GRANTED

No. 99-312

IN THE
Supreme Court of the United States

NORFOLK SOUTHERN RAILWAY COMPANY,
Petitioner,

v.

DEDRA SHANKLIN, Individually and as
Next Friend of Jessie Guy Shanklin,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF THE ASSOCIATION OF AMERICAN RAILROADS AS AMICUS CURIAE IN SUPPORT OF THE PETITIONER

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This brief of the Association of American Railroads is filed with the consent of the parties, the letters expressing consent having been filed with the Clerk of the Court.

STATEMENT OF INTEREST OF AMICUS CURIAE[1]

Amicus curiae Association of American Railroads (AAR) is an incorporated, nonprofit trade association representing the nation's major freight railroads and Amtrak. AAR's members operate approximately 75 percent of the rail industry's line haul mileage, produce 93 percent of its freight revenues, and employ 91 percent of rail employees. In matters of significant interest to its members, AAR frequently appears before Congress, administrative agencies and the courts on behalf of the railroad industry. One such matter is grade crossing safety and litigation resulting from accidents between trains and motor vehicles at grade crossings when it involves issues that may significantly impact AAR members.

Grade crossing litigation typically involves multiple claims of negligence against the railroad (e.g., excessive train speed, failure to sound the whistle, failure to keep a proper lookout, failure to remove obstructions, such as vegetation, from the right-of-way, and failure to maintain the warning devices at the crossing).[2] In addition, allegations, like those made in the case at bar, that the railroad negligently failed to provide adequate warning devices at the crossing, are virtually a given in crossing litigation. Such an allegation is typical even where federal funds have been used to install warning devices at the crossing, notwithstanding that the railroad has no decision making authority regarding the need for or selection of a particu-

[1] No person or entity other than AAR has made monetary contributions toward this brief, and no counsel for any party authored this brief in whole or in part.

[2] A number of such claims (unrelated to this appeal) were submitted to the jury in this case.

lar device, and cannot be required to pay for the upgrade (*see infra* note 13).

Prior to 1973, there was no uniform system for determining the need for warning devices at railroad grade crossings despite the well-recognized interstate character of rail operations. However, in 1973 Congress and the Secretary of Transportation created the Federal Grade Crossing Safety Program with the passage of the Federal-Aid Highway Act of 1973, Pub. L. No. 93-87, 87 Stat. 250 (codified at 23 U.S.C. § 130), which for the first time created a nationally uniform system for surveying railroad grade crossings and determining the need for warning devices at those crossings. The Program has been one of the most successful highway safety programs ever implemented. From 1974 through 1998, the number of injuries and deaths resulting from accidents between trains and motor vehicles at public grade crossings declined by 64 percent and 71 percent respectively. *See* Federal Railroad Administration, *Highway-Rail Grade-Crossing Accidents,* Calendar Year 1974 p. 7 (1975) (Table 10) and Federal Railroad Administration, *Railroad Safety Statistics, Annual Report 1998* ch. 7, p. 6 (July 1999) (Table 7-1). (*1998 Safety Statistics*). The Department of Transportation has concluded that "[b]ased on evaluations and improvements provided by the states, the Rail-Highway Crossing Program has helped prevent more than 8,500 fatalities and 38,900 injuries since 1974." [3]

As of 1998, there were 158,590 public grade crossings on the nation's rail system. *1998 Safety Statistics,* ch. 9, p. 6 (Table 9-1). Because grade crossings have such a pervasive presence on the rail network, the establishment and preservation of clear and uniform rules regarding the

[3] U.S. DOT, Federal Highway Administration, *The 1996 Annual Report on Highway Safety Improvement Programs,* at S-2 (April 1996).

duty of the various entities with an interest in highway/grade crossing safety to determine the need for and to install adequate warning devices at railroad grade crossings is a matter of great importance to AAR's member railroads.

AAR filed two briefs with this Court in *CSX Transp., Inc. v. Easterwood,* 507 U.S. 658 (1993), a case which addressed the question of when the Federal Railroad Safety Act of 1970 (FRSA) Pub. L. No. 91-548, 84 Stat. 971, and regulations issued by the Secretary of Transportation which implemented the Federal Grade Crossing Safety Program, preempt state-law duties, including tort claims alleging that the railroad negligently failed to determine the need for, and install, adequate warning devices. However, despite this Court's clear holding in *Easterwood* that such state law claims are preempted when federal funds participate in the installation of warning devices at railroad grade crossings pursuant to regulations issued by the Secretary of Transportation, the issue in this case continues to be raised with regularity in grade crossing litigation in courts throughout the nation. A minority of courts, such as the Sixth Circuit below, employ a test for preemption far afield of the *Easterwood* holding. The lack of uniformity with which the minority of lower courts have interpreted *Easterwood* has created great uncertainty regarding the role and duty of railroads with respect to grade crossing warning devices.

This case also has serious ramifications for the role of railroads in the Federal Grade Crossing Program. Since its inception in 1973, AAR members have been active participants in the Program, working with the states, which implement the Program, under which crossings are improved, on a priority basis, using federal funds.[4] Rail-

[4] Prior to the institution of the Program, AAR worked with USDOT to create a Rail-Highway Grade Crossing Inventory for

roads have a well defined role in the Program, under which they provide rail-related data regarding crossings, and participate on state-convened diagnostic teams where invited. However, their role does not include responsibility for selecting warning devices; nor does the railroads' role include overseeing the states' or Secretary's roles in, or implementation of, the Program. Nonetheless, the decision below would saddle railroads with the additional responsibility of assuring that the Program's requirements were complied with in all respects by state and federal agencies, with the adverse consequence of exposure to start tort claims if a court determines non-compliance by state and/or federal authorities—a strange consequence indeed.

Because preemption in the context of grade crossing litigation has remained an important and recurring issue facing railroads, AAR has maintained a continuing interest in the uniform interpretation and application of the *Easterwood* decision by lower courts.[5] AAR can play a valuable role in bringing to this Court's attention the railroad industry's perspective on the issues raised by this important case.

STATEMENT OF THE CASE

Amicus adopts the Statement of the Case of Petitioner.

