No. ___

IN THE

Supreme Court of the United States

PATRICIA LIMMER, BILLYE JOYCE SMITH, AND BOBBY JEAN NOTHNAGEL,
Petitioners,

v.

MISSOURI PACIFIC RAILROAD COMPANY D/B/A UNION PACIFIC RAILROAD COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Texas

PETITION FOR A WRIT OF CERTIORARI

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April 15, 2010

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QUESTION PRESENTED

Whether the federally funded addition of a component of a warning device (retroreflective tape) to an existing warning device (a crossbuck warning sign) at a railroad crossing is the installation of a "warning device" under 23 C.F.R. § 646.214(b)(3) and (4) so as to preempt state-law claims of negligence under this Court's decisions in *CSX Transportation, Inc. v. Easterwood*, 507 U.S. 658 (1993), and *Norfolk Southern Railway Co. v. Shanklin*, 529 U.S. 344 (2000), where federal regulations define "[p]assive warning devices" as "traffic control devices," 23 C.F.R. § 646.204, and the responsible federal agency has ruled that retroreflective tape is not a "traffic control device."

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Patricia Limmer, Billye Joyce Smith, and Bobby Jean Nothnagle respectfully petition for a writ of certiorari to review the judgment of the Texas Supreme Court in this case.

INTRODUCTION

The Texas Supreme Court adopted a standard for preemption under the Federal Railroad Safety Act of 1970 ("FRSA") and this Court's decisions in *CSX Transportation, Inc. v. Easterwood*, 507 U.S. 658 (1993), and *Norfolk Southern Railway Co. v. Shanklin*, 529 U.S. 344 (2000), that conflicts with the standard applied by the Eighth Circuit and the highest courts of South Dakota and Louisiana. The decision below also deepens a division of authority among courts in Texas regarding the preemptive effect of a federally funded program to improve railroad crossings in that State. In holding that federal law preempts petitioners' claims, the Texas Supreme Court also disregarded the responsible federal agency's official interpretation of its own regulations, fomenting even further confusion regarding the scope of preemption in this context.

This case involves an issue of great importance for public safety at railway-highway grade crossings. A grade crossing is the intersection of a public road and a railroad track at the same level. Collisions between cars and trains at such crossings kill and injure hundreds of people each year. Traditionally, the States imposed statutory and common-law tort duties on railroads to protect the public safety at grade crossings. In 1970, Congress enacted the FRSA and authorized the Secretary of Transportation to promulgate regulations to promote railroad safety.

The FRSA contains an express preemption provision that preempts state-law claims when a federal regulation "cover[s] the subject matter of" the state-law claims. 49 U.S.C. § 20106(a)(2). In *Easterwood* and *Shanklin*, this Court addressed the preemptive effect of federal regulations on state-law tort claims for negligence. In *Easterwood*, this Court rejected the railroad's contention that federal regulation preempted all claims arising from accidents at grade crossings. Instead, the Court held in *Easterwood*, and reaffirmed in *Shanklin*, that state-law claims are preempted only when federal funds have been used to install a warning device at the crossing in question under 23 C.F.R. § 646.214(b)(3)-(4).

In this case, a warning device (crossbuck sign) was in place at the crossing in question, but it was not proven that the crossbuck had been installed using federal funds. Retroreflective tape had been added to the existing crossbuck with federal funds. The Texas Supreme Court held that the addition of the retroreflective tape to the existing crossbuck sign constituted the installation of a warning device within the meaning of § 646.214(b)(4). That holding conflicts with a decision of the Eighth Circuit, which concluded that the addition of a component part of a warning device does not establish preemption. It also conflicts with decisions from the highest courts of South Dakota and Louisiana holding that federally funded maintenance activities do not constitute the installation of a warning device under federal law. In addition, the decision below disregarded, and gave no deference to, the responsible federal agency's official interpretation of its own regulations. This Court's guidance on the proper interpretation of federal law is needed to restore uniformity to the standard for

preemption of state-law claims arising from accidents at public grade crossings.

OPINIONS BELOW

The opinion of the Texas Supreme Court (Pet. App. 1a-27a) is reported at 299 S.W.3d 78. The opinion of the Texas Court of Appeals (Pet. App. 28a-75a) is reported at 180 S.W.3d 803. The orders of the District Court of Harris County, Texas, granting judgment to petitioners (Pet. App. 76a-78a) and denying respondent's motion for judgment notwithstanding the verdict (*id.* at 79a) are not reported (but are available at 2002 WL 34102422 and 2002 WL 34102421, respectively).

JURISDICTION

The Texas Supreme Court entered judgment on October 23, 2009, and denied a petition for rehearing on January 15, 2010 (Pet. App. 98a). This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The relevant provisions of the Federal Railroad Safety Act of 1970 (49 U.S.C. § 20106) and the Highway Safety Act of 1973 (23 U.S.C. § 130), as well as 23 C.F.R. §§ 646.204 and 646.214, are reproduced at Pet. App. 99a-112a.

STATEMENT

A. Federal Law Background

Traditionally, the States have had primary responsibility for protecting public safety at railway-highway crossings. State statutes and common-law tort duties have required railroads to provide, among other things, adequate warnings to the public at crossings. *See, e.g.*, *Grand Trunk Ry. Co. v. Ives*, 144 U.S. 408, 416-20 (1892). In the 1970s, Congress

enacted two federal statutes intended to improve railroad safety, and the Secretary of Transportation promulgated regulations to implement those statutes. In two cases, this Court has considered the pre-emptive effect of that federal regulatory regime. It has held that the federal regime preempts state-law claims only when the railroad can show that a warning device was installed at the crossing using federal funds.

1. In 1970, in response to a "large and steady increase in the number of train accidents" and the "extremely high fatality rate" of those accidents,[1] Congress enacted the FRSA, Pub. L. No. 91-458, 84 Stat. 971.[2] The FRSA's purpose is "to promote safety in every area of railroad operations and reduce railroad-related accidents and incidents." 49 U.S.C. § 20101. The FRSA contains an express preemption provision. *Id.* § 20106. That provision provides in pertinent part:

> 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.

Id. § 20106(a)(2).[3]

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[1] H.R. Rep. No. 91-1194, at 72 (1970), *as reprinted in* 1970 U.S.C.C.A.N. 4104, 4126.

[2] The FRSA was originally codified as amended at 45 U.S.C. § 421 *et seq.* In 1994, its provisions were recodified in Title 49, without changing their substance. *See* Act of July 5, 1994, Pub. L. No. 103-272, 108 Stat. 745. This petition cites to the statutory provisions as recodified in Title 49.

