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

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

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QUESTION PRESENTED

Whether state-law tort claims of negligence, based on inadequate warning devices at a railway-highway grade crossing, are preempted because federal funds participated in the installation of the warning devices as part of a congressionally mandated program to ensure a minimum level of protection at all such crossings.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Statutes and regulations—Continued: Page

Miscellaneous: Page

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INTEREST OF THE UNITED STATES

The question in this case is whether state-law tort claims arising out of accidents at railway-highway grade crossings are preempted by federal law governing safety at such crossings. The Federal Railroad Safety Act of 1970, 49 U.S.C. 20101 *et seq.*, and the Highway Safety Act of 1973, Pub. L. No. 93-87, 87 Stat. 282, vest broad powers in the Secretary of Transportation over railroad and highway safety. The Federal Railroad Safety Act also contains an express preemption provision (49 U.S.C. 20106) that is triggered solely through regulatory action by the Secretary. The United States has a strong interest in how these statutes and their implementing regulations are interpreted and applied.

STATEMENT

1 .a. "Nearly 10 times each day a train and a motor vehicle or a person collide at a rail-highway grade crossing"; in 1998,

431 people died in such accidents.[1] The States historically have borne primary responsibility for protecting public safety at railway-highway crossings. They generally have required the railroads, both through statute and common law tort duties, to provide adequate warnings to the public at crossings and to exercise due care in their design, construction, and maintenance. See, *e.g.*, *Grand Trunk Ry.* v. *Ives*, 144 U.S. 408, 416-420 (1892).

With annual death tolls from crossing accidents rising as high as 2500 in the first half of the twentieth century, Congress passed numerous laws that provided federal financial assistance to the States to improve safety at crossings.[2] In 1970, concerned about the "large and steady increase in the number of train accidents" and the "extremely high fatality rate" of such accidents,[3] Congress enacted the Federal Railroad Safety Act (Railroad Act), 49 U.S.C. 20101 *et seq.*, "to promote safety in every area of railroad operations and to reduce railroad-related accidents and incidents," 49 U.S.C. 20101.[4] The Railroad Act vests the Secretary of Transportation with the broad authority to "prescribe regulations and issue orders for every area of railroad safety." 49 U.S.C. 20103(a).[5] It also directs the Secretary to "maintain a

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[1] Dep't of Transp. (DOT), Off. of Insp. Gen., *Audit Report: Rail-Highway Grade Crossing Safety* at i (Sept. 30, 1999) (*Audit Report*).

[2] See Federal Highway Admin. (FHWA), *Rail-Highway Crossings Study* 1-8 to 1-9 (Apr. 1989) (*1989 Study*); FHWA, *Railroad-Highway Grade Crossing Handbook* 8-11 (Sept. 1986) (*Crossing Handbook*).

[3] H.R. Rep. No. 1194, 91st Cong., 2d Sess. 72 (1970); see also S. Rep. No. 619, 91st Cong., 1st Sess. 1 (1969).

[4] The Railroad Act originally was codified at 45 U.S.C. 421 *et seq.* In 1994, Congress recodified the Act's provisions in Title 49, without altering their substance. See Pub. L. No. 103-272, § 6(a), 108 Stat. 1378. This brief will cite to the Railroad Act as currently codified.

[5] The Secretary has delegated the authority to promulgate rail safety regulations to the Federal Railroad Administration, 49 C.F.R. 1.49(m), and the authority to promulgate regulations pertaining to highway safety to

coordinated effort to develop and carry out solutions to the railroad grade crossing problem," 49 U.S.C. 20134(a), and to "prescribe regulations and issue orders to ensure the safe maintenance, inspection and testing of signal systems and devices at railroad highway grade crossings," 49 U.S.C. 20134(b). The Railroad Act specifically addresses the pre-emptive effect of the Secretary's regulations and orders, providing that 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.

Also in 1970, Congress directed the Secretary to prepare a comprehensive study of the railway-highway grade-crossing problem and to submit recommendations for legislative action.[6] In the first part of that report, the Secretary surveyed the scope of the problem, its historical roots, and the quite limited success routine federal funding programs had experienced in combating this "major public safety issue." Dep't of Transp. (DOT), *Report to Congress: Railroad-Highway Safety Part I: A Comprehensive Statement of the Problem* at i (Nov. 1971) (*1971 Report*). The Secretary also documented that nearly 14,000 grade crossings were devoid of any warning signs alerting the public even to the existence of railroad tracks, much less to the possible approach of a train. *Id.* at ii, 24.

In the second part of his report, the Secretary recommended a multi-faceted and cooperative federal/state approach to reducing or eliminating the hazards arising from grade crossings. See DOT, *Report to Congress: Railroad-Highway Safety Part II: Recommendations for Resolving*

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the Federal Highway Administration (FHWA), 49 C.F.R. 1.48(o), 1.49(m). See also *CSX Transp., Inc.* v. *Easterwood*, 507 U.S. 658, 663 n.4 (1993).

[6] Railroad Act, Pub. L. No. 91-458, § 204, 84 Stat. 972; see also Highway Safety Act of 1970, Pub. L. No. 91-605, § 205(a), 84 Stat. 1742.

the Problem (Aug. 1972) (*1972 Report*). The Secretary recognized that a decision concerning the appropriate warning and protective devices needed for each crossing frequently turns upon unique and individualized conditions, and that it would be necessary to establish priorities in the allocation of funds in the long-term effort to bring all grade crossings up to an adequate level of protection. The Secretary therefore proposed that, "to satisfy the greatest safety needs through a priority approach," crossing improvement projects should be "accomplished on an individual intersection basis," *id.* at 31, and that grouping of intersections "is not appropriate for selecting individual crossings for improvement," *id.* at 76. The Secretary recommended that the States establish a "logical and orderly system" for allocating funds for improvement projects to "individual crossings" on a prioritized basis, *id.* at iii, and, at the same time, that each State "be strongly encouraged to develop procedures to assure that every crossing in the State will be given equal consideration for improvement," *id.* at iv, 92.

The Secretary further recommended, "[a]s a first step in improving grade crossing safety," the imposition of a uniform requirement that every crossing be provided with the minimum warning signs prescribed by the federal Manual on Uniform Traffic Control Devices. *1972 Report* 90; see also *1971 Report* 59, 67. Unlike the long-term program based on a prioritization of individual crossings, the minimum signing program would be undertaken across-the-board without individualized analysis of the appropriate protection ultimately needed for specific crossings.[7] That "mandatory minimum requirement for safety" would afford the public a uniform floor of advance warning at the more than 10,000 grade crossings that lacked any warning signs, the 75,000 crossings equipped only with nonstandard signs, and the more than

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[7] *1971 Report* 67 ("Installation of these signs would be made without any prior benefit-cost analysis.").