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all crossings in the United States. The Inventory data for each crossing are kept current through ongoing updates, and serve as an important source of information for use in the implementation of the Grade Crossing Program by federal and state authorities.

[5] Since *Easterwood* was decided, AAR has participated as *amicus curiae* in a number of cases in both state and federal court where the application of *Easterwood* was at issue. *See e.g., Hester v. CSX Transp., Inc.*, 61 F 3d 382 (5th Cir. 1995), *cert. denied*, 116 S.Ct. 815 (1996); *Bock v. St. L. Southwestern Ry. Co.*, 181 F.3d 920 (8th Cir. 1999); *Union Pac. R.R. v Sharp*, 952 S.W.2d 658 (Ark. 1997); *Pearson v. Colombus & Greenville Ry. Co.*, 672 So.2d 773 (Miss. App. 1995).

SUMMARY OF THE ARGUMENT

In *Easterwood,* this Court held that the regulations at 23 C.F.R. § 646.214(b) cover the subject matter of the selection and installation of grade crossing warning devices. When federal funds participate in the installation of such a device, these regulations become applicable and state law imposing a duty to install additional or different devices is preempted in accordance with FRSA's express preemption provision. 49 U.S.C. § 20106. At the trial in this case petitioner proved that federal funds were used to install the warning devices at the crossing where the accident occurred, and therefore, respondent's claim that petitioner negligently failed to install adequate warning devices should have been preempted as required by *Easterwood.* However, the Sixth Circuit found no preemption. Its decision, which requires as an additional condition of preemption that a railroad defendant show that a federal official specifically approved of the particular crossing devices installed, is a misapplication of *Easterwood,* premised on a failure to understand both the operation of the express preemption provision of FRSA and the nature of the Federal Grade Crossing Program.

The Federal Program, which has saved thousands of lives since its inception in 1973, established a national, uniform and rational system under which states survey the rail-highway grade crossings within their borders, determine the type of warning devices needed at each crossing, and upgrade crossings on a priority basis. The Program relies on the expertise of state highway officials to implement the Program's various elements, and affords them flexibility to exercise their judgment in carrying out these tasks. The Program assigns specific roles to the railroads, which include providing and updating rail-related information about the crossings over which they

operate, but does not include the selection of warning devices for those crossings.

The states' implementation of the Program is subject to federal oversight, and the requirements of § 646.214(b) where federal funds are used to improve crossings. Before federal money can be used to improve a crossing, approval of the FHWA is required and the state must comply with all federal requirements. Federal funds are approved for use in crossing upgrades when the federal government is satisfied that the state has met its obligations under the Grade Crossing Program; however, the Program does not require that federal officials scrutinize each crossing at which federal funds are used and grant an individualized approval for the devices installed.

In 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. Notwithstanding the proven effectiveness of the Federal Program, respondent and the Sixth Circuit would have juries, sitting in state law tort actions, and informed by hired expert witnesses, step into the shoes of, and second guess the decisions of federal and state officials here and elsewhere. Railroads and other defendants in these state law actions would not even be able to defend themselves by showing the process by which state highway officials evaluated and ranked, or set priorities for upgrading, a crossing, because introduction of such evidence is prohibited by 23 U.S.C. § 409. However, Congress in its wisdom has chosen to establish an effective, uniform, national system for improving crossing safety, and, where federal funds participate in the installation of warning devices, has expressly preempted state law duties requiring that different or additional devices be installed.

ARGUMENT

I. THE SIXTH CIRCUIT MISINTERPRETED THIS COURT'S DECISION IN *CSX TRANSP., INC. v. EASTERWOOD*

A. The Decision Below Is Grounded in a Misinterpretation of FRSA's Preemption Provision

> The scope of 23 C.F.R. 646.214(b) indicates that *for federally funded projects* the Secretary has covered the subject matter of what safety devices are appropriate. . . . Thus, the warning devices in place at a crossing improved with the use of federal funds have, by definition, been specifically found to be adequate under a regulation issued by the Secretary. Any state rule that more or different crossing devices were necessary at a federally-funded crossing is therefore preempted.

Brief for the United States at 27, *CSX Transp., Inc. v. Easterwood* (emphasis in the original). The Solicitor General's statement was a cogent and succinct anticipation of this Court's ruling in *Easterwood,* which held that:

> for projects in which federal funds participate in the installation of warning devices, the Secretary has determined the devices to be installed and the means by which the railroads are to participate in their selection. The Secretary's regulations therefore cover the subject matter of state law which, like the tort law on which respondent relies, seeks to impose an independent duty on a railroad to identify and/or repair dangerous crossings.

507 U.S. at 671. The decision below flies in the face of this straightforward holding.[6]

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[6] *Shanklin v. Norfolk Southern Ry. Co.*, 173 F.3d 386 (1999). On the other hand, *Easterwood* has been faithfully followed by the Fifth Circuit (*Hester supra*), the Eighth Circuit (*Elrod v. Burlington Northern R.R.*, 68 F.3d 241 (1996); *Bryan v. Norfolk &*

In order to achieve a result it deems desirable, the Sixth Circuit has imposed another condition to the clear-cut test for preemption established in *Easterwood*: in addition to establishing that federal funds participated in the installation of the devices, the defendant also must prove that the federal government made a specific determination, approving as adequate, the warning devices installed at the particular crossing that is the subject of the lawsuit. 173 F.3d at 397. This improper reading of *Easterwood* is based on a fundamental misunderstanding of the test for federal preemption under FRSA and its application to grade crossings as determined by this Court in *Easterwood*.

FRSA and *Easterwood* make clear that preemption occurs when the USDOT issues regulations covering the subject matter of the state law claim. Under the plain language of FRSA, preemption occurs at the time the Secretary "prescribes a regulation" that covers the subject matter.[7] *Easterwood* held that the regulations at 23 C.F.R. § 646.214(b) cover the subject matter of determining the need for, and installation of, grade crossing warning devices, and establish a process for making that

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Western Ry. Co., 154 F.3d 899 (1998), *cert. dismissed*, 119 S.Ct. 921 (1999); *Bock supra*), the Tenth Circuit (*Armijo v. Atchison, Topeka & Santa Fe Ry. Co.*, 87 F.3d 1188 (1996)) and the Eleventh Circuit (*Ingram v. CSX Transp., Inc.*, 146 F.3d 858 (1998)), as well as numerous federal district courts, and by the only two state Supreme Courts which have considered the issue. *See Sharp supra*; *Lubben v. Chicago Cent. & Pac. R.R.*, 563 N.W.2d 596 (Iowa 1997).