[3] In 2007, Congress added subsection (b), titled "Clarification regarding State law causes of action," to § 20106. *See* Implementing Recommendations of the 9/11 Commission Act of 2007,

Three years after passing the FRSA, Congress enacted the Highway Safety Act of 1973, which created the federal Railroad-Highway Crossings Program ("Crossings Program"). *See* Pub. L. No. 93-87, tit. II, § 203, 87 Stat. 250, 282, codified as amended at 23 U.S.C. § 130. The Crossings Program provided federal funding for States for "construction of projects for the elimination of hazards of railway-highway crossings." 23 U.S.C. § 130(a).

2. The Secretary of Transportation, through the Federal Highway Administration ("FHWA"), has promulgated regulations to implement the Crossings Program. One such regulation, 23 C.F.R. § 646.214(b), addresses the design of grade-crossing improvements, including the adequacy of warning devices installed under the Program. Subsection (b)(3) addresses the adequacy of warning devices "on any project where Federal-aid funds participate in the installation of the devices," and it mandates the inclusion of automatic gates with flashing light signals if any of several conditions are present at the crossing. *Id.* § 646.214(b)(3). Subsection (b)(4) provides that, "[f]or crossings where the requirements of § 646.214(b)(3) are not applicable, the type of warning device to be installed, whether the determination is made by a State regulatory agency, State highway agency, and/or the railroad, is subject to the approval of FHWA." *Id.* § 646.214(b)(4).

"Warning device" is not defined as such in the regulations. Instead, the regulations define "[a]ctive warning devices" as "those traffic control devices activated by the approach or presence of a train, such as flashing light signals, automatic gates and similar

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Pub. L. No. 110-53, § 1528, 121 Stat. 266, 453. That subsection does not affect the question presented in this case.

devices, as well as manually operated devices and crossing watchmen, all of which display to motorists positive warning of the approach or presence of a train." *Id.* § 646.204. "Passive warning devices" are defined as "those types of traffic control devices, including signs, markings and other devices, located at or in advance of grade crossings to indicate the presence of a crossing but which do not change aspect upon the approach or presence of a train." *Id.* The FHWA's *Manual on Uniform Traffic Control Devices for Streets and Highways* ("Manual"), which has been incorporated into the FHWA's regulations,[4] defines "[t]raffic control devices" as "all signs, signals, markings, and other devices used to regulate, warn, or guide traffic." Manual at I-1 (Pet. App. 118a).[5]

3. This Court has twice addressed the preemptive effect of the federal regime described above on state-law claims of negligence for inadequate warning devices at railway-highway crossings. In *Easterwood*, the Court considered whether the FHWA's regulations "cover[] the subject matter" of the allegations of negligence within the meaning of the FRSA's express preemption provision. 49 U.S.C. § 20106(a)(2). The Court rejected a broad view of preemption advanced by the railroad. It explained that the regulations as a whole did not preempt state-law claims entirely, but merely "establish[ed] the general terms of the bargain between the Federal and State Governments." 507 U.S. at 667. Likewise, the Court

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[4] *See* 23 C.F.R. § 655.601(a).

[5] The Texas Supreme Court relied on the 2003 version of the Manual (which incorporated two subsequent revisions), and this petition cites to that version, which is available at http://mutcd.fhwa.dot.gov/pdfs/2003r1r2/mutcd2003r1r2complet.pdf.

found no preemption based on the requirement in § 646.214(b)(1) that States employ devices "that conform to standards set out in" the Manual. *Id.* at 666. The Court explained that the Manual only "provides a description of, rather than a prescription for, the allocation of responsibility for grade crossing safety between the Federal and State Governments and between States and railroads." *Id.* at 669. The Court concluded, however, that § 646.214(b)(3) and (4) "do establish requirements as to the installation of particular warning devices"; thus, when those regulations apply, "state tort law is pre-empted." *Id.* at 670. In adopting that narrow view of the preemptive effect of the federal scheme, the Court approved the position advocated by the United States.[6]

Applying that narrow approach to the facts of the case, the Court concluded that the railroad had not "establish[ed] that federal funds 'participate[d] in the installation of the [warning] devices'" at the crossing where the accident occurred. *Id.* at 672 (quoting § 646.214(b)(3)(i)) (second and third alterations in original). Only motion-detection circuitry had been added at the crossing. *See id.* at 671-72.[7] The Court determined that the motion-detection circuitry did "not meet the definition of warning devices provided

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[6] *See* Brief for the United States as Amicus Curiae Supporting Affirmance at 11-12, *Easterwood*, *supra* (Nos. 91-790 & 91-1206) ("U.S. *Easterwood* Br.") (arguing that the Manual and the general implementing regulations of the Crossings Program "do not generally preempt States from imposing duties of care on railroads to provide adequate safety devices at grade crossings," but that § 646.214(b)(3)-(4) support a finding of preemption when they apply).

[7] The actual crossing gate (for which funds had been set aside) was never installed; the plan for the gate was abandoned and the funds reallocated. *See Easterwood*, 507 U.S. at 671-72.

in 23 CFR 646.204(i) and (j)." *Id.* at 672.[8] Accordingly, the Court held that § 646.214(b)(3) and (4) were "inapplicab[le]" and that the state-law claims were not preempted. *Id.* at 673.

This Court reaffirmed *Easterwood* in *Shanklin*. It held that state law is preempted only "once the FHWA has funded the crossing improvement and the warning devices are actually installed and operating." 529 U.S. at 354. The Court noted that its interpretation of the preemptive effect of § 646.214(b)(3) and (4) was "precisely" the interpretation that the FHWA endorsed in *Easterwood*. *Id.* (citing U.S. *Easterwood* Br. at 23).

Thus, under this Court's decisions, for a railroad to establish that federal law preempts a challenge to the adequacy of a warning device, it must demonstrate that federal funds participated in the "install[ation]" of a "warning device" at the crossing in question. 23 C.F.R. § 646.214(b)(4).

B. State Law Background: The 1989 Program

In 1989, Texas enacted a statute directing a state agency to "develop guidelines and specifications for the installation and maintenance of retroreflectorized material at all public grade crossings not protected by active warning devices."[9] Retroreflectivity

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[8] Section 646.204 was later amended by, among other things, removing the paragraph designations and placing the definitions in alphabetical order. *See* 62 Fed. Reg. 45,326 (Aug. 27, 1997) (interim rule); 68 Fed. Reg. 24,639 (May 8, 2003) (final rule adopting interim rule). The substance of the definitions of active and passive warning devices did not change.