70,000 grade crossings whose usage would likely rank them low on the States' priority review lists.[8]

b. Congress responded to the Secretary's reports by passing the Highway Safety Act of 1973, Pub. L. No. 93-87, 87 Stat. 282, Section 203 (87 Stat. 283) of which created the Rail-Highway Crossings Program, 23 U.S.C. 130 (1994 & Supp. III 1997). That program provides States with federal funds for up to 100% of the cost of the "elimination of hazards of railway-highway crossings." 23 U.S.C. 130(a); 23 C.F.R. 646.212(b). Participating States must develop programs to identify and improve dangerous crossings in a systematic way, and they must "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." 23 U.S.C. 130(d); see also 23 C.F.R. 924.9.[9] In response to the Secretary's call for the immediate installation of minimum warning signs at all crossings, Congress also directed that each State's program must "[a]t a minimum * * * provide signs for all railway-highway crossings." 23 U.S.C. 130(d).[10]

c. The Secretary, through the Federal Highway Administration (FHWA), has promulgated a series of regulations to implement the Crossings Program. In an "effort to encourage the States to rationalize their decisionmaking," *CSX Transp., Inc.* v. *Easterwood*, 507 U.S. 658, 667 (1993), the regulations require that accident and traffic-volume statistics, as well as other factors, determine the relative hazards

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[8] See *1972 Report* 90, 92; *1971 Report* 67; see also FHWA, *1978 Annual Report on Highway Safety Improvement Programs* 11 (Mar. 1978) [hereinafter, such reports will be cited as "*[year] Annual Report*"].

[9] DOT informs us that all 50 States, the District of Columbia, and the Territories participate in the Crossings Program.

[10] As of 1996, Congress had provided the States with more than $3.12 billion (or approximately 97% of project costs) to improve the safety of public crossings. *1996 Annual Report* IV-3 (Apr. 1996).

posed by different crossings and guide the prioritization and implementation of improvement projects. 23 C.F.R. 924.9(a).

In addition, the regulations address the installation of warning devices at crossings under the States' "[g]rade crossing improvement" program. 23 C.F.R. 646.214(b).[11] First, subsection (b)(1) of that regulation requires that all proposals for the installation of traffic control devices at crossings "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." 23 C.F.R. 646.214(b)(1). Although DOT's Manual on Uniform Traffic Control Devices for Streets and Highways (1988) (Manual) does not generally specify when particular warning devices are appropriate, it does require, as a minimum, that all crossings be equipped with two crossbuck signs (Manual § 8B-2) and, except in two narrow circumstances, advance warning signs (Manual § 8B-3).[12] Subsection (b)(1) thus identifies what minimum warning signs are required by 23 U.S.C. 130(d). The Manual anticipates that decisions regarding any additional warning devices, beyond the minimum, for individual grade crossings will be based upon site-specific engineering judgments. See Manual § 1A-4.[13]

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[11] The types of warning devices are classified as either "active" or "passive." Active warning devices are "those traffic control devices activated by the approach or presence of a train, such as flashing light signals [and] automatic gates." 23 C.F.R. 646.204. Passive warning devices are "traffic control devices, including signs," that "indicate the presence of a crossing but which do not change aspect upon the approach or presence of a train." *Ibid.*

[12] The crossbuck is the traditional crossed white planks bearing the words "RAILROAD CROSSING" in black lettering that are posted right before a crossing. Manual § 8B-2. The advance warning signs are round yellow signs bearing an "X" with an "R" on each side of the "X". *Id.* § 8B-3. In addition, if the speed limit on the public road crossing the tracks exceeds 40 miles per hour, advance pavement markings must be installed. *Id.* § 8B-4.

[13] The Secretary has incorporated the Manual's provisions into other federal regulations as well. 23 C.F.R. 655.601-655.603. Two amendments

Second, subsection (b)(2) of the regulation provides that, for those crossing improvement projects that are located within or near the terminus of a federal-aid highway project, the FHWA cannot accept the project "until adequate warning devices for the crossing are installed and functioning properly." 23 C.F.R. 646.214(b)(2).

Third, although the regulation does not similarly condition FHWA approval of non-federal-aid highway improvement projects on the installation of "[a]dequate" warning devices, subsection (b)(3) defines what constitutes "[a]dequate warning devices" both for projects under subsection (b)(2) and for any other "project[s] where Federal-aid funds participate in the installation." Subsection (b)(3) defines "[a]dequate warning devices" to include "automatic gates with flashing light signals" if one or more of five hazardous conditions exist or "if a diagnostic team recommends them." 23 C.F.R. 646.214(b)(3)(i).[14] If one of those conditions pertains, gates may be omitted only if "a diagnostic team justifies that gates are not appropriate" and the FHWA concurs with that determination. 23 C.F.R. 646.214(b)(3)(ii).[15]

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to the Manual are pending. See 64 Fed. Reg. 33,806 (1999) (Light Rail Transit Crossings); 64 Fed. Reg. 71,358 (1999) (Traffic Control for Highway-Rail Grade Crossings).

[14] Those five hazardous conditions are multiple main line railroad tracks; multiple tracks near a crossing where the approach of another train could be obscured; high speed train operation combined with limited sight distance; a combination of high speeds and moderately high volumes of highway and railroad traffic; or a high volume of vehicular traffic, high number of train movements, substantial numbers of schoolbuses or trucks carrying hazardous materials, unusually restricted sight distance, continuing accident occurrences, or any combination of the latter conditions. 23 C.F.R. 646.214(b)(3)(i).

[15] A "diagnostic team" is a group of knowledgeable representatives of the parties of interest in a railroad-highway crossing, who are selected by a State to evaluate individual crossings for improvement. See 23 C.F.R. 646.204; *Crossing Handbook* 79. The team usually includes a highway traffic engineer, a railroad signal engineer, and, as appropriate, representatives of highway design and maintenance agencies and federal, state,

Fourth, for individual crossings where the requirements of subsection (b)(3) are not applicable, "the type of warning device to be installed, whether the determination is to be made by a State regulatory agency, State highway agency, and/or the railroad, is subject to the approval of FHWA." 23 C.F.R. 646.214(b)(4). The federal regulations thus contemplate continued participation by railroads in the process of selecting and installing warning devices for individual crossings. *Easterwood*, 507 U.S. at 671.[16]

2. a. The Tennessee Department of Transportation participates in the federal Crossings Program. As required by 23 U.S.C. 130, Tennessee established a hazard priority program for grade-crossing improvements, under which it has compiled a prioritized list of the 3459 grade crossings in the State based on a computer assessment of over 50,000 factors. Pet. 8; J.A. 98, 100. When a crossing reaches the top of the list, Tennessee convenes a diagnostic team to evaluate the individual crossing and determine what types of protective devices are needed there. J.A. 100-101.

