

ORIGINAL

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PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: NORFOLK SOUTHERN RAILWAY COMPANY,
Petitioner v. DEDRA SHANKLIN, NEXT FRIEND OF
JESSIE GUY SHANKLIN

CASE NO: 99-312 e-1

PLACE: Washington, D.C.

DATE: Wednesday, March 1, 2000

PAGES: 1-61

REVISED

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OF THE
UNITED STATES

CAPTION: NORFOLK SOUTHERN RAILWAY COMPANY
vs. JESSIE GUY SHANKLIN
JESSIE GUY SHANKLIN

CASE NO. 00-1217

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1 IN THE SUPREME COURT OF THE UNITED STATES

2 - - - - -X
3 NORFOLK SOUTHERN RAILWAY :
4 COMPANY, :
5 Petitioner :
6 v. : No. 99-312
7 DEDRA SHANKLIN, NEXT FRIEND :
8 OF JESSIE GUY SHANKLIN :
9 - - - - -X

10 Washington, D.C.

11 Wednesday, March 1, 2000

12 The above-entitled matter came on for oral
13 argument before the Supreme Court of the United States at
14 10:07 a.m.

15 APPEARANCES:

16 CARTER G. PHILLIPS, ESQ., Washington, D.C.; on behalf of
17 the Petitioner.

18 GREGORY S. COLEMAN, ESQ., Solicitor General, Austin,
19 Texas; on behalf of Texas, et al., as amici curiae,
20 supporting the Petitioner.

21 THOMAS C. GOLDSTEIN, ESQ., Washington, D.C.; on behalf of
22 the Respondent.

23 PATRICIA A. MILLETT, ESQ., Assistant to the Solicitor
24 General, Department of Justice, Washington, D.C.; on
25 behalf of the United States, as amicus curiae,

1 supporting the Respondent.

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1 P R O C E E D I N G S

2 (10:07 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 now in Number 99-312, Norfolk Southern Railway Company v.
5 Dedra Shanklin.

6 Mr. Phillips.

7 ORAL ARGUMENT OF CARTER G. PHILLIPS

8 ON BEHALF OF THE PETITIONER

9 MR. PHILLIPS: Thank you, Mr. Chief Justice, and
10 may it please the Court:

11 7 years ago in CSX v. Easterwood this Court held
12 that when the provisions of 23 C.F.R. 646.213(b)(3) and
13 (b)(4), which from now on I am going to refer to as (b)(3)
14 and (b)(4), because otherwise I won't get any of my
15 argument out, quote, are applicable, State tort law is
16 preempted.

17 Specifically, the Court identified the sine qua
18 non of preemption as whether, quote, Federal funds
19 participate in the installation of warning devices at the
20 particular site. Preemption, the Court held, was
21 appropriate in that context because the determination of
22 what type of warning device to be installed at a
23 particular crossing is in those circumstances, quote,
24 subject to the Secretary's approval.

25 The Court expressly recognized that under that

1 particular regulatory scheme the Secretary has decided the
2 means by which railroads are to participate in the
3 selection of a particular device and thus, when
4 applicable, the Secretary's regulations cover the subject
5 matter of tort law regarding the adequacy of the
6 particular devices within the meaning --

7 QUESTION: Well, has the Secretary determined
8 the devices to be installed here, or is it just some
9 minimum program we're dealing with?

10 MR. PHILLIPS: This is not a minimum program,
11 Justice O'Connor. All of -- the program is the program.
12 (b) (3) refers specifically to any project, which means
13 that if Federal funds are involved it is subject to the
14 approval of the Secretary on the same standards as any
15 other project that happens to be submitted for the
16 Secretary's approval, and on the same standards.

17 QUESTION: I somehow had the impression that we
18 were dealing here with a crossing that had crossbucks
19 installed under the minimum program for a State.

20 MR. PHILLIPS: I think it's important --

21 QUESTION: In this case, Tennessee. Is that
22 right?

23 MR. PHILLIPS: No.

24 QUESTION: No, okay.

25 MR. PHILLIPS: That's absolutely wrong, Justice

1 O'Connor, on two counts, one a matter of law, and one is a
2 matter of fact. The legal problem with the argument is,
3 there is no such thing as a minimum protection program
4 that is distinct under (b)(1) from the projects, from the
5 any projects that are referenced in (b)(3). (b)(3)
6 specifically has the heading, adequate warning devices,
7 and it is designed to ensure that all projects that
8 receive Federal funds are in fact approved, and that the
9 Secretary has at least available the option to say no,
10 additional safety is required in a particular
11 circumstance.

12 The fact that the Secretary doesn't do that
13 routinely is simply a reflection of the respect that the
14 Secretary has in the way the States operate --

15 QUESTION: Mr. Phillips --

16 MR. PHILLIPS: -- the section 130 program. I'm
17 sorry, Chief Justice.

18 QUESTION: Where do we find (b)(1) and (b)(3)
19 set out in the -- in your brief, or somewhere else?

20 MR. PHILLIPS: It's in the appendix to the
21 petition, Mr. Chief Justice, at pages 46a and 47a.

22 QUESTION: Thank you.

23 QUESTION: Is it your position that preemption
24 occurs when the devices are installed and the -- pursuant
25 to the Federal program, and the money's paid?