[9] Act of May 17, 1989, 71st Leg., R.S., ch. 269, § 2, 1989 Tex. Gen. Laws 1212, 1213, previously codified as Tex. Rev. Civ. Stat. Ann. art. 6370b, § 2, recodified by Act of May 23, 1995, 74th Leg., R.S., ch. 165, § 1, 1995 Tex. Gen. Laws 1025, 1460,

is "a property of a surface that allows a large portion of the light coming from a point source to be returned directly back to a point near its origin."[10] The Texas law provided that "retroreflectorized material shall be affixed to the backs of crossbucks and their support posts in a manner that retroreflects light from vehicle headlights to focus attention to the presence of a nonsignalized crossing."[11] Crossbucks are "the familiar black-and-white, X-shaped signs that read 'RAILROAD CROSSING.'" *Shanklin*, 529 U.S. at 350. Federal funds were used to implement the 1989 program. *See* Pet. App. 14a. As provided in the Texas statute, the tape was applied to all crossings without an active warning device. There was no individualized review or approval of the adequacy of the warning devices at the crossings.

C. Procedural History

Respondent's railroad runs through the small town of Thorndale, Texas, crossing several streets, including Front Street. *See* Pet. App. 3a. There are two tracks at the Front Street crossing – a main line track on which trains can travel up to 60 mph, and a siding track. In April 1994, there was a large pile of gravel as big as a house – 14 feet high and 100 feet long – restricting a driver's view to the west of the crossing, along with vegetation growing in the railroad right-of-way. *See id.* at 4a. The crossing was

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codified as amended at Tex. Transp. Code Ann. § 471.004(a) (substituting the phrase "reflecting material" for "retroreflectorized material").

[10] Manual § 1A.13.

[11] Tex. Rev. Civ. Stat. Ann. art. 6370b, § 2, codified as amended at Tex. Transp. Code Ann. § 471.004(a) (substituting the phrase "unsignaled crossing" for "nonsignalized crossing" and "reflecting material" for "retroreflectorized material").

equipped with crossbuck warning devices, one crossbuck sign on each side of the crossing. *See id.* Pieces of retroreflective tape had been attached to the backs of the blades of the crossbuck signs and to the poles supporting the crossbuck signs.[12]

On April 24, 1994, three weeks after his retirement, William Limmer drove his pickup truck over the Front Street crossing. *See id.* at 29a. A train traveling at 40-50 mph from the side of the crossing where the obstructing pile of gravel rested collided with Mr. Limmer's vehicle, killing him instantly. *See id.* at 4a.

1. Trial Court Proceedings

Patricia Limmer and her two daughters sued respondent for negligence. Respondent asserted the affirmative defense of preemption, arguing that petitioners' claims were preempted because federal funds had paid for warning devices installed at the Front Street crossing. The preemption defense was tried to the bench, and the trial court rejected the defense. *See* Pet. App. 10a.

The negligence case was submitted to the jury. The charge and verdict form reflects that the jury found that the crossing was extra-hazardous, *i.e.*, that, "because of surrounding conditions, it [wa]s so dangerous that [a] person using ordinary care cannot pass over it in safety without some warning other than the usual cross buck sign." *Id.* at 84a. The jury further found that respondent was negligent and that its negligence was a proximate cause of the accident, after being instructed that it could consider only the following allegations of negligence: that respondent failed to provide automatic signals (such

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[12] For a diagram of the crossing, see Pet. App. 3a.

as flashing lights or gates), failed to provide a flag man, and failed to install a stop sign. *See id.* The jury separately determined that respondent was negligent and that its negligence was a proximate cause of the accident, after being instructed to consider only the following allegations of negligence: the failure to eliminate the sight restrictions, if any, caused by the gravel pile and the vegetation. *See id.* at 85a.

The jury also concluded that Mr. Limmer was negligent and that his negligence was also a proximate cause of the accident. It assigned proportionate responsibility for the collision at 85% to Union Pacific and 15% to Mr. Limmer. *See id.* at 87a. The trial court applied those percentages to the jury's award of compensatory damages. No punitive damages were awarded. *See id.* at 77a.

2. Texas Court of Appeals

Respondent appealed the judgment on several grounds, including that the trial court had erred in rejecting its preemption defense. The court of appeals affirmed the trial court's decision on the preemption issue. *See* Pet. App. 29a. Respondent argued that federal funds were expended to install warning devices at the Front Street crossing as part of two different programs: (1) a 1977 program designed to ensure that all public grade crossings in Texas complied with the minimum standards of the Manual, and (2) the 1989 program described above to add retroreflective tape to crossbuck signs in Texas. The court of appeals found that respondent had not shown that federal funds had been used to install

warning devices at the Front Street crossing under the 1977 program. *See id.* at 40a-51a.[13]

As for the 1989 program, the court of appeals held that petitioners' claims were not preempted because the retroreflective tape was not a warning device under 23 C.F.R. § 646.214(b). Looking to this Court's decisions in *Shanklin* and *Easterwood*, the court noted that "the proper inquiry is to see if the installed item meets the definition of warning device by being either an active warning device or a passive warning device as defined" in § 646.204. *Id.* at 52a. No party contended that the tape met the definition of an active warning device. *See id.* at 53a. "To qualify as a passive warning device," the court explained, "the Tape must be a 'traffic control device[] . . . located at or in advance of [the Front Street Crossing] to indicate the presence of a crossing.'" *Id.* (quoting 23 C.F.R. § 646.204) (alterations in original).

The court of appeals concluded that the tape was not a traffic control device. It recognized that the FHWA had issued an interpretation stating that retroreflective tape is not considered a traffic control device. *See id.* at 55a. The FHWA issued that interpretation in response to a request from petitioners' expert witness for an official ruling as to whether retroreflective tape on the back of a crossbuck sign and traffic sign posts constitutes a traffic control device. *See id.* at 116a-117a. The official interpretation – issued on August 2, 2000, and signed by Shelley J. Row, Director of the FHWA's Office of Transportation Operations – provides that "[r]etro-

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[13] The court of appeals initially found that preemption had been established based on that 1977 program, but that opinion was vacated on rehearing and replaced with the opinion described herein.

reflective tape is not considered a traffic control device and, therefore, its use around a traffic sign post does not conflict with the standards in the Manual on Uniform Traffic Control Devices." *Id.* at 116a. The court of appeals further observed that the Manual nowhere identifies retroreflective tape as a traffic control device. *See id.* at 54a. In addition, the court explained that, to be a warning device, the item must "indicate the presence of a crossing," 23 C.F.R. § 646.204, a function that tape alone does not and cannot perform, *see* Pet. App. 58a-59a.