[7] The preemptive language of FRSA reads as follows:

> 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.

49 U.S.C. § 20106 (emphasis supplied).

determination *whenever* federal funds are authorized and participate in the installation of those devices at a crossing. Once it has been established that these regulations are applicable, state law is preempted. No further conditions need be satisfied, because at the time the regulations become applicable, Congress' express intent to preempt state law becomes effective. The Sixth Circuit's reading of additional conditions and caveats into *Easterwood* is improper and should be reversed.

B. Preemption of State Law Duties to Select and Install Grade Crossing Warning Devices Occurs Wherever Federal Funds Participate in the Installation of Such Devices

As petitioner argues, once it has been established that federal funds participated in the installation of warning devices at a grade crossing, putative state law duties to select and install different devices, whether imposed on railroads or any other party (such as a state or its highway agency), are preempted. The rule established by this Court in *Easterwood* focuses on the use of federal funds because it is the participation of such funds that triggers the applicability of the regulations which cover the subject matter of the adequacy of crossing devices. *See* 23 C.F.R. § 646.214(b)(3) & (4) ("*Adequate warning devices* . . . on any project where federal funds participate in the installation of the devices are to include . . . "). Nothing in either FRSA or *Easterwood* suggests that preemption is triggered only at a later time, or by a different event, such as the occurrence of a specific determination by the federal government that a particular device provides adequate warning at a specific crossing.

Federal funds cannot participate or be expended on any grade crossing project without approval of the Federal Highway Administration (FHWA). 23 C.F.R. 646.216 (e)(1) & (2). Because FHWA approval of a grade

crossing improvement project is required before federal funds can participate,[8] evidence of federal funding is proof of FHWA approval, including any necessary determination or concurrence as to the warning devices being installed.[9] Hence, where federal funds have participated, state law may not impose independent duties with respect to the selection and installation of warning devices.

The Sixth Circuit's decision, which follows the Seventh Circuit's decision in *Shots v. CSX Transp., Inc.*, 38 F.3d 304 (1994),[10] appears to be based on the mistaken belief that if the *Easterwood* test is followed, "no one is responsible for the safety of the motorists who use the crossing." 173 F.3d at 394. Ignoring the role of the states and the railroads in the Federal Grade Crossing Program, the Sixth Circuit insists that the railroad prove that an individual evaluation of the particular crossing was done by federal officials representing the Secretary of Transportation, and that as a result of that analysis, a federal official approved not merely the expenditure of funds, but also the selection and installation of the particular device at the particular crossing. To the contrary, petitioner's reading of *Easterwood*—that the participation of federal funds in the installation of a crossing warning device triggers preemption—is not only a correct and complete statement of the law, it is fully consistent with sound

[8] FHWA approval is preconditioned upon FHWA's concurrence that the warning signs or signals are adequate and will permit safe and efficient use of the roadway. 23 U.S.C. §§ 109(d) & (e); 23 C.F.R. § 630.114(b)(1988); 23 C.F.R. § 646.214(b)(4) (1988). *See infra* Part II.C.

[9] *See Armijo supra*, 87 F.3d at 1190.

[10] Tellingly, the *Shots* court premised its holding on the notion that this Court did not really mean what it said in *Easterwood*. ("[W]e do not think the literal reading [of the Supreme Court's opinion in *Easterwood*] is the correct one." 38 F.3d at 307.)

public policy; moreover, it does not leave the public unprotected as the court below seems to suggest.

II. THE CROSSING IN THIS CASE WAS UPGRADED WITH FEDERAL FUNDS IN EXACTLY THE WAY REQUIRED BY THE FEDERAL GRADE CROSSING PROGRAM

Not only does the Sixth Circuit's result-oriented decision reflect a misunderstanding of the impact of the express preemption provision contained in 49 U.S.C. § 20106, it similarly fails to grasp the comprehensive nature of the Federal Grade Crossing Program, which provides the means of determining what safety improvements are needed at rail-highway grade crossings.[11] This Program, which has resulted in billions of dollars being spent on crossing improvements, thereby avoiding thousands of deaths and injuries, is the well conceived cornerstone of a nationally uniform system established to improve crossing safety after thorough and careful consideration by Congress and the Secretary of Transportation. To appreciate why the *Easterwood* test for federal preemption, read for its plain, literal meaning, is sound as both a matter of law and public policy, it is essential to understand the Program, why and how it came about, how it works, and the role it assigns to the state and federal governments, and the railroads.

[11] Evidence of the Sixth Circuit's misunderstanding of the Grade Crossing Program is its approval of the Seventh Circuit's approach in *Shots* as "limit[ing] federal preemption in grade crossing cases to only those instances where federal regulatory authority has been exercised." 173 F.3d at 394. In fact, federal regulatory authority has been exercised in this case, and in any situation where the expenditure of federal funds is authorized for crossing upgrades. *See infra* Part II.C. In reality, the Court is looking behind the exercise of federal authority to determine whether it was done properly or wisely, something which even *Shots* rejects. 38 F.3d at 308.

A. Historical Background Leading to the Establishment of the Federal Grade Crossing Program

The Federal Grade Crossing Program is the culmination of the evolution of public officials' attempts to deal with the problem of accidents between trains and members of the public (usually operating motor vehicles) where railroad tracks and public roadways intersect. The middle decades of the nineteenth century saw the rail industry grow and expand from a nascent industry centered on the eastern seaboard to a dominant industry with operations throughout all the states and territories of the United States. This era did not present the problem of grade crossing accidents as acutely as has the modern era of railroads, for the simple reason that roads and highways were scarce in many areas of the Nation at that time. The advent and proliferation of motor vehicles, of course, was a phenomenon that lay in the future.