Tennessee separately implemented a minimum protection program, which, as required by 23 U.S.C. 130(d), provides for the installation of base-level warning signs at all public crossings in the State. Pet. 8; J.A. 98, 102. Unlike the prior-

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and local government officials. *1989 Study* 4-9; see also *1971 Report* 73 (diagnostic teams also may include law enforcement agencies, railroads, and research organizations).

[16] See also 23 C.F.R. 646.216(b) ("preliminary engineering work" may be done by railroads). Railroads generally do not participate on diagnostic teams in Tennessee, apparently because of the logistical difficulties of coordinating the numerous railroad companies that use a given crossing. Nevertheless, the railroads still conduct their own field reviews of Tennessee's proposed improvements, prepare plans, develop and design the projects for improvements, "complete the preliminary engineering," and "complete the construction" of improvements "about 96% of the time." See FHWA, Tenn. Div. Off., *Railroad Grade Crossing Program Process Review* 4, 6, 9 (Dec. 1996). The railroads also can independently review crossing hazards and submit plans for improvement and proposed financing to the State. J.A. 97, 108-109.

ity program, the minimum protection program entailed no individualized engineering judgment about the proper types of warning devices for the particular grade crossings. J.A. 105. In 1987, the Oakwood Church Road crossing in Gibson County was part of a group of 196 crossings in eleven west Tennessee counties that were equipped with the minimum warning signs. J.A. 102-103, 133.

b. Shortly after 5:00 a.m. on October 3, 1993, an unscheduled train of petitioner's struck and killed respondent's husband while he was driving his car at approximately 20 miles per hour across the Oakwood Church Road crossing. Pet. App. 2a-3a; J.A. 50, 66. Respondent sued petitioner for damages under Tennessee statutory and common law. Pet. App. 2a. As relevant here, respondent alleged that petitioner was negligent in failing to install adequate warning devices at the crossing. *Ibid.*

Petitioner moved for summary judgment, contending that respondent's claim was preempted by the Railroad Act and the Secretary's regulations implementing the Crossings Program. The district court denied the motion, finding no preemption because the federally funded warning devices were erected as "only a small part of a minimum protection program designed to place such minimum protection at all Tennessee crossings," rather than as a result of an evaluation of the crossing by a diagnostic team pursuant to the federal regulations governing the priority review program. Pet. App. 34a, 36a. After a trial, a jury found Eddie Shanklin 30% negligent and petitioner 70% negligent. *Id.* at 2a.

c. The court of appeals affirmed. Pet. App. 1a-25a. It held that respondent's tort claim regarding the inadequacy of warning devices was not preempted simply because federal funds were expended to post the minimum warning signs. That broad preemption theory, in the court's view, would turn every funding decision "into an eradication of state sovereignty, regardless of how or why the decision was made." *Id.* at 17a. The court also rejected petitioner's argu-

ment that 23 U.S.C. 409 prevents railroads from properly defending such tort actions. Pet. App. 22a.

SUMMARY OF ARGUMENT

Tennessee's receipt of federal funds to install the minimum level of crossing protection required by 23 U.S.C. 130(d) and 23 C.F.R. 646.214(b)(1) does not preempt all state laws requiring the provision of additional protection at individual crossings. First, Congress has crafted a calibrated preemption provision that limits preemption to those regulations issued by the Secretary that cover the subject matter of state tort law. The regulation implementing the minimum protection requirement in 23 U.S.C. 130(d) does exactly the opposite, expressly opening the door to the States' requirement of additional warning devices at crossings. Both the statutory and the regulatory requirement of minimal protection, moreover, appear within a framework of rules that separately directs participating States to undertake particularized reviews of the protections needed by each individual crossing in the State and to install protective devices that are adequate to meet the unique conditions and circumstances present at each crossing. The Secretary's conclusion, confirmed by the statutory and regulatory text, that the minimal-protection regulation is not preemptive should be dispositive.

Second, the text and structure of both Section 130(d) and 23 C.F.R. 646.214(b) make clear that installation of the minimum warning signs does not oust either state officials or railroads of their traditional authority to determine the necessary level of protection for individual crossings. The minimum protection program was designed to establish a federal floor of protection pending the long-term completion of the States' prioritized programs for bringing an adequate level of protection to each crossing. Petitioner's reliance on regulations governing federal funding of that long-term prioritization program, 23 C.F.R. 646.214(b)(3) and (b)(4)—

and this Court's decision in *CSX Transportation, Inc.* v. *Easterwood*, 507 U.S. 658 (1993), interpreting the preemptive scope of those regulations—is thus misplaced. The latter regulations interpose a decisional process that prescribes what protections are adequate for individual crossings and how that determination of adequacy should be made in each case, thereby supplanting with a federally prescribed decisional process the crossing-specific determinations of adequacy normally made by a state official or a jury in a state-law tort suit. The statutory and regulatory requirement of across-the-board minimum protection, by contrast, leaves that state-law process for individualized assessments intact.

Third, the fact that the federal government has provided funding is alone insufficient to trigger preemption. The federal government routinely provides billions of dollars in funding to States without preempting their laws. Rather, as this Court held in *Easterwood*, only substantive regulations that cover the subject matter of state law are preemptive. The only role of federal funds under the Crossings Program is to limit the scope of preemption worked by a substantive regulation.

Finally, the evidentiary constraints imposed by 23 U.S.C. 409 (1994 & Supp. III 1997), which prohibits the use of studies and other documents underlying the States' prioritization program as evidence, do not alter the analysis. Section 409 simply creates a deliberative-process privilege to facilitate a thoroughgoing review of what protective devices are appropriate for crossings. It does not protect the final federal decision to fund a State's priority improvement project. Nor does it preclude the determination whether a crossing improvement was part of a categorized minimum protection program or, instead, was the product of individualized review under 23 C.F.R. 646.214(b)(3) and (b)(4).