The court of appeals also recognized that its conclusion that the tape is not a warning device was consistent with two federal district court decisions in Texas, both of which had rejected respondent's preemption defense based on the same 1989 program. *See id.* at 57a-58a.

3. Texas Supreme Court

The Texas Supreme Court granted discretionary review, reversed the court of appeals' judgment on the preemption issue, and ordered that judgment be rendered in favor of respondent. The court did not address the court of appeals' holding that preemption had not been established under the 1977 program. *See* Pet. App. 20a. It instead reversed the court of appeals and found preemption based on the 1989 program, holding that the addition of retroreflective tape to an existing crossbuck sign was the installation of a warning device as a matter of law.

The court began its analysis by quoting a number of definitions, including the definition of "[p]assive warning devices" in 23 C.F.R. § 646.204, the definition of "[t]raffic control devices" in the Manual, and the definition of "[t]raffic [m]arkings" in the FHWA's *Railroad-Highway Grade Crossing Handbook*. *See*

Pet. App. 14a-15a.[14] The court then opined – with little analysis – that, because "[m]arkings are specifically mentioned in the federal regulations as traffic control devices" and retroreflective tape attached to a crossbuck is "certainly" a marking, the tape must be both a traffic control device and a warning device under § 646.214(b)(4). *Id.* at 15a-16a. As for the fact that retroreflective tape is not identified as a traffic control device in the Manual, the court stated that "the *Manual* contemplates that most signs and warning devices will be retroreflective; it also mentions strips for crossbucks in several sections." *Id.* at 16a.

In addition, the court concluded that, even if the application of the tape was "only an enhancement or maintenance of the existing signs, not an installation," such application could still trigger preemption, because it amounts to "approval" of the type of warning device to be installed under the grade-crossing regulations. *Id.* at 19a-20a. Accordingly, the court declared "as a matter of law that the application of retroreflective tape to the crossbucks at the Front Street crossing was an installation of a federally funded and approved warning device" that preempted petitioners' claims. *Id.* at 20a.

As for the official FHWA interpretation stating that retroreflective tape is not considered a traffic control device, the court stated that it was "unable to

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[14] The Texas Supreme Court cited both the September 1986 version and the August 2007 version of the Handbook. *See* Pet. App. 15a n.50 (citing FHWA, U.S. Dep't of Transp., *Railroad-Highway Grade Crossing Handbook* (2d ed. Sept. 1986), *available at* http://www.fhwa.dot.gov/tfhrc/safety/pubs/86215/86215.pdf ("1986 FHWA Handbook"); and FHWA, U.S. Dep't of Transp., *Railroad-Highway Grade Crossing Handbook* (rev. 2d ed. Aug. 2007), *available at* http://www.fra.dot.gov/downloads/safety/HRGXHandbook.pdf ("2007 FHWA Handbook")).

ascribe any persuasive value to Rowe's [*sic*] letter." *Id.* at 19a. The court also explicitly refused to follow the two Texas federal court decisions that had rejected preemption defenses based on the same 1989 program. *See id.* at 19a n.60.

REASONS FOR GRANTING THE PETITION

I. THE DECISION BELOW CONFLICTS WITH DECISIONS FROM THE EIGHTH CIRCUIT, THE HIGHEST COURTS OF SOUTH DAKOTA AND LOUISIANA, AS WELL AS DECISIONS FROM OTHER STATE AND FEDERAL COURTS

The Texas Supreme Court's holding that the application of retroreflective tape was the "install[ation]" of a "warning device" such that 23 C.F.R. § 646.214(b)(4) applies and preempts petitioners' negligence claims conflicts with decisions of the Eighth Circuit, the highest courts of South Dakota and Louisiana, and other federal and state courts. Those courts properly have concluded that the addition of a component of a warning device or other federally funded item to a crossing is not the installation of a warning device under § 646.214(b)(4). Those holdings comport with this Court's decision in *Easterwood*. The decision below creates a division of authority on the proper standard for preemption in this context and creates the injustice that citizens in some States enjoy redress for certain forms of railroad negligence but citizens in Texas do not. This Court's review is needed to resolve the division of authority and to establish a uniform standard for determining when the federal railroad-safety regime preempts state-law claims.

A. The Texas Supreme Court's Decision Conflicts With Decisions Of The Eighth Circuit And The Highest State Courts Of South Dakota And Louisiana, And Is Inconsistent With *Easterwood*

1. In *St. Louis Southwestern Railway Co. v. Malone Freight Lines, Inc.*, 39 F.3d 864 (8th Cir. 1994), the Eighth Circuit decided a closely analogous case exactly the opposite of how the Texas Supreme Court decided this one. There, the Arkansas Highway and Transportation Department had inspected the crossing in question and decided to replace the lenses on the existing flashing light signals with larger lenses and to add automatic crossing gates. *Id.* at 866. The lenses were replaced within a week, but the plaintiff's accident at the crossing occurred before installation of the automatic crossing gates was completed. *Id.* The Eighth Circuit held that the addition of the federally funded larger lenses did not preempt the plaintiff's claims. It reasoned that, "like the circuitry installed in *Easterwood*, we do not believe the exchange of a single component part of the lights in place before the upgrade was the installation of a warning device defined in 23 C.F.R. § 646.204(i)-(j)." *Id.* at 867. Thus, under *Malone Freight*, the test for whether a warning device has been installed at a crossing is whether the item that is added is itself a "warning device" under the grade-crossing regulations.

The Eighth Circuit's decision in *Malone Freight* correctly followed this Court's reasoning in *Easterwood*. In *Easterwood*, funds had been allocated to install a warning gate at the crossing where the accident occurred. At the time of the accident, however, only motion-detection circuitry actually had been

placed in the warning gate. The railroad argued that, because "[t]he [Manual] recognizes that motion detection circuitry is a basic component of an active warning device system,"[15] the addition of the circuitry alone sufficed to establish preemption of the state-law claims. This Court rejected that contention. Focusing on the particular component at issue – the motion-detection circuitry – the Court explained that "[s]uch circuitry does not meet the definition of warning devices provided in 23 CFR §§ 646.204(i) and (j)." 507 U.S. at 672. Because the circuitry was not a warning device, § 646.214(b)(4) was "inapplicab[le]" and therefore not a basis for preemption. *Id.* at 673.