During the first century of railroading, regulation of grade crossings was generally a subject of state law. Although the rights and obligations of railroads and highway users were considered to be "mutual and reciprocal," [12] as roadways and tracks began to intersect, states often assigned the primary financial responsibility for the protection of the public at crossings to the railroads. Typically this was accomplished with approval of the courts. *See e.g., Erie R.R. v. Bd. of Pub. Utility Com'rs.*, 254 U.S. 394 (1921).

By the early years of the new century, the confluence of a mature railroad industry and an emerging automobile industry began to present public policy makers with new challenges. The twentieth century saw burgeoning motor vehicle traffic, followed, naturally, by the expansion of the nation's highway system. The proliferation of motor

[12] *See Continental Improvement Co. v. Stead*, 95 U.S. 161, 165 (1877).

vehicles increased dramatically the public's interaction with railroads at grade crossings and resulted in a significant increase in crossing accidents. The new environment confronting public policy makers led to a shift in thinking with respect to the grade crossing problem. One hundred years after the birth of the railroad industry in this Nation, this Court observed that, as a result of railroad supported crossing improvements during that period, a shifting of benefits had occurred from the railroads to highway users and the public. The Court concluded that "[t]he railroad has ceased to be the prime instrument of danger and the main cause of accidents" and that "[i]t is the railroad which now requires protection from dangers incident to motor transportation." *Nashville, C. & St. L. Ry. v. Walters*, 294 U.S. 405, 422-23 (1935).

Walters raised, for the first time, the rationale that responsibility for bearing the financial burden for crossing safety should be allocated in accordance with the benefits derived, a concept that was codified in § 5(b) of the Federal-Aid Highway Act of 1944, ch. 626, 58 Stat. 839 (now codified at 23 U.S.C. 130(b)) ("The Secretary . . . may set for each [project for the elimination of hazards of highway-rail grade crossings] a percentage of the costs of construction which shall be deemed to represent the net benefit to the railroad or railroads for the purpose of determining the railroad's share of the cost of construction.) Though states continued to look to railroads to provide funding for crossing improvements, where federal funds were used for the elimination of hazards at a grade crossing, the portion of a project allocable to the railroad was limited to ten percent. *Id.*[13] Moreover, the overall outlook of public policy makers continued to shift.

[13] The Secretary of Transportation subsequently has found that grade crossing improvement projects are of "no ascertainable net benefit to the railroads and there shall be no required railroad share of the costs." 23 C.R.F. § 646.210(b)(1).

The Interstate Commerce Commission (ICC), which, until the creation of the Department of Transportation in 1966, had jurisdiction over railroad safety, concluded that grade crossing safety had become a public concern which should be addressed through public initiative and funding.[14]

Within a decade of the ICC report, and in the face of steady and unabated casualties at crossings, Congress took decisive action. In 1970, comprehensive rail safety legislation was enacted under FRSA, codified at 45 U.S.C. § 421 *et seq.* (1988), with Congress specifically directing that "laws, rules, regulations, orders and standards relating to railroad safety shall be nationally uniform to the extent practicable." 45 U.S.C. § 434 (1988).[15] While Congress provided the Secretary of Transportation with authority to enact regulations in all areas of rail safety, 45 U.S.C. § 431(a) (1988), special attention was focused on grade crossing safety. FRSA mandated the Secretary to submit to Congress within a year, "a comprehensive study of the problem of eliminating and protecting grade crossings" to include "recommendations for appropriate action." 45 U.S.C. § 433(a) (1988). The Secretary also was required to "undertake a coordinated effort toward the objective of developing and implementing solutions to the grade crossing problem" using regulatory authority over both rail and highway safety. 45 U.S.C. § 433(b) (1988). Unmistakably, Congress was keenly aware of the urgency of attacking this problem.

> The Committee is aware that grade crossing accidents constitute one of the major causes of fatalities connected with rail operations. The need to do something about these terrible accidents . . . necessitates an immediate attack on the grade crossing problem as soon as possible.

H.R. Report No. 91-1194 (1970), *reprinted in* 1970 U.S.C.C.A.N. 4104, 4116.

Responding to the congressional mandate, the Secretary of Transportation submitted a two-part report to Congress, which crystallized the emerging consensus among public policy makers.[16] The Secretary concluded that rather than simply being a railroad problem, "the grade crossing safety problems today . . . is part of a national traffic safety problem." Report to Congress: Part I, at A30. Consequently, "the original concept that railroads have the primary or sole responsibility, financial or otherwise, for the elimination or protection of grade crossings has gradually changed, particularly in situations where Federal participation or Federal funds are involved." *Id.* In 1970, for the most part, only crossings located on the Federal-aid highway system were eligible

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[14] The ICC stated that

> In the past it was the railroad's responsibility for protection of the public at grade crossings. . . . Now it is the highway, not the railroad, and the motor vehicle, not the train, which creates the hazard. . . . [H]ighway users are the principle recipients of the benefits following from rail-highway grade crossing separations and from special protection at rail-highway grade crossings. For this reason the cost of installing and maintaining such separations and protective devices is a public responsibility and should be financed with public funds the same as highway traffic devices.

Prevention of Rail-Highway Grade-Crossing Accidents Involving Railway Trains and Motor Vehicles, ICC Report No. 33440, 322 ICC 1, 82, 87 (1964).

[15] FRSA has since been recodified at 49 U.S.C. 20101 *et seq.* Section 434 has been recodified at 49 U.S.C. § 20106.

[16] *See* U.S. Dept. of Transp. Report to Congress: Railroad-Highway Safety Part I: A Comprehensive Statement of the Problem (1971) [hereinafter "Report to Congress: Part I"]; U.S. Dept. of Transp. Report to Congress: Railroad-Highway Safety Part II: Recommendations for Resolving the Problem (1972) [hereinafter "Report to Congress: Part II"].

for improvements using federal funds, which had been available since 1916. *Id.* at 37.[17]

The Secretary found that responsibility over rail-highway intersections is typically divided among state agencies and the railroads, commenting that grade crossings are "the only location along the highways where the highway authorities do not have total responsibility for and control over the installation, operation and maintenance of traffic control devices." Report to Congress: Part II, at 33. The Secretary concluded that

> the net effect of the current division of responsibility and authority among the private and public interests involved at the State and local level results in a fragmented approach to grade crossing safety. . . . *The need for national coordination of an issue that affects the nation's railroad and highway systems is apparent.*

Id. at 34 (emphasis supplied).