ARGUMENT

A STATE'S INSTALLATION, WITH FEDERAL FINANCIAL ASSISTANCE, OF THE MINIMUM ADVANCE-WARNING SIGNS REQUIRED BY FEDERAL LAW DOES NOT PREEMPT STATE LAW REQUIRING ADDITIONAL PROTECTION AT A RAILWAY-HIGHWAY GRADE CROSSING

A. Established Principles Of Preemption Favor Preservation Of Tennessee's Tort Law

Under the Supremacy Clause, U.S. Const., Art. VI, Cl. 2, if a state law conflicts with or frustrates the operation of federal law, the state law must yield. *CSX Transp., Inc.* v. *Easterwood*, 507 U.S. 658, 663 (1993). Preemption analysis turns upon congressional intent, as revealed through the text and structure of the statute at issue. *Id.* at 664; see also *Medtronic, Inc.* v. *Lohr*, 518 U.S. 470, 484 (1996). In this case, Congress spoke directly to the question of preemption in the text of the Railroad Act, expressly providing that the States "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.[17] While the Railroad Act grants broad preemptive authority to the Secretary, four considerations weigh against a determination that the Secretary's regulation governing the minimum warning requirement preempts Tennessee tort law.

First, by limiting preemption to those federal rules, regulations, and orders that "cover[]" the subject matter of state law, Congress confined preemption to situations in which the federal regulations "substantially subsume the subject

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[17] The preemption provision's reference to a state "law, rule, regulation, order, or standard" encompasses duties imposed through state tort law. *Easterwood*, 507 U.S. at 664.

matter of the relevant state law." *Easterwood*, 507 U.S. at 664. It thus is not enough to show that the federal regulations "touch upon or relate to" the same matters as state law. *Ibid.* The federal rule must substantially occupy the place of state law.

Second, the overall structure of the Crossings Program evidences Congress's intent to preserve to the extent possible the States' historic role in regulating crossing safety. For example, the Crossings Program relies upon the voluntary participation of the States in the funding programs and largely leaves the ultimate selection and implementation of improvement projects to the States. See 23 U.S.C. 130 (1994 & Supp. III 1997); 23 C.F.R. Pt. 924. The Railroad Act mandates that the Secretary "maintain a coordinated effort to develop and carry out solutions to the railroad grade crossing problem." 49 U.S.C. 20134(a); see also 23 U.S.C. 401 (similar, for highway safety programs). Various statutory provisions governing highway safety share with or delegate to the States the exercise of federal regulatory authority.[18]

The preemption provision itself also demonstrates sensitivity to the States' interests. All state laws pertaining to railroad safety remain intact unless and until the Secretary prescribes a regulation covering their subject matter. 49 U.S.C. 20106. Even after federal standards are promulgated, "the states may adopt more stringent safety requirements 'when necessary to eliminate or reduce an essentially local safety hazard,' if those standards 'are not incompatible with' federal laws or regulations and not an undue burden on interstate commerce." *Easterwood*, 507 U.S. at 662. The preemption provision thus "displays considerable solicitude

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[18] See 23 U.S.C. 117; Transp. Equity Act for the 21st Century, Pub. L. No. 105-178, § 1305(a), 112 Stat. 107 (to be codified at 23 U.S.C. 106(c)); Intermodal Surface Transp. Efficiency Act of 1991, Pub. L. No. 102-240, § 1016, 105 Stat. 1945. Tennessee has executed an oversight agreement with the FHWA, and the installation of minimum warning signs was made pursuant to that agreement.

for state law in that its express pre-emption clause is both prefaced and succeeded by express savings clauses." *Id.* at 665.

Third, this Court has long recognized that authority over public safety at grade crossings falls peculiarly within the regulatory power of the States.[19] Where, against such a backdrop, Congress carefully crafts a preemption provision to protect competing state interests and structures a statutory scheme to preserve the States' traditional regulatory role, this Court should hesitate to find preemption "[i]n the interest of avoiding unintended encroachment on the authority of the States." *Easterwood*, 507 U.S. at 663-664. Thus, absent evidence that it was the "clear and manifest purpose of Congress," *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947), or of the Secretary that the federal "minimum" level of protection for all grade crossings preempt all state efforts—whether through statute, rule, or common law—to provide protection beyond that federal minimum, state law should not be impeded.

Finally, just as the preemption accomplished by a statute turns on congressional intent, the preemptive scope of federal regulations likewise turns upon the intent of the promulgating authority—in this case, the Secretary of Transportation, acting through the FHWA. Unless foreclosed by the regulation's plain text, the agency's interpretation of its regulations, including their preemptive scope and effect, should be dispositive.[20] Here, the Secretary does not

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[19] See, *e.g.*, *Lehigh Valley R.R.* v. *Board of Pub. Util. Comm'rs*, 278 U.S. 24, 34-35 (1928); *Southern Ry.* v. *King*, 217 U.S. 524, 532-533 (1910); *Cleveland, C., C. & St. L. Ry.* v. *Illinois*, 177 U.S. 514, 516-517 (1900); *Railroad Comm'n Cases*, 116 U.S. 307, 334 (1886); see also FHWA, *Traffic Control Devices Handbook* 8-7 (1983) (*Traffic Control Handbook*) ("Jurisdiction over railroad-highway grade crossings resides almost exclusively in the States.").

[20] See *Medtronic*, 518 U.S. at 496; *id.* at 505-506 (Breyer, J., concurring); *Hillsborough County* v. *Automated Med. Labs., Inc.*, 471 U.S. 707, 714-715 (1985); cf. *Auer* v. *Robbins*, 519 U.S. 452, 461-462 (1997).

construe his regulations to preempt the States from imposing, either by statute or common law, a higher level of protection at a crossing on which federal funds were expended only to install the bare minimum level of protection required by federal law.

B. The Federal Requirement That Minimum Warning Signs Be Posted At All Grade Crossings Does Not Preempt State Laws Requiring Additional Protection At Individual Crossings

1. Congress has mandated that all States receiving federal funds for the "elimination of hazards of railway-highway crossings," 23 U.S.C. 130 (1994 & Supp. III 1997), must "[a]t a minimum * * * provide signs for all railway-highway crossings," 23 U.S.C. 130(d). The Secretary's regulations elaborate upon this requirement by requiring installation of the minimum signage requirements outlined in the Manual. 23 C.F.R. 646.214(b)(1). It is undisputed that Tennessee posted only the minimum warning signs at the Oakwood Church Road crossing as part of an effort to furnish a group of 196 crossings a base level of protection under its "minimum protection program," rather than through an individualized evaluation of that specific crossing under its priority improvement program. See J.A. 98-107; Pet. 8-9; Pet. Br. 19-20.