The Texas Supreme Court's decision conflicts with *Malone Freight*'s faithful application of *Easterwood*. While a crossbuck is a warning device under the grade-crossing regulations, retroreflective tape is only a component of a properly maintained crossbuck.[16] Like the lenses in *Malone Freight* and the circuitry in *Easterwood*, the tape itself provides no warning; it only functions to warn drivers as a component of the crossbuck apparatus. The Texas Supreme Court opined that the tape's purpose was to reflect light and provide warning to drivers, *see* Pet. App. 16a, but the same could be said for the larger lenses in *Malone Freight*. This case thus would have been decided differently in the Eighth Circuit.

2. The Texas Supreme Court's decision also conflicts with decisions of other state appellate courts. In particular, the highest courts of two States have

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[15] Reply Brief for Petitioner and Cross-Respondent at 21, *Easterwood*, *supra* (Nos. 91-790 & 91-1206).

[16] *Cf. Shanklin*, 529 U.S. at 350 (preemption triggered where crossing in question was equipped with federally funded advance warning signs and "reflectorized crossbucks").

concluded that federally funded maintenance or improvement activities do not support preemption if the item added is not itself a "warning device." In *Boomsma v. Dakota, Minnesota & Eastern Railroad Corp.*, 651 N.W.2d 238 (S.D. 2002), *overruled on other grounds by State v. Martin*, 683 N.W.2d 399 (S.D. 2004), federal funds had been used to add rubberized mats to the crossing in question. The South Dakota Supreme Court rejected the railroad's preemption defense, explaining that "[i]t is of no consequence that federal funds were used to put rubberized mats on the service line" because the "rubber mats do not constitute warning devices." *Id.* at 244. Likewise, in *Duncan v. Kansas City Southern Railway Co.*, 773 So. 2d 670 (La. 2000), the railroad could prove only that federal funds were used to add an inventory number to the crossing where the accident occurred. The Louisiana Supreme Court found no preemption, stating that "[a]n inventory number does not meet the definition of warning devices provided in" § 646.204. *Id.* at 680. A New Mexico appellate court reached a similar conclusion in *Largo v. Atchison, Topeka & Santa Fe Railway Co.*, 41 P.3d 347 (N.M. Ct. App. 2001). There, the federally funded maintenance activity involved "widen[ing] and install[ing] sixteen track feet of timber planking at the crossing." *Id.* at 350-51. The court concluded that the claims were not preempted, stating that "the record indicates that no warnings were placed at the crossing as the result of the federal program." *Id.* at 351.

Those decisions correctly recognize that it is not enough for federal funds to have been used in connection with any maintenance or improvement activity at the crossing. Instead, under those decisions,

preemption is appropriate only when a "warning device" is installed within the meaning of the FHWA's regulations. Under the decision below, by contrast, essentially any minor upgrade to a warning device at a crossing can be considered the installation of a new warning device, triggering preemption under *Easterwood* and *Shanklin*. This Court's guidance is needed to establish the proper standard for determining when a warning device has been installed at a crossing under § 646.214(b)(4).

B. The Decision Below Squarely Conflicts With Federal Court Decisions On The Preemptive Effect Of Texas's 1989 Program

In addition to the broader conflict over the proper interpretation of § 646.214(b)(4) outlined in Part I.A, *supra*, federal district court decisions specifically addressing the application of retroreflective tape demonstrate the confusion in the lower courts regarding the standard for determining when an addition at a crossing constitutes the installation of a warning device under § 646.214(b)(4). As the Texas Supreme Court acknowledged, *see* Pet. App. 19a n.60, three federal district courts in Texas have considered the preemptive effect of the 1989 program to apply retroreflective tape to crossbucks in Texas. Two of those courts denied summary judgment for the defendants, while the other court gave preemptive effect to the application of retroreflective tape under the 1989 program.

In *Lesly v. Union Pacific Railroad Co.*, No. H-03-0772, 2004 U.S. Dist. LEXIS 23018 (S.D. Tex. June 25, 2004), the court considered whether the 1989 program to add "retroreflective material on crossbucks at all crossings that did not have active warning devices" preempted state-law claims arising from

accidents at those crossings. *Id.* at *11. The court concluded that retroreflective tape, "in and of itself, is not a 'warning device' as defined by" the Manual. *Id.* at *12. Accordingly, the court held that "Union Pacific cannot rely on the doctrine of preemption." *Id.*

Similarly, the court in *Enriquez v. Union Pacific Railroad Co.*, No. 5:03-CV-174, 2004 U.S. Dist. LEXIS 28989 (E.D. Tex. Dec. 30, 2004), denied a motion for summary judgment based on the addition of retroreflective tape to a crossbuck under the 1989 program. The court rejected the notion "that reflective tape, alone, amounts to a passive warning device." *Id.* at *45. Relying on *Lesly*, the court explained that, "[i]n the same sense that the pole of a crossbuck sign is not a passive warning device, the tape, without more, is not a passive warning device." *Id.* The court further noted that this was true under both the regulation's definition of passive warning device and the Manual's definition of traffic control device. *See id.* at *44-*45.

Another federal district court in Texas, however, reached the opposite conclusion on the preemptive effect of the 1989 program. *See McDaniel v. Southern Pac. Transp.*, 932 F. Supp. 163 (N.D. Tex. 1995). That court found that "federal funds were approved and expended, from 1989 to the early 1990s, in the course of an upgrading project which provided for applying reflectorized tape to the backs of crossbucks" and that photographs of the crossing where the accident occurred "clearly show[ed] reflectorized tape attached to the support posts of the crossbucks." *Id.* at 167. On the basis of those facts, the court concluded that preemption was appropriate. *See id.* In doing so, the court implicitly determined – without

analysis or explanation – that the mere "upgrading of the crossbucks with reflectorized tape" (*id.*) constituted the "install[ation]" of a "warning device" within the meaning of § 646.214(b)(4).[17]

That conflict between the federal district courts and state supreme court in Texas creates significant confusion and the opportunity for forum-shopping and races to the courthouse. In the Eastern and Southern Districts of Texas, a person seeking to recover for injury or death caused by negligence at a crossing marked with retroreflective tape can cite authority for the proposition that its claim is not preempted, whereas a plaintiff in Texas state court will be denied a cause of action for the railroad's negligence through preemption and a plaintiff in the Northern District faces contrary authority on the question. In *Bates v. Dow AgroSciences LLC*, 544 U.S. 431 (2005), this Court granted certiorari to resolve a disagreement between the Texas Supreme Court and the Texas federal courts on the preemptive effect of the Federal Insecticide, Fungicide, and Rodenticide Act. It should do the same here.