1 MR. PHILLIPS: Yes. I think both of those are
2 probably required in any given circumstance.

3 QUESTION: That's the point at which preemption
4 occurs?

5 MR. PHILLIPS: Right. At that point, preemption
6 occurs, and at that point as well, of course, that
7 particular crossing we now know is part of this global 130
8 program that is designed to systematically,
9 comprehensively collect data, analyze each of the
10 crossings throughout the State, and make a determination
11 on a regular basis as to whether or not those crossings
12 are adequate on a going-forward basis.

13 QUESTION: Mr. Phillips, you started with
14 discussion of the Easterwood case, and that was a case
15 that held there was no preemption, yet you're using it to
16 support your position that there is preemption. Now, no
17 doubt that case held Federal assistance is necessary to
18 preemption, but it never homed in on the kind of crossing
19 protection involved here, that is, simply the sign. There
20 was -- the Court was looking at an upgraded -- was it not?
21 It wasn't a simple sign, but it was some kind of a gate
22 that was involved?

23 MR. PHILLIPS: No, Justice Ginsburg. What was
24 actually involved there, there was no evidence as to any
25 protections at the Cartersville --

1 QUESTION: Yes, but --

2 MR. PHILLIPS: -- Crossing in CSX.

3 QUESTION: Yes, but the --

4 MR. PHILLIPS: There was --

5 QUESTION: It was originally a proposal not for
6 a simple sign, but for gates. Then that was transferred
7 to some place else.

8 MR. PHILLIPS: No --

9 QUESTION: All -- my only point is that the
10 Court was not looking at what we have before us today.
11 That is, funding simply of a sign.

12 MR. PHILLIPS: Okay. Again, there are two
13 answers to that, Justice Ginsburg. First of all, this is
14 not funding of a sign. What actually happened in
15 Tennessee -- Tennessee has a program, a quote, minimum
16 program that is Tennessee-specific, that is different,
17 that is unique to Tennessee. Every other State basically
18 has a project, but Tennessee decided to upgrade over what
19 is required specifically under section 130.

20 Section 130 says, yeah, everybody should have a
21 sign at a crossing. Tennessee went beyond that and said,
22 you have to have reflectorized crossbucks, and you have to
23 have a warning sign at every crossing. That is above and
24 beyond the Federal minimum, and that is exactly what was
25 placed on all of the projects that were involved in the

1 1987 Federal funding.

2 That's the scheme in place here. Now, that's
3 the factual distinction which says, this is not -- even if
4 you want to work off of a notion that there's a minimum
5 sign program, which I don't think is incorporated into
6 this regulatory scheme, it wouldn't apply here. But the
7 more -- but over and above that, it's clear that this
8 regulatory scheme envisions that the Secretary will pay
9 money and then be responsible, along with the State on a
10 prospective basis for ensuring the safety and the
11 protection of the citizens who have to make -- who have to
12 go across those particular crossings, and the Court
13 understood that when it set out the legal framework to be
14 applied in this particular context.

15 To be sure, the Court held there was no Federal
16 funding at that particular site.

17 QUESTION: It held there was no preemption, and
18 I'm a little troubled at the idea of taking a case that
19 held there was no preemption in that case to establish
20 beyond question that there is preemption in a case that
21 was not before the Court.

22 MR. PHILLIPS: Well, I wouldn't be so bold as to
23 tell you that there's no basis for rethinking the wisdom
24 of the basic analysis in Easterwood, but the reality of
25 what happened in Easterwood is, the Solicitor General

1 described this exact scheme and said that this is a --
2 that this prospective approach will work perfectly well,
3 it is exactly what Congress wanted, but the key is to make
4 sure that each individual grade crossing is embraced by
5 this scheme, and you can only be assured of that once you
6 have Federal funding, or that Federal moneys participate
7 in the installation of the devices for any project under
8 (b) (3).

9 QUESTION: If the Secretary decided that it
10 would be desirable to have every crossing meet at least a
11 minimum standard, there would be no way to do that without
12 affecting preemption, in your view?

13 MR. PHILLIPS: I think if the Secretary spends
14 the money under the program that's set up today, under the
15 (b) (3), (b) (4) program that exists today, then the
16 Secretary would necessarily have to review the moneys that
17 are being spent and ensure that those projects are being
18 done in a safe fashion, and then rely on the States,
19 subject to Federal approval as well, because it's all
20 federally funded, to ensure the future safety of them.

21 QUESTION: But he couldn't -- the Secretary
22 couldn't say, in your view, we don't want to engage in
23 that kind of detailed analysis, we just want to say
24 universally every crossing will have at least the minimum
25 sign?

1 MR. PHILLIPS: I think the answer to that
2 problem would be that the Secretary ought to change the
3 regulations so that they no longer define adequate warning
4 devices at all projects for which Federal funds are
5 involved.

6 QUESTION: Under these regulations the
7 Secretary --

8 MR. PHILLIPS: I think if they want to get out
9 of that they could do that.

10 QUESTION: -- the Secretary could not do that.

11 MR. PHILLIPS: I'm sorry?

12 QUESTION: Under these regulations, the
13 Secretary could say -- couldn't say, without looking at
14 any particular crossing, we are going to require every
15 crossing to have at least the minimum.