The federal requirement that States install a minimum level of protection does not preempt the States' ability to mandate enhanced protections at individual crossings. "By its very terms, in fact, the statute purports only to establish *minimum* standards." *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U.S. 132, 148 (1963); see *Shots* v. *CSX Transp., Inc.*, 38 F.3d 304, 308 (7th Cir. 1994) ("Minimum is not a synonym for optimum, or even adequate.").[21] And the

[21] See also *Cipollone* v. *Liggett Group, Inc.*, 505 U.S. 504, 518 (1992) ("That Congress requires a particular warning label does not automatically pre-empt a regulatory field."); *Hillsborough*, 471 U.S. at 722 n.5

statute and regulation do so in a context that clearly anticipates the installation of additional protective devices by States at those very same crossings. Section 130(d) imposes the minimum signing requirement as the first step in a long-term process under which the States will "conduct and systematically maintain a survey of all" highway-railway grade crossings, "identify those railroad crossings which may require separation, relocation, or protective devices," and "establish and implement a schedule of projects" for such repairs. 23 U.S.C. 130(d).

Similarly, the Secretary's regulation expressly provides that the minimum required by the Manual can be "supplemented to the extent applicable by State standards." 23 C.F.R. 646.214(b)(1).[22] That provision, moreover, immediately precedes a number of other regulatory provisions that govern the States' efforts to provide "[a]dequate warning devices" for individual crossings improved under the States' priority programs. See 23 C.F.R. 646.214(b)(2)-(b)(4). Thus, contrary to petitioner's assertion (Br. 42), even after installation of the minimum warning signs, "the final authority to decide what warning system is *needed*" at individual crossings remains squarely in "the railroad's and the state's hands" (*ibid.* (emphasis added)).

In short, while Congress, through the Crossings Program, intended eventually "that every railroad crossing in America will be provided with modern, up-to-date, protection adequate to the risks of *each such crossing*," H.R. Rep. No. 118, 93d Cong., 1st Sess. 35 (1973) (emphasis added), the minimum protection requirement ensures that, both in the interim and at the conclusion of the priority review process,

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("The federal interest at stake here is to ensure minimum standards, not uniform standards.").

[22] See also *Easterwood*, 507 U.S. at 669-670 (Manual is not preemptive of state tort law requiring additional protections); *Traffic Control Handbook* 1-2 (States have imposed "more stringent requirements than the minimums expressed in the [Manual]").

travelers will never again come upon a grade crossing (let alone a train) without some standardized advance warning of the danger.[23] There is accordingly no textual or structural basis for concluding that installation of the minimum warning signs required by federal law preempts States from implementing those additional protective measures that either federal or state law separately requires.[24] To the contrary, the "structure and purpose" of 23 U.S.C. 130(d) and 23 C.F.R. 646.214(b) "as a whole" (*Gade* v. *National Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 98 (1992)) leave no doubt that Congress intended the imposition of a minimum protection requirement to establish "a floor beneath which [public protection] may not drop—not a ceiling above which [it] may not rise" (*California Fed. Sav. & Loan Ass'n* v. *Guerra*, 479 U.S. 272, 285 (1987)).

2. Petitioner contends (Br. 26-30) that the Secretary's regulations governing, not minimum, but "[a]dequate warn-

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[23] See FHWA, *Federal-Aid Highway Program Manual*, Transmittal 39, at 6 (July 3, 1974) (*FHWA Program Manual*) ("As a *first priority* [under the Crossings Program] each State * * * shall identify those grade crossings at which there are either no signs or nonstandard signs and institute an improvement program to provide signing and pavement markings in compliance with the [Manual] at all grade crossings.") (emphasis added); 23 C.F.R. 924.9(b) (in state plans under the Crossings Program, "special emphasis shall be given to the legislative requirement that all public crossings be provided with standard signing"); *1975 Annual Report* 77 (Dec. 1974) ("First priority shall be given to those grade crossings at which there are no warning signs or nonstandard signs."); 119 Cong. Rec. 28,108 (1973) (Rep. Dorn) ("we must do all that we can on an orderly, priority basis").

[24] The Secretary's annual reports to Congress (see 23 U.S.C. 130(g) (1994 & Supp. III 1997)) likewise separately tracked the States' performance in implementing Section 130(d)'s minimum protection mandate and in the success of their priority improvement programs. See, *e.g.*, *1991 Annual Report* IV-3 (Apr. 1991) (approximately half the States are in full compliance with the minimum signing requirements); *1988 Annual Report* 21 (Apr. 1988) (same); *id.* at D-4 (Tennessee remains out of compliance with minimum standard); *1977 Annual Report*, H.R. Doc. No. 136, 95th Cong., 1st Sess. 11 (1977).

ing devices" for grade crossing improvements, 23 C.F.R. 646.214(b)(3) and (4), preempt any and all state rules requiring the installation of more than minimal protection at individual crossings, as long as the crossing was previously outfitted with minimum signage protection under Section 130(d) and 23 C.F.R. 646.214(b)(1). That argument mixes apples and oranges. Subsections (b)(3) and (b)(4) of 23 C.F.R. 646.214 govern, as the name suggests, what shall be regarded as "adequate" protection for individual crossings as part of a State's prioritized crossing improvement program. By their very terms, those regulations do not apply to across-the-board installations of minimum requirements, because those installations entail no individualized studies of the crossings or determinations that signage that satisfies the minimum requirements for all crossings is also adequate for each particular crossing.

More specifically, subsection (b)(3) directs that gates with flashing lights must be installed at each crossing if a particularized review of conditions reveals either specified operations *at that crossing* that increase the risk of accidents or if "[a] diagnostic team recommends them." 23 C.F.R. 646.214(b)(3)(f). The applicability of (b)(3) thus cannot be determined without a diagnostic team reviewing the particular crossing. Likewise, subsection (b)(4) applies only "where the requirements of § 646.214(b)(3) are not applicable." Again, a decision concerning subsection (b)(3)'s applicability or inapplicability cannot be made without particularized review of the crossing's conditions. Subsection (b)(4) also requires a "determination" by the relevant state official or railroad regarding what would constitute "[a]dequate warning devices" for that crossing.[25] In short, it is only devices

[25] Similarly, the Manual makes clear that, beyond the minimum requirements identified for crossings, "[t]he selection of traffic control devices at a grade crossing is [to be] determined by public agencies having jurisdictional responsibility at specific locations." Manual § 8D-1. "[W]hether any active traffic control system is required at a crossing and,

installed on the basis of such individualized determinations, made through the application of a federally prescribed decisional process as part of a State's approved plan for prioritizing and implementing crossing improvements statewide, that qualify as "adequate" warning devices under 23 C.F.R. 646.214(b)(3) and (b)(4).[26]

Indeed, petitioner proves our point with its lengthy discussion (Br. 36-39) of the Secretary's "historic practice of relying on *expert* state determinations in approving the *adequacy* of warning devices" (Br. 39) "*at a particular crossing*" (Br. 36), both prior to and under subsections (b)(3) and (b)(4). (Emphases added.) What petitioner fails to come to grips with, however, is that no such "expert" determination was ever made about the "adequacy of warning devices" at this "particular crossing." J.A. 105-107. Nor, the Department of Transportation informs us, are such determinations generally made as part of States' compliance with the minimum-protection requirement.[27] We similarly agree with peti-