II. THE TEXAS SUPREME COURT'S PREEMPTION STANDARD CONTRADICTS THE REGULATIONS' PLAIN LANGUAGE AND THE IMPLEMENTING AGENCY'S INTERPRETATION OF THOSE REGULATIONS

The Texas Supreme Court held that the application of retroreflective tape to a crossbuck is the "install[ation]" of a "warning device" as a matter of law, such that § 646.214(b)(3) and (4) apply and preempt state-law claims. In so holding, the Court

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[17] The *McDaniel* court also held in the alternative that preemption would be appropriate based on the 1977 Texas program. *See* 923 F. Supp. at 167.

misinterpreted the pertinent federal regulations, disregarded the promulgating agency's official interpretation of those regulations, and violated the presumption against preemption.

A. No "Warning Device" Was "Installed" When Retroreflective Tape Was Applied To The Crossbucks At The Front Street Crossing

Under *Easterwood*, preemption applies only "for projects in which federal funds participate in the installation of warning devices," 507 U.S. at 671, because it is only then that the grade-crossing regulation, which refers to the "install[ation]" of a "warning device" at a crossing, 23 C.F.R. § 646.214(b)(4), "cover[s] the subject matter of" state tort law within the meaning of the FRSA's express preemption provision, 49 U.S.C. § 20106(a)(2). Under the regulation's plain language, no "warning device" was "installed" when retroreflective tape was applied to the existing crossbucks at the Front Street crossing.

Retroreflective tape is not a "warning device" under § 646.214(b)(4). The regulations define "[p]assive warning devices" as "those types of traffic control devices, including signs, markings and other devices, located at or in advance of grade crossings to indicate the presence of a crossing." 23 C.F.R. § 646.204. Thus, to be a "passive warning device," an item must be a "traffic control device" that "indicate[s] the presence of a crossing." *Id.* Retroreflective tape satisfies neither of those conditions. First, retroreflective tape does not "*indicate* the presence of a crossing." *Id.* (emphasis added). Without a crossbuck, the tape does not indicate the presence of anything, let alone a crossing.

Second, retroreflective tape is not a "traffic control device." Traffic control devices are defined in the Manual as "signs, signals, markings, and other devices *used to regulate, warn, or guide traffic*." Manual at I-1 (Pet. App. 118a) (emphasis added). Just as retroreflective tape alone does not "indicate the presence of a crossing," 23 C.F.R. § 646.204, the tape itself does not "regulate, warn, or guide traffic," Manual at I-1 (Pet. App. 118a). Nor is retroreflective tape a "sign[], signal[], [or] marking[]." *Id.* Nothing in the Manual suggests that those terms refer to retroreflective tape.

In any event, nothing was "installed" at the crossing within the meaning of § 646.214(b)(4). In ordinary usage, one does not speak of "installing" tape. The retroreflective tape was applied, attached, or affixed to the crossbucks at the Front Street crossing. But it was not "installed." *See Lesly*, 2004 U.S. Dist. LEXIS 23018, at *12 (refusing to accept railroad's contention that "the process of merely adding retroreflective tape to crossbucks constitutes 'installing' a 'warning device'").[18]

B. The Texas Supreme Court Misinterpreted The Governing Federal Regulations

To support its holding that the tape is a warning device under the regulations, the Texas Supreme Court asserted that the tape is a "*marking* used to

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[18] The Texas Supreme Court asserted that it saw "no reason why" the application of retroreflective tape, if considered just an enhancement or maintenance activity, would not fall under the grade-crossing regulations as demonstrating FHWA "approval" of the warning devices at the crossing. Pet. App. 19a. That is incorrect because preemption under *Easterwood* and *Shanklin* requires the "install[ation]" of a warning device. 23 C.F.R. § 646.214(b)(4).

warn traffic of railroad crossings." Pet. App. 15a (emphasis added). The court pointed to the definition of a "passive warning device" as "including signs, markings and other devices." 23 C.F.R. § 646.204; *see* Pet. App. 14a. But, under the regulation, a "marking[]" is only a passive warning device if it "indicate[s] the presence of a crossing." 23 C.F.R. § 646.204. Retroreflective tape alone does not indicate the presence of a crossing, *see supra* Part II.A, and the court below offered no explanation of how it could fulfill that function.

In addition, the court below noted that the Manual "mentions strips for crossbucks in several sections." Pet. App. 16a. But the court failed to consider the nature and context of those references. There is no mention of the tape being a warning device itself. Instead, the Manual refers to retroreflective tape as a component or feature of the warning device. Thus, it states that crossbucks should be "retroreflectorized white," that a "strip of retroreflective white material . . . shall be used on the back of each blade of each Crossbuck sign," and that a "strip of retroreflective white material . . . shall be used on each support at passive highway-rail grade crossings." Manual § 8B.03. Those passages demonstrate that retroreflective tape is a *component* of a warning device – namely, a properly reflectorized crossbuck – not a warning device itself. That reflectorization is simply a feature of certain warning devices is confirmed by § 1A.03 of the Manual, which provides that "[d]evices should be designed so that *features such as* size, shape, color, composition, lighting or *retroreflection*, and contrast are combined to draw attention to the devices." Manual § 1A.03 (emphases added).

Furthermore, neither the Manual's separate part on "markings" nor the chapter on "Signs and Marking" within the Grade Crossings part provides any support for the Texas Supreme Court's conclusion that retroreflective tape applied to a crossbuck is a "marking" as that term is used in the definition of a traffic control device. To begin with, retroreflective tape is not listed in those sections of the Manual that discuss markings. And the chapter addressing markings in the context of grade-crossing traffic control devices discusses "pavement markings," "stop lines," and "dynamic envelope markings," Manual §§ 8B.20-8B.22,[19] none of which is remotely similar to the application of retroreflective tape to a crossbuck.