16 MR. PHILLIPS: That's correct. The way this is
17 set up at this point, it specifically says any project,
18 and I think that language necessarily means that if you're
19 allowing Federal funds to participate, regardless of how
20 you do it, you preempt State law.

21 I want to be clear about this, though, and it's
22 the reason why Easterwood is a sensible approach to this
23 problem, is, it doesn't mean that people are left
24 unprotected. That's the suggestion made by both the
25 Solicitor General and the respondent in this case.

1 The point here is that the States have a
2 continuous obligation, and the railroads have a continuous
3 obligation to update information about each one of these
4 grade crossings, the information that they have available.
5 How many trains are running? What kinds of materials are
6 running on those trains? What kinds -- and from the
7 States. What's running on that road? Is there going to
8 be a high school built next door, et cetera, all of which
9 goes into a yearly report to determine whether or not each
10 of those grade crossings is safe. You --

11 QUESTION: Mr. Phillips, did the Solicitor
12 General support the outcome that we reached in Easterwood?

13 MR. PHILLIPS: He did not support the -- oh, he
14 supported the outcome --

15 QUESTION: The outcome.

16 MR. PHILLIPS: -- that you reached in
17 Easterwood, yes, Justice Scalia.

18 QUESTION: Did he support the rationale?

19 MR. PHILLIPS: He not only supported the
20 rationale, he -- I was going to say invented. That's
21 probably harsh. He came up with the rationale, yes, Your
22 Honor. It was his analysis of this regulatory scheme that
23 suggested that ultimately the linchpin to preemption ought
24 to be Federal funding, because in that way you guarantee
25 that each project has had an initial look, subject to the

1 approval of the Secretary of Transportation, and then you
2 get the benefit of the entire --

3 QUESTION: So you're saying that having
4 persuaded us that that was correct, the Solicitor General
5 now wants to persuade us that it's not correct?

6 MR. PHILLIPS: I think the Solicitor General
7 could fairly be described as having come up the hill to
8 ask you to come back down the hill --

9 QUESTION: Well, it's a different Solicitor
10 General, too, isn't it? Isn't it a different Solicitor
11 General?

12 MR. PHILLIPS: My -- yes, Your Honor, there is a
13 different Solicitor General.

14 QUESTION: Representing a different philosophy
15 on this whole area of the law, I would say.

16 MR. PHILLIPS: Well, I -- no question about
17 that, Justice Stevens.

18 QUESTION: Yes. May I ask just sort of a basic
19 question? Normally when we have sort of a preemption here
20 the railroads contribute something. They pay a lot of
21 money to do something, and in exchange they get the
22 exemption from tort liability, but here it's rather odd,
23 because as I understand from your brief the incentive to
24 put in the safety devices for the railroads isn't -- is
25 not -- tort liability doesn't provide a sufficient

1 incentive, because the cost of installation exceeds their
2 potential liability. You say that in your brief.

3 And here it's rather unusual because the
4 Government provides the money and with it provides total
5 preemption and protection for the railroads, and the
6 railroads get two benefits at no cost.

7 MR. PHILLIPS: But that -- and the reason for
8 that -- I mean, it's not as though this is -- I mean, the
9 reason why there's no cost to the railroads is that
10 there's no real benefit to the railroad because first of
11 all, you know, having grade crossings does no benefit to
12 the railroad. If the railroad had its choice, it would
13 close those roads so they don't go across the railroad, so
14 that part of it, allowing them to keep going across
15 doesn't provide any benefit.

16 The safety that you're trying to provide -- and
17 that's why the Federal Government doesn't require, and
18 expressly limits the amount the railroads can be made to
19 pay for these particular projects, because they recognize
20 the beneficiary of this particular program are the people,
21 are the users of the highway, not the users of the
22 railroad.

23 But the reason why it ends up with the
24 particular situation you've described, Justice Stevens, is
25 the nature of the relatively unique statutory preemption

1 under 201.06 in title 49. There, Congress made it clear
2 that when the Secretary has adopted a requirement, then
3 that preempts State law, and all that the Solicitor
4 General's position and the Court held in CSX was that in
5 this particular context, with the funding that we've made,
6 it was subject to the approval, that creates a requirement
7 that triggers covering the subject matter under the
8 preemption provision, which is how you end up there.

9 I think in that -- I'm sorry.

10 QUESTION: Just on this, go back for a second to
11 the regulation, (b)(4). I take it that the problem has
12 arisen because most of the time you're telling me
13 everywhere but Tennessee. Most of the time that the
14 Secretary gives money, or at least a lot of the time,
15 they'll use it to make signs, or they'll use it to make
16 bells, or they use it to make gates or tunnels or
17 something, and normally somebody in authority, whether
18 it's Federal or State, considers that to be adequate.

19 But sometimes money is taken where we're just
20 going to do this quickly, a quick sign, and we're not
21 saying it's adequate, we're saying it's minimum, and here
22 it's Tennessee that says that, and maybe they're the only
23 ones ever to say it. That's true, isn't it? Have I got
24 it right?