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if so, what type is appropriate," will depend on the determination of the responsible authority "[b]ased on an engineering and traffic investigation" of that particular crossing. *Ibid.*

[26] See also Fed. Railroad Admin., *Rail-Highway Crossing Safety Action Plan* 5 (June 1994) (*Action Plan*) ("highway-rail crossings are selected by highway authorities for safety improvements *one at a time*") (emphasis added); *1989 Study* 4-9 ("Based on an engineering and traffic investigation, a determination is made as to which type of traffic control system is required at a crossing. This investigation is made by a diagnostic team."); *FHWA Program Manual* 7 ("The priority schedule of crossing improvements should be based on: *1* The ranking of crossings using the State's current hazard index. *2 An onsite inspection. 3* Accident history.") (emphasis added); *Crossing Handbook* at 63 (priority improvements are to be based on, among other things, "onsite inspections of public crossings"); *id.* at 79 ("Engineering studies should be conducted of those railroad-highway grade crossings that have been selected from the priority schedule" to "review the crossing and its environment; identify the nature of the problem; and, recommend alternative improvements.").

[27] See Pltf. Mem. in Support of Sum. J., Exh. 4 at 8-9 ("No, there was no engineering judgment in the minimum protection program. It was a * * * program whereby we wanted every crossing, regardless, to have a

tioner's State amici (Br. 10-14) that preemption is appropriate when a State has brought the prescribed federal decisional process to bear on a particular crossing and, through that federal program, has determined precisely what "combination of enhancements comprise the *best*"—not minimum—"solution for the safety to the traveling public at *that crossing* location" (Br. 12) (emphases added). We disagree only with the extension of that preemption to the routine, categorized installation of minimum protection at every crossing statewide. Rather, as those amici acknowledge (Br. 10 n.6), until an individual crossing has been improved under a State's priority program, responsibility for that crossing will "continue to be maintained by the railroads."

That limited scope of preemption under subsections (b)(3) and (b)(4) comports with Congress's requirement that a regulation "cover[] the subject matter" of state law before it will be preempted. Through subsections (b)(3) and (b)(4), the Secretary has interposed a prescribed federal decisional process for identifying precisely what protections are "adequate" for individual crossings and has carved out the specific role for railroads to play in that process. See *Easterwood*, 507 U.S. at 670-671 (when the provisions of 23 C.F.R. 646.214(b)(3) and (4) "are applicable," "the Secretary has determined the devices to be installed and the means by

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certain minimum."); *id.* at 37 ("[T]here was no engineering judgment. We were making sure there was a minimum protection at every crossing."); 1 Dep. of W. Cantrell 17 (May 3, 1995) (minimum protection and priority program are "two distinct programs"); *id.* at 8 (minimum program implemented simply by "compil[ing] a list of the crossings statewide"); *Shots*, 38 F.3d at 308-309 (minimum protection installed at 2638 crossings without "a determination by the State of Indiana or the federal Secretary of Transportation as to what safety devices would be adequate at each of the thousands of crossings covered by it"); Pet. for Writ of Cert. 13, *Bock* v. *St. Louis S.W. Ry.*, No. 99-538 ("minimum" protection installation undertaken without gathering information about individual crossings); *Action Plan* 35 ("[L]ow-volume crossings are seldom reviewed by diagnostic teams and any work done at these crossings is usually limited to the installation of passive warning devices.").

which railroads are to participate in their selection"). In so doing, the Secretary's regulation has substantially subsumed the role traditionally played by state officials or by the jury in a tort suit in determining the appropriate level of protection for an individual crossing and assigning a level of responsibility for providing such protection to the railroads.

By contrast, under 23 U.S.C. 130(d) and 23 C.F.R. 646.214(b)(1), implementation of the minimum warning requirement (i) brings no focused federal decisional process to bear on the adequacy of a particular crossing's protective devices, (ii) entails no determination of what protections are "adequate" for a given intersection based on its own particular conditions and usages, and (iii) offers no federally prescribed role for railroads in installing the statutorily prescribed minimum level of protection. Rather, the statutory and regulatory scheme expressly leave to future study and review by the State and/or railroads the decision as to what level of protection each individual crossing actually warrants. See *Hillsborough County* v. *Automated Med. Labs., Inc.*, 471 U.S. 707, 721 (1985) (where no federal official "has struck a particular balance between safety and quantity" and the "regulations, which contemplated additional state and local requirements, merely establish minimum safety standards," additional protections by local government are not preempted). Section 130(d) and 23 C.F.R. 646.214(b)(1) therefore do not "cover[] the subject matter" of state tort law.[28]

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[28] It is, moreover, difficult to reconcile petitioner's argument (Br. 19-20) that Tennessee's minimum protection program requires the installation of additional warning requirements beyond the federal minimum with petitioner's simultaneous argument that installation of the minimum protection with federal funds preempted any Tennessee law—common law or otherwise—that requires additional protection at grade crossings. In any event, petitioner errs in characterizing the Tennessee program as exceeding the federally prescribed minimum. See n.12, *supra*; J.A. 54 (speed limit for road at issue was 55 mph, requiring pavement markings); see also *1987 Annual Report* 48 (Apr. 1987) (federal minimum requirements are

C. Federal Funding Of The Minimum Warning Devices Alone Is Insufficient To Trigger Preemption

1. Petitioner places great weight (Br. 27-30) on the fact that federal funds financed the installation of the minimum warning signs in this case. But the provision of federal funds is not a "regulation" or "order" of the Secretary that "cover[s] the subject matter" of any state law. 49 U.S.C. 20106. Indeed, the federal government routinely provides billions of dollars to the States without preempting their laws or regulations.

Petitioner contends (Br. 25-30) that, under *Easterwood*, "[f]ederal funding is the touchstone of preemption in this area." Br. 29. *Easterwood* held no such thing. If federal funding sufficed to trigger preemption, then there would have been no need for the Court carefully to parse the various regulations to determine which "cover[ed] the subject matter" of state tort law. See *Easterwood*, 507 U.S. at 667-671. Instead, *Easterwood* held only that, when subsections (b)(3) and (b)(4) "are applicable, state tort law is preempted," 507 U.S. at 670, because the regulation's provision for individualized crossing improvements based on diagnostic studies and particularized analyses "cover[s] the subject matter of state [tort] law which * * * seeks to impose an independent duty on a railroad to identify and/or repair dangerous crossings," *id.* at 671.