B. The Federal Grade Crossing Program Was Established By Congress to Require a Uniform, Effective and Rational Approach to the Problem of Crossing Accidents

Congress promptly responded to the Secretary's Report, creating the Federal Grade Crossing Program as part of the Federal-Aid Highway Act of 1973. This Program, for the first time, established a national, uniform and consistent method for determining the need for, and providing for the installation of, warning devices at railroad grade crossings. The Program was established through the existing statutory framework of federal oversight and

[17] When the Secretary's Report was authored there were about 223,000 public grade crossings, which the Report noted, varied greatly in terms of quantity of both rail and highway traffic and other pertinent characteristics. Report to Congress: Part II pp. 8-9 (Table 2). About 48,900 crossings were on the Federal-aid highway system. *Id.* at 6.

funding of highway improvement projects,[18] with specific roles for each of the involved entities, including the railroad. In 1976, Congress created a specific program authorizing funds for roads off the Federal-aid system. Pub. L. No. 94-280, 90 Stat. 452.

1. *Under the Federal Program states must survey and prioritize their crossings for improvements*

The heart of the Federal Program is 23 U.S.C. 130(d), which requires each state to "conduct and systematically maintain a survey of all highways to identify those railroad crossings which require separation, relocation, or protective devices, and establish and implement a schedule of projects for this purpose." Part 924 of 23 C.F.R. elaborates, requiring each state to have a highway safety program that includes a planning, implementation and evaluation component. States must have a process for collecting and maintaining a record of accident, traffic and highway data, including, for grade crossings, the characteristics of both highway and train traffic. § 924.9(a)(1). There must be a process for identifying locations determined to be hazardous on the basis of accident experience and potential. § 924.9(a)(2). Importantly, there must be a process for establishing priorities for implementing highway safety improvements. § 924.9(a)(4). To develop priorities, states must utilize a hazard index formula to determine the relative hazard at each crossing. § 924.9 (a)(4)(iii). Each state must have process for scheduling and implementing safety improvement projects in accordance with the priorities developed under § 924.9. *See* § 924.11(a).

[18] Each state is required to have a highway safety program approved by the Secretary in accordance with uniform guidelines promulgated by the Secretary. 23 U.S.C. § 402(a).

2. *The Federal Program relies on the expertise of the state to determine the needs of their crossings and provides maximum flexibility for the states to carry out this task*

The Federal Program did not reinvent the wheel: rather, it recognized that the tools for improving crossing safety lie primarily with the states. The federal government makes available funds for crossing improvements, recognizing, however, that the state and local highway agencies possess the regulatory expertise and experience in motor and pedestrian traffic issues necessary to make sound judgments related to improving crossing safety. After all, warning devices at railroad grade crossings are traffic control devices, the sole purpose of which is to regulate and govern the flow of motor and pedestrian traffic on the roadways. These devices do not regulate train traffic.

With the carrot of federal money and the stick of federal oversight, the Program was designed to ensure that the states utilize their tools in a nationally uniform, effective, rational and efficient way. Uniformity, in the context of the Federal Program, means not that every crossing should be treated alike—clearly they should not be—but rather that the states are uniformly implementing a consistent, comprehensive approach, on a prioritized basis, to enhance safety at railroad-highway grade crossings. Each state is to report annually to the Secretary on the progress it is making to implement the Program and the effectiveness of improvements being made. 23 U.S.C. 130(g). In turn, the Secretary is to report to Congress with an analysis and evaluation of each state's program, including identification of states not in compliance. *Id.* Failure on the part of states to comply can result in loss of eligibility for federal funds.

The Federal Program does not trample on the ability of states to exercise authority to protect their citizens at grade crossings. To the contrary, federal law and regulation give the states maximum flexibility to implement the Program in accordance with their individual needs and practices.[19] As *Easterwood* recognized, where states choose to use federal money to install warning devices of any kind at crossings, federal regulations do establish certain requirements, 23 C.F.R. § 646.214(b)(3) & (4): these regulations cover the subject matter of the very state law that is at issue in this case. *See supra* Part I.A. However, even these regulations, which set the standards for adequate warning devices when federal funds are used, are written to allow for flexibility and subjective judgment. The factors listed at 23 C.F.R. § 646.214(b)(3)(i)(A)-(E), which call for installation of automatic gates and lights are, for the most part, neither precise nor specifically defined (e.g., "high" speed trains; "limited" sight distances; "moderately high" volumes of traffic; "substantial" numbers of school buses). This clearly allows for the exercise of judgment by state officials evaluating a crossing. As the Department of Transportation observed, "[t]he selection of traffic control devices at a crossing is determined by the public agency having jurisdiction. Due to the large number of significant variables to be considered, there is no single system of active control devices universally applicable to crossings." U.S.DOT, Federal Highway Administration, *Rail-Highway Crossings Study* 4-9 (1989).[20]

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[19] The Highway Administration "does not believe that the inclusion of rigid requirements for a detailed program content is necessary to maintain federal oversight and control of the overall highway safety improvement program." Highway Safety Improvement Program, Final Rule, 44 Fed. Reg. 11,543, 11,544 (Mar. 1, 1979). For example, the regulations do not dictate the hazard index formula the states must utilize, and a number of different indices are used by the states. *See* U.S. DOT, Federal Highway Administration, *Railroad-Highway Grade Crossing Handbook* 63 (2d ed. 1986).