25 MR. PHILLIPS: Well, I mean, Tennessee said they

1 wanted to have a minimum protection program --

2 QUESTION: Okay, so maybe nobody else ever does,
3 but our problem is, it makes tremendous sense to preempt
4 something, where somebody in authority has said this is
5 adequate, so keep the private plaintiffs out of it. It
6 doesn't seem to make very much sense to do it when they're
7 just saying it's minimum, but you're telling me that the
8 regs say that, so that's what it is. But as I look at the
9 reg, the key reg would have to be (4) --

10 MR. PHILLIPS: (b) (4) --

11 QUESTION: (b) (4).

12 MR. PHILLIPS: Right.

13 QUESTION: (b) (3) doesn't apply.

14 MR. PHILLIPS: Right.

15 QUESTION: And it talks about whether the
16 determination is made by State regulatory agencies, State
17 highway, et cetera.

18 Well, why couldn't you say, the word
19 determination there means the determination that this is
20 adequate, as well as what it is, and so the reg, (b) (4),
21 can -- because you don't need that clause set off in
22 commas, you know.

23 It can refer to giving the money, and obviously,
24 if there's some determination that it's adequate, then you
25 read it as preemptive, but if nobody's ever made a

1 determination that it's adequate, it just doesn't preempt,
2 or it doesn't apply. It's talking about adequacy
3 determinations. It's talking about applying where
4 there -- could you read it that way?

5 MR. PHILLIPS: Well, Justice Breyer, the next
6 line where you stop the quotation --

7 QUESTION: Yes.

8 MR. PHILLIPS: -- says, subject to the approval
9 of the Federal Highway Administration.

10 QUESTION: Yes.

11 MR. PHILLIPS: So the initial determination of
12 adequacy is made by those who are the closest to the
13 situation, and they cover essentially the scope of
14 individuals who would have information relevant to make
15 the determination as to the adequacy of these particular
16 devices, but all of that remains subject, ultimately, to
17 the Secretary's approval, and if the Secretary's not
18 convinced that these are adequate, and essentially that
19 has to be --

20 QUESTION: This, I don't understand about how it
21 works. Suppose that Tennessee takes \$43, \$43,000, and it
22 says, with this \$43,000 we are going to make two signs at
23 two crossings, and we tell you, this may not be enough,
24 absolutely may not be enough, and they have to get the
25 Secretary's approval.

1 Now, is the Secretary forbidden to approve it
2 unless Tennessee says it's not adequate? Tennessee said
3 it's not. We don't know if it is.

4 MR. PHILLIPS: Well, what is clear is that the
5 Secretary is supposed to exercise discretion, particularly
6 with respect to all 109, section 109 --

7 QUESTION: Well, you have a 109 argument, but if
8 I don't read 109 the way you read it, why don't I read the
9 reg to say, where there's an adequacy determination by
10 somebody in authority, you win? Where there's no adequacy
11 determination, 10 -- the (b)(4) does not bar anything.
12 Could I read it that way? That's my --

13 MR. PHILLIPS: I don't think that would be --
14 the scheme was designed to be comprehensive and, indeed, I
15 don't read the -- I don't read the --

16 QUESTION: Wait, are you --

17 QUESTION: What is the word -- doesn't it hinge
18 on what the word determination means?

19 MR. PHILLIPS: Yes, that's right.

20 QUESTION: Well, how can you possibly read
21 determination to refer to adequacy? Where the requirement
22 of 64 -- 646.214 b3 -- are not applicable, the type of
23 warning device to be installed --

24 MR. PHILLIPS: Right.

25 QUESTION: -- whether the determination is made

1 by a State or regulatory agency is subject to the approval
2 of --

3 MR. PHILLIPS: Right.

4 QUESTION: That word determination there
5 obviously means the determination of the type of warning
6 device to be installed.

7 MR. PHILLIPS: But Justice Scalia, the entire
8 regulatory scheme is the (b) (3), (b) (4) scheme, and look
9 at the beginning of (b) (3). It says, adequate warning
10 devices.

11 This is an entire effort -- and the Court
12 recognized this in CSX. This is an entire effort to make
13 sense out of a grade crossing situation that was a mish-
14 mash of State and Federal law, and to provide a
15 comprehensive solution to it which requires that the
16 Secretary have ultimate control both in terms of making
17 safety determinations, which comes out of 109, and this is
18 an implementation of 109.

19 QUESTION: I don't deny that. I am just
20 focusing on whether the word determination in (4) refers
21 to adequacy or refers to the type of device to be
22 installed, and it seems to me it clearly refers to the
23 type of device to be installed.

24 MR. PHILLIPS: Oh --

25 QUESTION: And if the State says, even though we

1 think this device is not adequate, just between you and
2 me, we're going to install it. That has been the
3 determination made by the State, and it would be subject
4 to the approval of the Secretary.

5 MR. PHILLIPS: And that -- to me that's the
6 pivotal point, though, is the subject to the approval of
7 the Secretary. It means it's also subject to the
8 disapproval of the Secretary on the basis that this is not
9 adequate for the particular circumstance.

10 The fact that the States do an outstanding job
11 and therefore don't implicate this problem doesn't mean
12 that the Secretary doesn't necessarily have that authority
13 and, frankly, the fact that Texas is here defending the
14 State's job I think speaks volumes.

15 QUESTION: And you say the Secretary has
16 exercised it just by providing the funds, whether or not
17 any particular review is made?

18 MR. PHILLIPS: Well, the Secretary receives
19 whatever information the Secretary wants on a project-by-
20 project basis if that's what he requires, and then has to
21 sign -- one of his delegees has to sign off on it, so yes,
22 there has to be a determination under those circumstances.