Correspondingly, *Easterwood* correctly "cast doubt" on the view, which petitioner renews, that group—rather than

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"crossbucks, advance warning signs, and pavement markings"). Petitioner is also mistaken in contending (Br. 20 n.12) that the Tennessee minimum protection program "uses the full panoply of passive warning devices," since it does not include stop signs, yield signs, other warning signs, continuously flashing lights, rumble strips, enhanced crossing illumination, stop lines, or supplemental pavement markings. See Manual § 8B-5; FHWA, *Notice of Proposed Amendments to the Manual on Uniform Traffic Control Devices*, Pts. III, IV & VIII §§ 8B.7, 8B.9 (Jan. 6, 1997); 64 Fed. Reg. at 71,365.

individually focused—projects, under which a particular crossing's protective needs were neither reviewed nor implemented, fall within the preemptive scope of subsection (b)(3) or (b)(4). See 507 U.S. at 672. It is only for those crossing improvement "projects in which federal funds participate in the installation of warning devices," based upon the individualized review prescribed by subsections (b)(3) and (b)(4), that it can accurately be said that "the Secretary has determined the devices to be installed *and* the means by which railroads are to participate," *Easterwood*, 507 U.S. at 671, thereby warranting preemption under the *Easterwood* rationale.[29]

The only role played by federal funds in *Easterwood* was to limit the scope of preemption worked by the substantive regulation. It was only after first having identified a regulation that "cover[ed] the subject matter of state law," 507 U.S. at 671, that the Court inquired if the funding "precondition[]" for application of that substantive regulation had been met, *ibid.*

In short, the central flaw in petitioner's argument is its equation of the federally funded, categorized installation of minimum warning signs under 23 U.S.C. 130(d) and 23 C.F.R. 646.214(b)(1), with individual federally funded grade-crossing improvements under which warning devices that actually are determined to be adequate to the particular needs of a specific crossing are installed following specialized

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[29] The government's brief in *Easterwood* was similarly limited to grade-crossing improvement projects that installed "adequate" devices under 23 C.F.R. 646.214(b)(3) and (4). See, *e.g.*, Gov't Br. at 8, 12, 23-24, 27 & n.31, *CSX Transp., Inc.* v. *Easterwood*, *supra* (Nos. 91-790 & 91-1206). The brief did not address preemption under the minimum protection program. Indeed, the brief noted that federal law requiring "all crossings [to] be equipped, at a minimum with a cross-buck warning signs" is an "exception" to the general rule that the "Manual does not generally specify when particular safety devices are required." *Easterwood* Br. at 10 (citing Manual § 8B-2 and 23 U.S.C. 130(d)); see also *id.* n.9. The brief thus identifies the limits of its preemption argument.

diagnostic review, under 23 C.F.R. 646.214(b)(3) and (b)(4). It is only in the latter situation that the subject matter of standards of care imposed through state tort law is covered —and thus preempted—because it is only then that the crossing-specific determination of adequacy normally made by a jury or state officials is supplanted by a similarly individually focused federal decisional process.

2. Petitioner argues (Br. 36-40) that, by statute and regulation, the Secretary could not finance the State's installation of minimum warning signs without first finding that the minimum was also "adequate" protection for each of the hundreds or thousands of crossings involved in a State's minimum improvement program. Petitioner relies, in particular, upon 23 U.S.C. 109(e), which provides in relevant part that

> No funds shall be approved for expenditure on any Federal-aid highway, or highway affected under chapter 2, of this title, unless proper safety protective devices complying with safety standards determined by the Secretary at that time as being adequate shall be installed or be in operation at any highway and railroad grade crossing * * *.

The short answer is that Section 109(e) has no application to this case, or to the approximately 80% of all public grade crossings off the federal highway system (*1971 Report* i, 26), because they are neither "Federal-aid highway[s]" (23 U.S.C. 101) nor "highway[s] affected under chapter 2" (23 U.S.C. 201 *et seq.*). See J.A. 128; *Easterwood*, 507 U.S. at 670 n.10.[30]

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[30] The fact that, in 1976, Congress authorized the Secretary to fund off-system projects "subject to all the provisions of chapter 1 of title 23," Pub. L. No. 94-280, § 203(a), 90 Stat. 452, does nothing to advance petitioner's case (see Pet. Br. 10-11 n.7). That provision was repealed two years later and replaced with an authorization to fund projects "on any public road" without any reference to chapter 1 or Section 109(e). Pub. L. No. 95-599, § 203(a) and (b), 92 Stat. 2728.

The longer answer is that, even if 109(e) did apply, it does not tie the Secretary's hands in the manner petitioner proposes. Section 109(e) does not restrict the Secretary to funding only those projects that immediately accomplish all aspects of highway safety. Rather, Section 109(e) requires only that the Secretary find that the protective devices being installed are "adequate" "at that time." The statute thus dictates a contextual and time-sensitive inquiry.[31] The Secretary may not fund minimum warning-sign installation programs unless the State proposes to install the "proper" minimum warning signs prescribed by federal law (*i.e.*, the Manual, 23 C.F.R. 646.214(b)(1), and 23 U.S.C. 130(d)). Likewise, the Secretary may not fund individual crossing improvement projects unless they propose to install protective devices that both conform to the Manual and are adequate for the needs of the particular intersection (*i.e.*, lights and gates for subsection (b)(3) crossings). Under petitioner's cramped reading of 109(e), by contrast, the Secretary could furnish no funds at all for the minimum signage program that Congress made its "first priority" under 23 U.S.C. 130(d), *FHWA Program Manual* 6, because such programs by definition install minimum rather than adequate protection. This Court should hesitate to read Sections 109(e) and 130(d) in such self-defeating terms.[32]

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[31] See *Medtronic*, 518 U.S. at 502 (opinion of Stevens, J.) ("the meaning of words must always be informed by the environment within which they are situated").

[32] Petitioner's invocation (Br. 35; Pet. 7) of 23 C.F.R. 630.106, which governs the authorization of federal funds, fails for the same reason. The "prerequisite requirements" of federal law connote the same contextual and project-sensitive interpretation as Section 109(e). See *Martin* v. *OSHRC*, 499 U.S. 144, 150-151 (1991) (courts accord substantial deference to an agency's interpretation of its own regulations). Because 23 U.S.C. 109(e) neither means what petitioner reads it to mean nor has any relevance to this case, the fact that some prior versions of the regulation (see 23 C.F.R. 630.114(b) (1988)) included an "*e.g.*" reference to 109(e) in dis-

3. Finally, petitioner's position requires the Court to ignore the very rationale for preemption upon which it relied in *Easterwood*, and subverts, rather than fosters, the railroad safety concerns that animate the Railroad Act and the Highway Safety Act. In *Easterwood*, this Court explained that a "scheme of negligence liability" could "complement" the Secretary's regulations governing the prioritization of crossing hazards "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." 507 U.S. at 668.