[20] The Sixth Circuit remarked that the plaintiff attempted to introduce evidence at trial showing that some of the 646.214(b)(3)

A key aspect of the Federal Program is the requirement that in prioritizing crossing improvement projects, states must consider the accident *potential* at all the crossings within their borders, a departure from the previous state-law focus on accident history, which naturally limits its evaluation to crossings at which accidents have occurred. "The FHWA considers that reducing the potential for accidents is the most important aspect of the safety improvement program . . ." 44 Fed. Reg. at 11,544. This requires a forward looking, prospective evaluation of crossings, calling for, among other things, taking into account planned development in the area near the crossing and other conditions that might increase or decrease hazards in the future.[21] For example, FHWA suggested that state officials should develop pertinent information by "contacts with school transportation officials, route managers for motor bus companies, AMTRAK, and local officials who might be aware of special situations." 44 Fed. Reg. at 11,543. *See* 23 C.F.R. § 924.9(a)(4)(v). In making decision about crossings, states also rely in part

conditions existed at the crossing. 173 F.3d at 388. Such evidence has no bearing on the preemption analysis. Whether 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. To hold otherwise would be tantamount to a determination that when the federal government issued this regulation, it meant that it be enforced by juries sitting in state law tort suits years after the fact. *See Sharp supra*. ("[W]hether the conditions listed in (b)(3) exist at a particular crossing is for the FHWA, not a jury to decide. Once the FHWA has spoken on the issue by providing federal funds for a state improvement project, the determination of whether (b)(3) conditions exist has already been made, and it may not be revisited by the state court." 952 S.W.2d at 667.).

[21] In contrast, regulation through tort law generally is retrospective in nature: juries evaluate the facts surrounding a specific accident, determine the standard of care, largely based on past experience, and award damages based on their determination of whether a defendant adhered to such a standard.

on the USDOT/AAR Railroad-Highway Grade Crossing Inventory. *See supra* note 4.

3. *The Program requires railroads to provide railroad-related information relevant to crossings to highway officials and to cooperate with crossing evaluations done by the states*

Railroads, of course, have a role in the Program, albeit a role which is limited and geared toward utilizing the railroads' particular knowledge and expertise: it does not include the selection of warning devices. While railroads are not privy to much of the key information related to a crossing (e.g., motor vehicle traffic counts), they clearly are in the best position to supply some important, relevant information, such as train frequency, train speed and commodity mix (e.g., hazardous materials). Consequently, they have an obligation to provide such information, and to keep it up to date.[22] Railroads also are required to supply accident-related information to FRA (copies of which are forwarded to the states), which provides additional data to be used by the states in setting priorities and making decisions.

Railroads also may be asked to serve on a diagnostic team assembled by the state to evaluate crossings and make recommendations regarding the devices to be installed at a crossing. Once a federally funded project is approved, the railroad frequently, but not always, will be selected by the state as a contractor to install the device, subject to the federal regulations governing this procedure.

[22] *See* U.S. DOT, *National Railroad-Highway Crossing Inventory Update Manual* (1976), under which railroads are required to update railroad-related data, and state authorities are required to update non-railroad-related data. The Grade Crossing Program is a dynamic one. Even after a crossing has been improved with federal funds, it is monitored by state officials. If changed conditions warrant, the warning devices at a crossing may be further upgraded with federal funds. *See Armijo supra* 87 F.3d at 1192.

C. When FHWA Approves Federal Funding for a Crossing Project of Necessity It Approves of the Warning Devices at Each Crossing Within the Project

The Sixth Circuit's holding is premised on a faulty view of the Grade Crossing Program, and evinces a lack of understanding of the approval process required by federal law. The Federal Program is not, nor was it ever meant to be, a program under which the federal government evaluates each and every grade crossing. Nor does it envision the federal government acting as a passive dispenser of funds. Instead, it lays out a process for the states to make evaluations and decisions, which are subject to federal approval when a state decides to use federal funds.[23]

Federal law mandates that federal funds may not be used on a planned highway safety improvement unless the project meets all federal requirements, including being adequate and sufficient from a safety standpoint. *See* 23 U.S.C. 109(d) & (e).[24] Before a state highway agency may proceed with an improvement project using federal funds it must seek written authorization from FHWA. The applicable regulatory requirement in effect at the time

[23] States are free to decide for which crossing projects they will seek to utilize federal funds. 23 U.S.C. § 145.

[24] Although the court below glossed over this important point, the significance of this statutory proscription was not lost on the court in *Hester supra*, which reasoned that "[t]he regulations direct the Secretary to authorize the expenditure of federal funds only on the projects that satisfy, *inter alia*, the requirements of federal law, specifically 23 U.S.C. § 109. [footnote omitted] . . . The fact that federal funds participated in the installation of the warning devices legally presupposes that the Secretary approved and authorized the expenditure, which in turn legally presupposes that the Secretary determined that the safety devices installed were adequate to their task." [footnote omitted] 61 F.3d at 387. *See also Sharp supra*, 952 S.W.2d at 667. Even if, as the Sixth Circuit suggests, the state did not carry out the Federal Program in compliance with the law (and there is no support for this suggestion),

of the project in this case, 23 C.F.R. § 630.114(b) (1988), provided that ". . . authorization can be given only after applicable prerequisite requirements of Federal laws and implementing regulations and directives have been satisfied, i.e., A-95 clearing house review and standards as prescribed by 23 U.S.C. 109." [25] Section 109(e) requires "proper safety devices complying with the safety standards determined by the Secretary at that time as being adequate." Further, 23 C.F.R. § 646.216 contains comprehensive requirements for FHWA authorizations at all stages of the project, including approval of the project or state-railroad agreement, and approval of all plans, estimates and specifications. It is ludicrous to suggest that FHWA simply authorizes funds without any consideration as to how the funds are being spent or whether the project is in compliance with applicable regulations.[26]

that says nothing about whether regulations covering the subject matter are applicable, and does nothing to undermine preemption.

[25] This regulation was subsequently recodified and cast in slightly different language in 1996 as 23 C.F.R. § 630.106(a). FHWA's explanation of the recodification indicates no change in substance was intended as a result of the rewording. Federal Aid-Project Authorization, Final Rule, 61 Fed. Reg. 35,629, 35,630 (July 8, 1996).