23 I'd like to reserve the balance of my time.

24 QUESTION: Very well, Mr. Phillips.

25 Mr. Coleman, we'll hear from you.

1 ORAL ARGUMENT OF GREGORY S. COLEMAN
2 ON BEHALF OF TEXAS, ET AL., AS AMICI CURIAE,
3 SUPPORTING THE PETITIONER

4 MR. COLEMAN: Mr. Chief Justice, and may it
5 please the Court:

6 Justice Breyer, I'd like to begin with your
7 question. The main concern here is, what are you doing?
8 Why should we allow a preemption if you're just putting in
9 crossbucks without any independent determination of
10 whether that's good enough?

11 And the reason that that should not be a concern
12 to this Court is that the respondents and the United
13 States are attempting to get the Court to look at this
14 particular aspect of the crossings program, when you go
15 through and make sure that all the crossings have at least
16 crossbucks. What they're forgetting about is the rest of
17 the crossings program.

18 Part 924 requires the States to have a
19 prioritization scheme which collects astounding amounts of
20 data about each of these crossings.

21 QUESTION: Where do we find 924?

22 MR. COLEMAN: It's in the same -- 23 C.F.R. 6 --
23 part 924 generally describes the process by which you
24 create, or collect the data about the crossings and then
25 crunch it through, and you have a prioritization scheme.

1 It's basically a mathematical formula that collects data
2 about these.

3 The railroads are required to give the States
4 data. The States collect their own data. They crunch the
5 numbers and they come up with a priority score for each
6 crossing. The States then, every year, look at all of the
7 crossings and find where the crossings have the highest
8 hazard risk. Let's go and do active device conversions of
9 those crossings, and that's what we do.

10 Now, in Texas, for instance, we get
11 approximately \$22 million a year for this program. In
12 Texas, we could go to every passive device crossing in the
13 State and put in new crossbucks and what-not every single
14 year and only use about a third of our money.

15 So if we did a State-wide crossings program,
16 which we're actually getting ready to do another one to
17 upgrade a lot of the crossbucks, we still have about two-
18 thirds of our money to go down the survey and determine
19 which crossings have the highest relative risk, where do
20 we want to spend the money that we have to upgrade from
21 crossbucks to active devices, and in Texas that's almost
22 always gates and flashers, the (b)(3)-type devices.
23 That's why it should not be a concern.

24 QUESTION: You mean to upgrade even where it's
25 not required? Aren't you -- you're required to have that?

1 MR. COLEMAN: We upgrade even where it's not
2 specifically required by (b) (3).

3 QUESTION: Okay.

4 MR. COLEMAN: We have in Texas about 12,000
5 public crossings.

6 QUESTION: What about number 8,617 on the list?
7 You say, gee, that's a concern, because you know, if you
8 really look at it, it's not a great crossing, and people
9 have been hurt there, and somebody would like to sue the
10 railroad because they think the railroad should have done
11 a better job itself, and why should the fact that you
12 happen to put a crossbucks up when the plaintiff is going
13 to say, that's woefully inadequate, stop the plaintiff
14 from suing just because maybe 15 years from now you're
15 going to get around to number 8,617?

16 MR. COLEMAN: Well, Justice Breyer, that's
17 ultimately the question in this case, who gets to decide
18 that.

19 QUESTION: Yes, right, but I mean, you haven't
20 relieved the concern by saying that that is what's there.
21 I mean, I'd be worried about it, and that's my basic
22 question.

23 MR. COLEMAN: The concern, and the concern
24 expressed in Shots and Shanklin is that the States aren't
25 doing a good job in prioritizing crossings and putting in

1 active devices where the --

2 QUESTION: They're doing a great job. The
3 concern is, there's a limited amount of money, and number
4 8,617 on the list, woefully inadequate though it is, could
5 be the railroad's fault for its woeful inadequacy, and
6 that's what this plaintiff claims.

7 MR. COLEMAN: That simply not the case in Texas
8 or in other States.

9 QUESTION: You mean, there's no bad crossing way
10 down on that list that the railroad's never in fault? How
11 would we know?

12 MR. COLEMAN: I'm not saying that there are no
13 bad crossings, but this program is nearly 30 years old.
14 We have 12,000 crossings. We have approximately 4,500
15 crossings in Texas with active devices. Texas has
16 thousands of rural crossings that have very low priority
17 index scores, but the types of crossings we believe, and
18 the people at our Department of Transportation believe the
19 types of crossings that absolutely require active devices
20 under (b) (3) were covered long, long ago.

21 What we're talking about now is relative risk
22 relating to vehicle traffic, train traffic, speeds of
23 trains, and we simply go down the list each year and
24 choose those crossings that have the highest risk, and
25 then we convert them to active devices, and even if we did

1 a State-wide project, we still have two-thirds of our
2 money for that year to do that, so if you think about
3 it --

4 QUESTION: I'm puzzled about one thing. How
5 does the outcome of this case bear on your ability to
6 carry out your own program? Does it matter which way we
7 decide it?