Transforming the States' compliance with Congress's first priority of providing minimal warning signs at crossings nationwide into a blanket immunization for the railroads from tort liability, as petitioner advocates, would defeat the goal of full informational disclosure and sharply reduce the railroads' incentive to recommend, endorse, or support crossing improvements. Under petitioner's theory, the State's erection of crossbucks and the minimum warning signs at a crossing would relieve the railroads of all responsibility to cooperate with diagnostic teams, to alert the State that their trains have sharply increased their speed or frequency, or to report an increased number of school buses at a crossing due to the construction of a new school nearby.[33] The impact of petitioner's theory, moreover, would be sweeping. Currently, more than one-half of all public crossings are equipped with only the minimum warning signs. *Audit Report* 3. It thus would be "spectacularly odd" (*Medtronic*, 518 U.S. at 491 (opinion of Stevens, J.) to conclude that Con-

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cussing the authorization of funding for highway projects likewise does not assist petitioner's argument (Pet. Br. 16, 35).

[33] See *1971 Report* 55 (in one year, school buses were involved in 255 near misses with trains; trucks carrying flammable materials were involved in 203 near misses).

gress intended the provision of limited financial assistance[34] to the States' minimum programs

> to preclude tort liability for the railroad's failing to have active warning devices at any of the thousands of crossings [subject to such agreements] 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 ha[s] 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.[35]

D. The Evidentiary Privilege Created By 23 U.S.C. 409 Comports With The Preservation Of State Tort Law

Finally, petitioner contends (Br. 42-48) that Tennessee's tort law should be preempted because 23 U.S.C. 409 (1994 & Supp. III 1997) restricts the ability of railroads to prove that the required diagnostic review process has been undertaken. Section 409 provides:

> Notwithstanding any other provision of law, reports, surveys, schedules, lists, or data compiled for the purpose of identifying, evaluating, or planning the safety enhancement of potential accident sites, hazardous roadway conditions, or railway-highway crossings, pursuant to sections 130, 144, and 152 of this title * * * shall not be subject to discovery or admitted into evidence in a

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[34] The average cost of each of Tennessee's minimum protection projects in 1987 was approximately $665. J.A. 128.

[35] Because the regulation applies only if federal funds participate in the "installation of the devices," 23 C.F.R. 646.214(b)(3); see also 23 C.F.R. 646.214(b)(2), preemption does not occur under the Secretary's regulations until the warning devices approved as adequate for the individual intersection are actually installed and operational. See *St. Louis S.W. Ry.* v. *Malone Freight Lines, Inc.*, 39 F.3d 864, 867 (8th Cir. 1994), cert. denied, 514 U.S. 1110 (1995).

> Federal or State court proceeding or considered for other purposes in any action for damages arising from any occurrence at a location mentioned or addressed in such reports, surveys, schedules, lists, or data.

Petitioner misunderstands the operation of that privilege. Congress enacted Section 409 in 1987 (see Pub. L. No. 100-17, Title I, § 132(a), 101 Stat. 170) to ensure that the States' priority lists for crossing improvements would not become a fount of litigation against state officials and to promote the candid sharing of information about individual crossing conditions by knowledgeable parties.[36] The rule thus functions as a deliberative-process privilege, protecting the data, communications, and underlying information compiled by the parties involved in crossing improvements.

Nothing in either the text of Section 409 or the purpose of the privilege precludes the introduction of evidence concerning the final decision made by regulatory authorities, the final determination regarding appropriate protective devices made by a diagnostic team, or the mere fact that a specialized assessment of an individual crossing was or was not made. Indeed, in this case, witnesses, who were cognizant of the limitations of Section 409, properly testified to the fact that no engineering study was made at the Oakwood Church Road and that the signs were installed as part of a minimum protection program rather than a priority improvement project. See J.A. 100-107, 115-117, 125-126. Similar evidence apparently has been introduced in other cases. See n.27, *supra*; *Bock* v. *St. Louis S.W. Ry.*, 181 F.3d 920, 921 (8th Cir. 1999) (evidence that diagnostic team inspected particular crossing), petition for cert. pending, No. 99-538. Courts ac-

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[36] See Pet. App. 20a; *Harrison* v. *Burlington N. R.R.*, 965 F.2d 155, 160 (7th Cir. 1992); *Robertson* v. *Union Pac. R.R.*, 954 F.2d 1433, 1435 (8th Cir. 1992); *Sawyer* v. *Illinois Cent. Gulf R.R.*, 606 So.2d 1069, 1074 (Miss. 1992); Fed. Railroad Admin., *Rail-Highway Crossing Safety Report* 15 (July 1985).

cordingly may entertain the evidence needed to make a proper preemption determination in tort cases arising from crossing accidents.

Beyond that, petitioner's (Br. 4-5, 47; Pet. 18-19) and the State amici's (Br. 15-17) objections to the supposed unfairness of holding railroads responsible in tort law for the inadequacy of warning devices are misdirected. Unless a regulation of the Secretary covers the subject matter of state law, the federal Crossings Program leaves state tort law where it finds it.[37] The federal government neither requires nor prohibits States to perpetuate the historical tort liability of railroads for failing adequately to warn the public of the danger created by the operation of their trains.[38]

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[37] The States, moreover, may have good reasons for continuing to impose tort liability on the railroads. As this Court explained in a decision sharply narrowing the authority on which petitioner relies (see Br. 5, 6 (citing *Nashville, Chattanooga, & St. Louis Ry.* v. *Walters*, 294 U.S. 405 (1935)):

> The railroad tracks are in the streets not as a matter of right but by permission from the State or its subdivisions. The presence of these tracks in the streets creates the burden of constructing grade separations in the interest of public safety and convenience. Having brought about the problem, the railroads are in no position to complain because their share in the cost of alleviating it is not based solely on the special benefits accruing to them from the improvements.

Atchison, Topeka & Santa Fe Ry. v. *Public Util. Comm'n*, 346 U.S. 346, 353 (1953); see also *1971 Report* A31 ("[W]hile railroads are private corporations, they are affected with a certain public interest, and are operated for public purposes. Railroad companies are for certain purposes quasi-public corporations * * * regulated by the public to serve the public convenience.").

[38] Similarly, the State amici's concerns (Br. 3 & n.2) about suits against the States have no bearing on the question presented here. The federal laws at issue neither create private causes of action against the States nor require the States to surrender their sovereign immunity as a condition of receiving federal funds.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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