grade crossings. Although such reports are non-discoverable and inadmissible under Section 409, they do not include the FHWA approvals contemplated by Section 646.214(b). More fundamentally, Section 409 does not include such approvals in the documents and data subject to its privilege. *See* Cert. App. 21a. In sum, Section 409 simply does not bar a court from considering evidence relevant under Section 646.214(b). *See also* JA 102 (testimony of engineer in charge of Tennessee crossing program confirming that there is no obstacle to State providing information on "what was done at a particular crossing" after improvements are made). As the Sixth Circuit showed, the reports and surveys issued pursuant to the two other provisions referred to in Section 409 – 23 U.S.C. §§ 144 and 152 – similarly do not contain the FHWA approvals contemplated by 23 C.F.R. § 646.214(b). Cert. App. 21a.

in agency evaluations of highway safety hazards. Pet. Br. 44. It thus assumes the continued *existence* – not the preemption – of tort actions involving a wide range of railroad-related accidents, including specifically those involving "railway-highway crossings." 23 U.S.C. § 409. Put differently, Section 409 only places certain information off-limits in civil litigation, which *presupposes* that common-law actions pertaining to grade-crossing accidents will go forward.[11]

[11] Petitioner fails to remind the Court that Section 409 was raised by the railroad in *Easterwood* for the same proposition as Petitioner urges here: the alleged impossibility of meeting its preemption "burden." In response to the Solicitor General's contention that preemption required the railroad to demonstrate that federal funds were used specifically to upgrade the crossing devices at the Cook Street Crossing, the railroad argued that such proof could not be discovered or judicially considered under Section 409. Reply Brief for Petitioner/Cross-Respondent in *CSX* v. *Easterwood*, at Part III.C.1, Nos. 91-790, 91-1206 (U.S. filed Nov. 16, 1992). In rejecting the railroad's preemption argument, and holding that federal funding was a necessary (although not a sufficient) condition for preemption, this Court in *Easterwood* did not so much as mention the railroad's Section 409 argument. The Court presumably recognized, as did the Sixth Circuit below, that Section 409's privilege does not cover simple proof of FHWA funding or approval and does not, therefore, have any bearing on preemption. Indeed, Petitioner now concedes that "it is possible to identify Oakwood Church Road as one of the crossings at which warning devices were installed in this project," Pet. for Cert. 9 n.11, tacitly acknowledging that the kind of information that the railroad claimed in *Easterwood* could not be discovered and judicially considered was in fact both discovered and considered.

CONCLUSION

For the reasons stated above, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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