8 MR. COLEMAN: We think it does. First of all,
9 we think that this is an excellent Federal-State
10 cooperation program that has worked well --

11 QUESTION: Federal-State without requiring any
12 contribution from the railroads.

13 MR. COLEMAN: It has worked very well.

14 QUESTION: Yes.

15 MR. COLEMAN: The safety statistics have
16 dramatically improved over the past 30 years, and fatality
17 rates have plummeted during the time this project --
18 program --

19 QUESTION: But wouldn't that happen no matter
20 which way we decided the case?

21 MR. COLEMAN: If the Sixth Circuit determination
22 in this case is correct, that there must be a separate
23 Federal determination regarding the adequacy of all the
24 devices, we think that that will divert resources. We,
25 the States, are already doing these determinations.

1 QUESTION: But it will divert the railroad's
2 resources. It won't divert your resources.

3 MR. COLEMAN: We believe it will divert Federal
4 resources, because it will be the Federal Government that
5 will have to make independent determinations. The Federal
6 Government will start sending out, or having to send out
7 duplicative diagnostic teams, what-not. That is money --

8 QUESTION: Suppose we just said, where nobody
9 has said it's adequate, under those circum -- nobody in
10 authority has said it's adequate. Under those
11 circumstances, no preemption. Would that meet your
12 problem?

13 MR. COLEMAN: I don't believe you can say nobody
14 has said it's adequate, because in any given year -- for
15 instance, if Texas does a State-wide crossings program, it
16 still has two-thirds of that money. It looks down the
17 survey list regarding the relative priorities and it makes
18 a determination as to which crossings will receive active
19 devices and which crossings won't. That determination --

20 QUESTION: Mr. Coleman, you seem to be arguing
21 something contrary to what Mr. Phillips argued. He seemed
22 to be saying the Federal Government does make these
23 determinations, and you seem to be saying they just make a
24 blanket determination and we don't want them to make
25 individual determinations.

1 MR. COLEMAN: No, I think my --

2 QUESTION: So how does the scheme work?

3 MR. COLEMAN: Justice O'Connor, I believe my
4 argument is entirely consistent with Mr. Phillips. The
5 States make the determination as an initial matter. They
6 are submitted to the Federal Highway Administration for
7 approval under (b)(3) and (b)(4). We believe that all of
8 these programs are submitted under (b)(3) and (b)(4) and
9 are submitted for approval and, as he noted, the fact that
10 the Secretary approves most of these programs suggests
11 that the Secretary does have confidence in the State's
12 ability to evaluate these crossings.

13 QUESTION: I assume he can look through the
14 statistics that you've generated as to the traffic, as to
15 the nearness of high schools and all of that.

16 MR. COLEMAN: Yes, Justice Scalia.

17 QUESTION: And on the basis of that determine
18 that this is not a place that in his view requires an
19 automatic signal.

20 MR. COLEMAN: The Secretary has discretion to do
21 as little or as much background check or updating of the
22 State's numbers as he or she wants.

23 QUESTION: But he has no discretion as to
24 whether or not approval is required. If he does nothing,
25 he approves? Is that right or not?

1 MR. COLEMAN: I believe that the regulation --

2 QUESTION: If he accepts it and gives the
3 funding, does that mean that he approves?

4 MR. COLEMAN: Under the regulations, the
5 Secretary may approve, disapprove, the Secretary may
6 qualify approval, the Secretary may condition approval on
7 changes being made. I believe the Secretary --

8 QUESTION: May the Secretary do nothing and just
9 say, I -- you know, may be good, may be bad. I neither
10 approve nor disapprove. I am neutral.

11 MR. COLEMAN: I don't think that Federal funds
12 can be used unless there's an approval.

13 QUESTION: Well, is that 23 U.S.C. 109 that says
14 that Federal -- which is at 40a of the appendix to the
15 petition at the top of the page. It says, no funds shall
16 be approved for expenditure unless proper safety devices
17 complying with safety standards determined by the
18 Secretary at the time as being adequate shall be
19 installed.

20 Does the intersection that's involved in this
21 case, the Oak Church intersection, come within the ambit
22 of the highways covered by 23 U.S.C. 109?

23 MR. COLEMAN: There's some question about
24 whether the text of that provision applies. We believe
25 that the spirit does, because the programs were brought

1 together in the seventies. Importantly, the Federal
2 Highway Administration has never made any distinction
3 between on-system or off-system crossings.

4 The States, when they submit projects, include
5 both on-system and off-system for approval.

6 QUESTION: On-system meaning a Federal aid
7 highway or a highway affected under chapter 2?

8 MR. COLEMAN: Yes, Justice Kennedy. We believe
9 that when the States make these determinations the
10 Secretary is expressing approval of the devices.

11 QUESTION: Thank you, Mr. Coleman.

12 MR. COLEMAN: Thank you.

13 QUESTION: Mr. Goldstein, we'll hear from you.

14 ORAL ARGUMENT OF THOMAS C. GOLDSTEIN

15 ON BEHALF OF THE RESPONDENT

16 MR. GOLDSTEIN: Mr. Chief Justice, and may it
17 please the Court:

18 Our position, as several of the questions have
19 identified, is that the Government did not determine that
20 minimum protection devices would be adequate to protect
21 the Oakwood Church Road crossing and, to put that in the
22 language of the preemption provision of the Federal
23 Railroad Safety Act, no Federal regulation or order,
24 quote-unquote, covers the subject matter of the State law
25 duty here, which is to provide an adequate warning under

1 the circumstances at the crossing of the approach of a
2 train.