Finally, the court below relied on the FHWA's Handbook, which the court noted defines "[t]raffic markings" as "[a]ll lines, patterns, words, colors, or other devices, except signs, set into the surface of, applied upon, or attached to the pavement or curbing or to the objects within or adjacent to the roadway, officially placed for the purpose of regulating, warning, or guiding traffic." Pet. App. 15a (quoting 2007 FHWA Handbook at 226). Again, however, retroreflective tape alone does not "regulat[e], warn[], or guid[e] traffic" and thus does not meet that definition. Furthermore, a full review of the Handbook demonstrates that retroreflective tape is not considered a traffic control device. The 2007 FHWA Handbook has (at 83-97) an entire section devoted to "Passive Traffic Control Devices." That section is further divided into two sections – "Signs" and "Pavement Markings." Those sections refer to the Manual, and,

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[19] "Dynamic [e]nvelope" refers to "the clearance required for the train and its cargo overhang due to any combination of loading, lateral motion, or suspension failure." Manual § 1A.13.

although they discuss the crossbuck as an example of a sign that is a passive warning device, there is no mention of retroreflective tape as its own warning device. Rather, as in the Manual, the Handbook discusses the use of the tape in the section discussing features of a crossbuck warning device. That section also has (at 85-86) a table titled "Current MUTCD Devices," which lists numerous devices under the heading "Traffic control device" – including the crossbuck – but *not* retroreflective tape.

In any event, the Handbook neither states "official policy" nor "'constitute[s] a standard, specification, or regulation,'" as the court below admitted. Pet. App. 15a n.50 (quoting 2007 FHWA Handbook (Notice)). Thus, nothing in the Handbook could override the grade-crossing regulations and the Manual, both of which make clear that retroreflective tape is not a warning device.

C. The Court Below Disregarded The FHWA's Conclusion That Retroreflective Tape Is *Not* A Traffic Control Device

The Texas Supreme Court's construction of the Manual conflicts with the interpretation of the federal agency that promulgated it.

1. The FHWA's Manual recognizes that "situations often arise" that necessitate "interpretation or clarification of this Manual." Manual § 1A.10. Accordingly, the FHWA has established a procedure for submitting requests for "official interpretations of the [Manual]" to the FHWA's Office of Transportation Operations.[20] "FHWA responds to each request

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[20] FHWA, Official MUTCD Interpretations Issued by FHWA ("*Official Manual Interpretations*"), *at* http://mutcd.fhwa.dot.gov/resources/interpretations/index.htm; *see* Manual § 1A.10.

for an interpretation with a formal written reply." *Official Manual Interpretations.* Recent official interpretations are posted on the Internet for public access. *Id.* The FHWA further explains that "an Official Interpretation should be considered as FHWA policy guidance" and that "agencies are encouraged to follow guidance given in an interpretation." *Id.*

Petitioners followed the FHWA's procedures for obtaining an official interpretation. Before trial, petitioners' expert witness wrote a letter to the FHWA requesting an official determination of whether retroreflective tape is a traffic control device under the Manual. In response, the FHWA issued an "official ruling" concluding that "[r]etroreflective tape is not considered a traffic control device." Pet. App. 116a.[21] The official ruling was signed by Shelley Row, as Director of the FHWA's Office of Transportation Operations. The FHWA's interpretation of its Manual, which has been incorporated into the agency's regulations, is entitled to deference. *See Auer v. Robbins*, 519 U.S. 452, 461-62 (1997) (unless contrary to the plain text, agency's interpretation of its own regulation is dispositive).[22]

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[21] Interpretation II-56(I) also advised that the use of retroreflective tape on the back of crossbucks had been proposed in § 8B.2 of the revision of the Manual. As discussed above, the 2003 version of the Manual provides in § 8B.03 that a crossbuck should have retroreflective tape on the back of its blades except in certain circumstances.

[22] The Texas Supreme Court incorrectly asserted (*see* Pet. App. 17a) that petitioners had not argued that this letter was entitled to deference. *See* Brief on the Merits of the Limmer Parties as Respondents at x, 22 (Tex. filed Jan. 31, 2007).

The FHWA's determination that retroreflective tape is not a "traffic control device" is significant because the regulations define a "[p]assive warning device[]" as a "traffic control device[]." 23 C.F.R. § 646.204. The FHWA's determination that retroreflective tape is not a traffic control device therefore means that the tape also is not a warning device under the grade-crossing regulations. Accordingly, § 646.214(b)(4) does not apply, and there is no preemption under *Easterwood* and *Shanklin*.

2. The Texas Supreme Court dismissed the FHWA's official ruling as simply a brief, "conclusory" piece of personal correspondence from Director Row. Pet. App. 18a. But that ignores the FHWA's official process for obtaining an authoritative interpretation of the Manual, a process that petitioners followed in this case. The Texas Supreme Court's references to "Rowe's [*sic*] consideration" as insufficiently "thorough" and to the interpretation as "conclusory" and "contain[ing] no reasoning and no reference to authority of any kind," *id.*, miss the point. A court's obligation to defer to an agency's interpretation of its own regulation under *Auer* does not depend on the thoroughness of the agency's consideration or reasoning. *See Auer*, 519 U.S. at 461; *cf. Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) (weight given to agency's informal *statutory* interpretation depends on thoroughness of consideration, validity of reasoning, and consistency). The Texas Supreme Court thus failed to give the agency's official interpretation the deference it deserved.

The court below also discounted the FHWA's official ruling because it found that ruling to be in "some tension" with a 1989 letter from an FHWA safety and traffic operations coordinator to a Texas employee.

Pet. App. 18a. The court stated that the 1989 letter "encourag[ed] participation in the retroreflective tape program, repeatedly referring to the tape as a 'device' and describing its use as a warning signal." *Id.* at 18a-19a. Nothing in the 1989 letter, however, stated that retroreflective tape is a "warning device" within the meaning of the grade-crossing regulations. Further, unlike the FHWA's official ruling, the 1989 letter did not purport to be an interpretation of the FHWA's Manual or regulations. The letter therefore provides no basis for discounting the FHWA's official ruling that retroreflective tape is not a traffic control device. Moreover, the 1989 letter cautions that the tape is "not intended to be used in lieu of upgrading when it is warranted." *Id.* at 115a.

D. The Texas Supreme Court Disregarded The Presumption Against Preemption

This Court has made it clear that state law is preempted only in the limited circumstances where § 646.214(b)(3) and (4) apply and "cover" the subject matter of state law. *Easterwood*, 507 U.S. at 670-71. In so holding, the Court relied on the principle that "a court interpreting a federal statute pertaining to a subject traditionally governed by state law will be reluctant to find pre-emption." *Id.* at 664. In that regard, the Court followed the position advocated by the United States, which explained that "[p]roviding compensatory remedies through the mechanism of the tort system is undoubtedly within the States' historic police power" and that state law had historically required railroads to exercise a duty of care to make crossings safe. U.S. *Easterwood* Br. at 14-15. This Court recently has reaffirmed the importance of the presumption against preemption. *See, e.g., Wyeth v. Levine*, 129 S. Ct. 1187, 1194-95 (2009); *Altria Group,*

Inc. v. Good, 129 S. Ct. 538, 543 (2008). And it has made clear that the presumption applies to the interpretation of a federal regulation. *See, e.g., Hillsborough County v. Automated Med. Labs., Inc.*, 471 U.S. 707, 715-16 (1985).