[26] At the time of the project in question, the standard Federal-Aid Project Agreement (Form PR-2, *see* J.A. 128), required to be submitted to FHWA by the state agency, begins with the state's certification that it has complied or will comply with Title 23, U.S. Code, and all federal regulations, policies and procedures. The "Agreement Provisions" also include the following requirement:

> 11. *Signing and Marking.* The State highway agency will not install or permit to be installed any signs, signals or markings not in conformance with the standards approved by the Federal Highway Administration pursuant to 23 U.S.C. 109(d) or the State's certification as applicable.

J.A. 130. 23 C.F.R. Part 630, Subpt. C, App. A (1988) Since FHWA's divisional offices maintain a continuing relationship with the state agency and are well aware of the quality of the state's inventory data, hazard indexing formula, and other aspects of the state's grade crossing plan, the state's Project Agreement assur-

D. The Federal Program Envisions That Like the Crossing in This Case There Are Numerous Crossings Where Passive Devices Are Deemed Adequate

It is perfectly reasonable, and consistent with the Federal Program, that passive warning devices, like those installed in this case, would constitute the most appropriate device for many crossings. The Grade Crossing Program contemplates that in many cases, given the characteristics of a crossing, minimal passive devices would be considered by highway officials to be adequate for a crossing.[27] The Secretary's Report to Congress recognized that given the combination of train and highway traffic volume at tens of thousands of crossings "there is but a remote possibility of finding adequate justification for other than minimum protection of the static sign type." Report to Congress: Part I at v. Congress too recognized as much. Noting that with respect to over 70,000 crossings, having less than 2 train movements and 5,000 vehicular movements daily, "[f]ew . . . have sufficient accident potential to justify train actuated protection." H.R. Rep. No. 93-118 (1973), *reprinted in* 1973 U.S.C.C.A.N. 1859, 1893. In fact, projects like the one undertaken by Tennessee in this case, under which a group of low hazard crossings

ances are more than sufficient basis for FHWA's concurrence as regards to the adequacy of the devices which the states propose for installation with federal funds. Of course, where FHWA has reservations either as to the quality of the state's program, or the project documents indicate that the state has not complied with FHWA requirements as to the adequacy of the devices, FHWA is required to deny federal funding, or require the state to amend the proposal to meet federal requirements as to the adequacy of the proposed devices.

[27] The Sixth Circuit draws a distinction between federal funding of "minimum" crossing devices and "adequate" devices, suggesting that preemption may apply only when the latter are installed. There is no basis in the law or regulations to support the notion that two forms of federal funding exists under the Grade Crossing Program: one which requires compliance with applicable regulations, and one which does not.

were upgraded with passive devices, were specifically contemplated in the Secretary's Report.[28]

Crossing improvements are to be accomplished in accordance wtih the priorities established under the state's priority ranking system. Tennessee officials would have had numerous data about the Oakwood Church Road crossing at their disposal from the Inventory,[29] as well as from the state's own data collection efforts required by § 924.9(a). No doubt, they were well aware of their obligations under federal law when using federal funds. Their judgment that this rural crossing, and the others included in the same upgrade project, warranted improvement with the passive devices that were actually installed is hardly surprising. The Secretary's authorization of funds for the project signified the federal governments was satisfied that all federal requirements were met. *See supra* note 26. There is no requirement that such a decision be reflected through a particularized "approval" with respect to each and every crossing covered by a project.

III. THE SIXTH CIRCUIT'S DECISION MISPERCEIVES THE SIGNIFICANCE OF 23 U.S.C. § 409 IN GRADE CROSSING LITIGATION

The Sixth Circuit's decision would allow state court juries to piggyback onto the Federal Program and second guess the decisions of state DOTs and FHWA whenever passive devices only have been installed. Not only is this approach totally at odds with the Grade Crossing Program, its unworkability is underscored by the operation of another federal statute, 23 U.S.C. § 409. Section 409 precludes reports, surveys, schedules, lists or data com-

[28] The Report recommended implementation of a program for installation of passive devices "[t]o effectively treat the large number of lower volume crossings which do not warrant active protection . . ." Report to Congress: Part II at ii.

[29] The Inventory, along with accident history, is available at the FRA website at http://safetydata.fra.dot.gov/officeofsafety.

piled or collected for the purpose of identifying, evaluating, or planning safety enhancements of rail-highway crossings under the Grade Crossing Program from being discovered, admitted into evidence or used in any other way in an action for damages.

The success of the Grade Crossing Program is dependent on sound decision making by state authorities in identifying hazardous crossing, selecting adequate warning devices, and scheduling upgrades on a priority basis. Section 409 is meant to promote sound decision making by fostering complete candor in the collection and maintenance of the data needed properly to make such decisions, by eliminating the concern that the data will be used as the basis for alleging liability in subsequent litigation.[30]

In concluding that § 409 does not bar the railroad from showing that the Secretary "approved passive warning devices at the Oakwood Church Road Crossing", 173 F.3d at 397, the Sixth Circuit missed the significance of § 409.[31] Section 409 serves an important purpose in ensuring the effectiveness of the Federal Program. In doing so, as a practical matter, it puts off limits to railroads or other defendants, such as a state, if sued over its DOT's decisions (as well as plaintiffs), the best evidence to show the degree and nature of hazard posed by a particular crossing to support an argument to the jury that the warning devices at the crossing were adequate. In a law-

[30] *See Harrison v. Burlington Northern R.R.*, 965 F.2d 155 (7th Cir. 1992); *Robertson v. Union Pacific R.R.*, 954 F.2d 1433 (8th Cir. 1992).

[31] The FHWA did make such an approval when it authorized the use of federal funds for the project which included the Oakwood Church Road crossing, a fact that *was* proved by the railroad. Granted, the railroad (even if not barred by 409) did not show FHWA's specific approval of particular passive devices at a particular crossing: that kind of approval is not a requirement of the Program, nor is it intended to be.

suit like the one giving rise to this case, the railroad might never even be able to tell a jury where the crossing ranked on the state's list,[32] let alone what kind of traffic engineering judgments the state DOT officials made with regard to the crossing.[33] Instead, the key issue at such trials will turn into a battle of hired experts, testifying on the basis of their own "theories," having no relation to the hazard analysis made by the state agencies under the Federal Grade Crossing Program.