3 Now, we are joined in that view both by the
4 Federal Government, whose regulations or orders are
5 involved, and also the testimony of the Tennessee State
6 official who ran the program in question.

7 QUESTION: Now, the position -- your opponents
8 claim that the position that you're asserting here was not
9 the position that you took in the court of appeals, is
10 that correct?

11 MR. GOLDSTEIN: I'm --

12 QUESTION: I mean, as to the outcome of course
13 it is.

14 QUESTION: You're not representing the Solicitor
15 General.

16 MR. GOLDSTEIN: That's correct, I --

17 QUESTION: No, I thought it --

18 MR. GOLDSTEIN: But I think Justice Scalia is
19 correct. He understands that.

20 QUESTION: Yes, I understand who you are.

21 MR. GOLDSTEIN: No --

22 (Laughter.)

23 QUESTION: And -- now, I may be wrong about
24 what's asserted in the opposing briefs, but I thought they
25 asserted that with respect to you it's a new position as

1 well. They assert that.

2 MR. GOLDSTEIN: I don't understand there to be
3 any tension between our position below and here
4 whatsoever. Our position is that you have to -- the
5 Government has to have decided what's adequate here if
6 it's going to cover the subject matter of a State law duty
7 to provide an adequate warning.

8 QUESTION: No, but you go along with the
9 Government's division of (3) and (4) into minimums and
10 then those areas where you need on-site inspections to go
11 above the minimums. That's not the position you took
12 below.

13 MR. GOLDSTEIN: What we explained below is that
14 this is a crossing, if you look at it in terms of (b) (3)
15 and (b) (4), just -- let's go to the regulations which are
16 the only ones they're alleged to preempt here --

17 QUESTION: Right.

18 MR. GOLDSTEIN: Is that at the very least, even
19 if these regulations were applicable, they weren't
20 complied with, because the district court explained that
21 the conditions set out, if we could just turn to the cert
22 petition 47a in the appendix, there's a list of six or
23 seven conditions there, and what the district court said,
24 and we supported that view on appeal, is look, these
25 conditions existed at this crossing.

1 The State never went out and considered what
2 were -- what was the situation at the crossing, and so
3 there was never a determination by the State that what
4 happened here, that the minimum protection devices they
5 installed were, in fact, adequate, and we're saying the
6 same thing here, except we have even a brighter line
7 that's suggested both by the opinion below and by the
8 Solicitor General, and that --

9 QUESTION: Well, I mean, that comes to whether
10 the money could have -- can be given. I thought that the
11 money can't be given unless there are adequate warning
12 devices.

13 MR. GOLDSTEIN: And that is not correct, and let
14 me just get right to the nub of it. The -- (b) (3) and
15 (b) (4), as the Solicitor General has explained, don't
16 apply to this crossing at all, and let me explain why.
17 What (b) (3) and (b) (4) are, are provisions that guide
18 determinations of individual crossings.

19 You go out, you study your crossing with an
20 expert team, and you look at these conditions in (b) (3),
21 and if these conditions exist, then you have to put up
22 lights and gates unless the engineering team tells you
23 otherwise, and if these conditions don't exist, under
24 (b) (4) the Secretary gets to decide what it is you're
25 going to put up.

1 QUESTION: Now, do you need on-site inspection
2 to determine whether (a), (b), (c), (d), (e) and (f)
3 exist?

4 MR. GOLDSTEIN: Yes. That's the only way you'll
5 ever know.

6 QUESTION: Why? Why? They go into some length
7 saying, of course we could even decide if (b)(3) exists.
8 We have loads of material.

9 MR. GOLDSTEIN: But --

10 QUESTION: We have all the statistics. What do
11 you mean, you have to go out and look? We have pictures
12 of it in our office. I mean, what's to look.

13 MR. GOLDSTEIN: But (b)(4) is the negative.
14 You -- I can tell you, based on a statistical analysis,
15 whether or not there are high-speed trains, sure, and they
16 were here. The trains traveled at a maximum speed of 60
17 miles an hour.

18 What I can't do, without going to the crossing,
19 is make the judgment about these conditions all not being
20 there. You have to go out and study the combinations that
21 are evaluated here, and in addition the most critical
22 conditions aren't available to anyone, and that -- without
23 going out to the crossing, and that is --

24 QUESTION: Excuse me. I don't -- I really don't
25 understand. You're saying you can tell, sitting in your

1 office, from this mass of statistics, that (a), (b), (c),
2 (d), (e), and (f) exists.

3 MR. GOLDSTEIN: Some of them. Some of them,
4 that there is --

5 QUESTION: Ah, not all of them.

6 MR. GOLDSTEIN: That there are multiple mainline
7 railroad tracks. There's a piece of data about that.

8 QUESTION: But you can't tell that they don't
9 exist.

10 MR. GOLDSTEIN: No. You cannot tell that other
11 of the conditions do not exist, and the most particular
12 example is the sight distance. You cannot tell, just
13 sitting in your office, and the State's hazard index does
14 not evaluate whether a driver who comes up to the crossing
15 can see the train in time to stop.