The Texas Supreme Court ignored this Court's guidance regarding the reluctance to find preemption. Instead, it reversed the presumption, going out of its way to bend inapplicable definitions and provisions of the Manual and the Handbook to preempt petitioners' claims. The court's reasoning contradicted the plain language and structure of the relevant regulations, as well as the implementing agency's official interpretation of those regulations. It identified nothing sufficient to overcome the presumption against preemption. *Cf. Bates*, 544 U.S. at 449 ("Even if Dow had offered us a plausible alternative reading . . . – indeed, even if its alternative were just as plausible as our reading of that text – we would nevertheless have a duty to accept the reading that disfavors pre-emption.").

III. THIS CASE PRESENTS A RECURRING QUESTION OF EXCEPTIONAL IMPORTANCE WARRANTING THE COURT'S IMMEDIATE RESOLUTION

Whether the federally funded addition of a component to an existing warning device preempts state-law claims arising from accidents at railway-highway crossings is a question of importance to public safety nationwide. The conflict between the Texas Supreme Court and the Eighth Circuit and the highest courts of South Dakota and Louisiana demonstrates the confusion in the law regarding the proper standard for determining preemption in this context. Furthermore, three federal district courts and the Texas Su-

preme Court already have considered the preemptive effect of the same 1989 program – confirming that the issue is one of recurring importance, particularly in light of the fact that Texas is one of several States with a disproportionately high share of accidents at railway-highway crossings.[23] The question presented is ripe for this Court's review, and this case presents an ideal vehicle in which to resolve it.

A. The Standard For Preemption Of State-Law Tort Claims For Inadequate Warning Devices Affects Hundreds Of People Who Are Injured Or Killed At Railway-Highway Crossings Each Year

The United States has approximately 139,862 public grade crossings.[24] More than 55,000 public grade crossings are equipped with crossbuck warning devices.[25] In 2007, there were 2,205 motor vehicle incidents at public grade crossings,[26] and public railway-highway crossings incidents resulted in 299 deaths and 817 injuries.[27] In addition, railway-

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[23] *See* Office of Inspector General, U.S. Dep't of Transp., *Audit of the Highway-Rail Grade Crossing Safety Program*, Report No. MH-2004-065, at 4 (June 16, 2004), *available at* http://www.oig.dot.gov/sites/dot/files/pdfdocs/mh2004065.pdf (noting that, from 1994 to 2003, California, Illinois, Indiana, Louisiana, Ohio, and Texas had the most public grade-crossings accidents).

[24] *See* FHWA, U.S. Dep't of Transp., *Facts and Statistics*, *at* http://safety.fhwa.dot.gov/xings/xing_facts.cfm ("FHWA Facts and Statistics").

[25] *See* Office of Safety Analysis, Federal Railroad Admin., U.S. Dep't of Transp., *Railroad Safety Statistics: 2007 Final Annual Report*, Table 9-3 (Apr. 2009), *available at* http://safetydata.fra.dot.gov/OfficeofSafety/publicsite/Publications.aspx.

[26] *See id.* at Table 7-1.

[27] *See* FHWA Facts and Statistics.

highway crossing collisions are particularly severe. In 2002, while one of out every 149 vehicle collisions resulted in a fatality, one out of every *ten* crossing collisions resulted in a fatality.[28]

Those statistics demonstrate the unfortunate fact that accidents at railway-highway crossings remain common. As the cases discussed in Part I of the petition show, an oft-litigated question in suits by injured victims and their families to recover for the negligent failure of railroads to provide adequate warning devices is whether a federally funded program to maintain or upgrade a crossing preempts any claim of negligence by the railroad in providing warnings at that crossing. Without this Court's intervention, lower federal and state courts will continue to reach disparate results on similar facts, undermining both the uniformity of federal law and the FRSA's purpose of "promot[ing] safety in every area of railroad operations and reduc[ing] railroad-related accidents and incidents." 49 U.S.C. § 20101.

In urging the court below to grant discretionary review in this case, *amici* supporting respondent attested to the importance of the question presented. The Association of American Railroads ("AAR") asserted that "the question of what constitutes a warning device is an important and recurring issue" and that "the issues raised in this case will likely recur with great frequency." AAR *Amicus* Br. at 4, 12 (Tex. filed May 3, 2006). Similarly, *amicus* BNSF Railway Company contended that "[f]ederal preemption is the

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[28] *See* 2007 FHWA Handbook at 4; *see also* FHWA Facts and Statistics (noting that, "[w]hile the number of railroad grade crossing fatalities, injuries, and crashes are small in comparison to others, these incidents have the potential of catastrophic consequences").

critical threshold issue for grade crossing suits in courts throughout the United States." BNSF *Amicus* Br. at 3 (Tex. filed Apr. 25, 2006). It further explained that "grade crossings have such a pervasive presence on the rail network *across the nation*" that "the establishment and preservation of clear and uniform rules outlining the various duties of the entities having interests in public grade crossing safety . . . is essential." *Id.* at 2 (emphasis added).

B. The Question Presented Is Ripe For The Court's Review, And This Case Is An Ideal Vehicle For Resolving It

Numerous state and federal courts, including the highest courts of three States and the Eighth Circuit, have addressed the question of what constitutes a warning device sufficient to support preemption under this Court's decisions. The conflict between the decision below and the decisions of multiple other state and federal courts demonstrates the confusion in the lower courts over the proper standard for preemption under *Easterwood* and *Shanklin*. Furthermore, the same 1989 program at issue in this case has now been squarely considered by several federal district courts in Texas, as well as the Texas Supreme Court. The conflict that has arisen is well-developed and requires this Court's resolution, both to clarify federal law nationwide and to remove the incentive to engage in forum shopping among state and federal courts in Texas.

There is no preliminary or threshold issue that this Court would have to decide before reaching the question presented. The parties and courts below have assumed that federal funds were used to apply the retroreflective tape in question, eliminating the often-complicated factual issue of determining whether

federal funds actually were used at the crossing in question.

Nor is there any alternative ground for affirming the judgment. Although respondent argued below that preemption was appropriate under a separate 1977 program, the state court of appeals rejected that contention, and the Texas Supreme Court declined to address it. Thus, this case cleanly presents an important issue of law warranting this Court's review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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