IV. THE FEDERAL GRADE CROSSING PROGRAM EFFECTIVELY PROTECTS THE PUBLIC

The use of federal funds to install warning devices at a crossing has the effect of preempting state law requiring the installation of different or additional devices. Establishing this as the sole test of preemption is not a decision to leave the public unprotected as the result of a legalistic application of the preemption doctrine.[34] The public is, and for over two and a half decades has been, protected by the Grade Crossing Program.

The public is protected by crossings being upgraded with either passive or active warning devices pursuant to

[32] *See Sawyer v. Illinois Central Gulf R.R.*, 606 So.2d 1069 (Miss. 1992); *Claspill v. Missouri Pac. R.R.*, 793 S.W.2d 139 (Mo. 1990).

[33] The Sixth Circuit suggests, though it has no way of knowing, that the crossing in this case "ha[s] not yet been analyzed in accordance with subsection (b)(3) and (4)." 173 F.3d at 395. Of course, because of § 409, the litigants have no way of determining this, much less informing the court. In fact, in *St. Louis S.W. Ry. Co. v. Malone Freight Lines*, 39 F.3d 864 (8th Cir. 1994), the court found that, even if a federally funded project for gates and flashers was ongoing, but unfinished at the time of an accident, because of § 409 "the evidence presented at trial should be the same as if no upgrades had been planned." *Id.* at 867.

[34] Of course, plaintiffs will continue to have a remedy for a railroad's violation of other state law duties that are not preempted, such as failure to sound the train's whistle or to keep a proper look out. If this Court reverses the Sixth Circuit, the case will go back for a new trial on the other allegations raised by the plaintiff.

the Program, and those crossings remain on the state's hazard index and continue to be surveyed as required by 23 U.S.C. § 130(d) for possible additional upgrades or even grade separation. Further upgrades may be necessitated as traffic count changes, train traffic increases, or other factors warrant additional devices upon evaluation by the state. This is accomplished through updating the DOT Grade Crossing Inventory, periodic state surveys, diagnostic team reviews, accident reports, and the receipt of other information deemed relevant by the state. This is an on-going review process not impacted by the initial installation of a particular kind of device at the crossing. The Sixth Circuit's belief that the *Easterwood* test for triggering federal preemption would leave "the public unprotected" demonstrates a lack of understanding and appreciation of the Federal Grade Crossing Program.

In fact, the Program has been remarkably successful in eliminating hazards at grade crossings. Since the Program began the numbers of grade crossing accidents, and related injuries and fatalities, have dropped dramatically.[35] Moreover, since the *Easterwood* decision established that state law is preempted where federal funds participate in the installation of warning devices, the numbers of injuries and fatalities have continued to decline significantly.[36] And, significantly, during that time, most courts have not followed the narrow view of the Sixth and Seventh Circuits regarding preemption. *See supra* note 6. There is certainly no evidence that petitioner's view of preemption increases the risk to the public.

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[35] *See supra* p. 2.

[36] From 1993 through 1998, the number of injuries and fatalities resulting from accidents between trains and motor vehicles at public crossings declined by 32.4% and 37.1% respectively. *See* Federal Highway Administration, *Highway-Rail Crossing Accident/Incident and Inventory Bulletin, Calendar Year 1993*, p. 33 (1994) (Table 4); *1998 Safety Statistics*, ch. 7, p. 6 (Table 7-1).

V. UNDER THE FACTS OF THIS CASE AND WHENEVER FEDERAL FUNDS PARTICIPATE IN THE INSTALLATION OF CROSSING WARNING DEVICES CONGRESS HAS PREEMPTED STATE LAW TORT DUTIES REQUIRING THE INSTALLATION OF ADDITIONAL OR DIFFERENT DEVICES

In this case, the Grade Crossing Program was utilized as it was intended, i.e., the federal government did step in, first when it issued regulations covering the subject matter that are applicable whenever federal funds are used to improve a crossing, and subsequently when it authorized federal funds for use on a project covering the crossing at which the accident took place. There is no evidence that any required (or "desired") action was not taken on the railroad's part.[37] Nonetheless, the Sixth Circuit and respondent believe that it would be desirable to require railroads to implement their own programs parallel to the Federal Program, and to undertake their own evaluations of crossings on top of those done by the states. At the end of the day, they would have railroads install and pay for automatic gates at all crossings that do not have them, including crossings where federal money has been spent, and federal approval given, for the installation of passive devices. The hammer to enforce this requirement would be the threat of state law tort suits.

Whether superimposing state tort law on top of the Federal Program would provide a more effective means of achieving crossing safety is hardly debatable: in response to the Secretary's Report highlighting the shortcomings inherent in the then-prevailing fragmented approach under state law, Congress decided that there was a better way

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[37] The Sixth Circuit opined that the *Hester*; *Elrod*; *Armijo* approach to preemption improperly grants the railroad a prize (i.e., immunity from state tort law), without requiring that the railroad "take[] the desired action" (i.e., work with the state to improve the crossing), 173 F.3d at 395, an opinion that does not withstand scrutiny.

of dealing with grade crossing safety—and the results overwhelmingly prove the congressional wisdom.[38]

In any case, where, as here, state regulation has been displaced by virtue of the Supremacy Clause of the Constitution, art. VI, cl. 2, the effectiveness of state law is legally irrelevant. *See Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 235 (1947). (Regulated party "could not be required by the State to do more or additional things or to conform to added regulations, even though they in no way conflicted with what was demanded of him under the Federal Act" and "[t]he federal scheme prevails though it is a more modest, less pervasive regulatory plan than that of the State.") If, as respondent contends, state tort law provides a preferable way to improve crossing safety or, as the Sixth Circuit implies, the Federal Program is not working properly, those matters are for Congress to address, and if need be, remedy.

CONCLUSION

The judgment of the Court of Appeals should be reversed and the case remanded for a new trial on respondent's claims unrelated to the adequacy of the grade crossing warning devices.

Respectfully submitted,

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[38] Given their important role in the Program, a number of states, recognizing the need for a clear test for preemption, have written to the Federal Railroad Administration in support of petitioner's position. These letters will be lodged with the Court.