16 And let me just point you to the testimony about
17 this, and what it is that the State actually was doing
18 here as the delegatee of the Federal Government.
19 Tennessee's official who ran this program explained that
20 when they put these minimum protection devices up they
21 were not evaluating the conditions of the crossing. This
22 is in the red brief at pages 31 to 35, and I will point
23 you just to --

24 QUESTION: Well, I don't know that we would want
25 to decide this case just on the basis of what an official

1 said about this particular crossing.

2 MR. GOLDSTEIN: Mr. Chief Justice, I understand
3 that. This testimony is about the Tennessee program writ
4 large, what it is that they were doing under their minimum
5 protection program, and let me just detour briefly to
6 explain that Mr. Phillips is not correct when he says that
7 this is somehow just unique to Tennessee. As the Federal
8 Government's brief explains, every single State in the
9 country tracks separately and had separate minimum
10 protection programs and a separate program dealing with
11 adequacy.

12 QUESTION: Well now, this crossing in question
13 was identified as one of I think 196 crossings for which
14 Federal funds were sought, and are you saying that the
15 Secretary approved funds for inadequate safety devices?

16 MR. GOLDSTEIN: Let me say first that it is, of
17 course, more than 196. 196 were done at once, but there
18 were actually --

19 QUESTION: The 196 list included this one.

20 MR. GOLDSTEIN: Yes.

21 QUESTION: Included Oak Church specifically.

22 MR. GOLDSTEIN: Yes.

23 QUESTION: And the Secretary approved Federal
24 funds for the installation of those devices there.

25 MR. GOLDSTEIN: Yes.

1 QUESTION: Are you saying that the Federal
2 Government approved funds for the installation of
3 inadequate safety devices?

4 MR. GOLDSTEIN: Yes, and here is why.

5 QUESTION: Can it do that?

6 QUESTION: And it's authorized to do that.

7 MR. GOLDSTEIN: Yes.

8 QUESTION: And that's the SG's position, too.

9 MR. GOLDSTEIN: Yes.

10 QUESTION: And since he's authorized to do it, I
11 assume they're entitled to those funds whether or not he
12 approves it.

13 MR. GOLDSTEIN: And in fact there's a
14 congressional mandate.

15 QUESTION: And you say he can do that
16 consistently with (b)(4), or that (b)(4) is simply
17 inapplicable?

18 QUESTION: Or its section 109.

19 MR. GOLDSTEIN: Let me deal with two separate
20 statutes and a regulation. 109, the only provision in
21 question is 109(e), and the clause that Mr. Coleman was
22 referring to you, there's a provision that says on every
23 Federal aid highway you can only install adequate warning
24 devices. This is not a Federal aid highway, and I will
25 point you to the supplemental lodging of the petitioner.

1 The last document in there explains that this is an off-
2 system crossing. It is a local, rural road, and it was
3 not required to comply with 109(e).

4 QUESTION: But the section also says not just
5 Federal aid highway, or highway affected under chapter 2
6 of this title.

7 MR. GOLDSTEIN: And chapter 2 is in the main
8 things like Indian lands. It doesn't apply here, if the
9 Court goes and reviews chapter 2. There's no allegation
10 by the petitioner.

11 To return to Justice Kennedy, whether or not
12 there's a statutory and regulatory authority for the
13 Federal Government to approve minimum protection devices
14 that are not adequate, it is in 23 U.S.C. 130(d), which is
15 reprinted in the red brief at page 4 at the top. It's the
16 first block quote.

17 This is the statute that set up the hazard
18 program that Mr. Coleman refers to that's in the
19 regulations at part 924, and if I could again, while
20 you're looking this up, detour briefly to note that the
21 Court unanimously held in Easterwood that the program
22 under which Mr. Coleman is relying was not preemptive. It
23 was just a way to rationalize the spending of Federal
24 funds.

25 To return back to the statute, there are two

1 things in it, and let me just briefly put this in context.
2 The Secretary of Transportation went to Congress in 1971
3 and 1972 and said, look, we've got a real problem. We've
4 got thousands upon tens of thousands of crossings that
5 aren't protected. We've only got so much money. We think
6 that you need to set out funding on an annualized basis so
7 that we can protect more crossings every year, but in the
8 meantime, we have to have --

9 QUESTION: As I understand it, you're saying the
10 section you just referred to, the quoted section on
11 page -- is the one that authorizes the Federal Government
12 to contribute funds even where the situation is
13 inadequate. I don't see that in the language that you
14 refer to.

15 MR. GOLDSTEIN: Mr. Chief Justice, below -- the
16 last sentence, at a minimum --

17 QUESTION: Would you please give me the page
18 number?

19 MR. GOLDSTEIN: I apologize, Justice Kennedy.
20 Page 4 of the red brief. The first block quote, the last
21 sentence. 130(d) says, at a minimum, such a schedule,
22 which is the schedule of improvements, shall provide signs
23 for all railway highway crossings. That is, Congress
24 said, at the very least, everything has got to have
25 standard signs without regard to the conditions.

1 The next block quote is the Secretary's
2 implementation of that. Remember, I did stop to answer
3 the Chief Justice's question. This is implementing the
4 Secretary's recommendation that we need to install
5 adequate warning devices as Federal funds become
6 available, but in the meantime, because that's going to
7 take so long, we need a finger in the dike. We've at
8 least got to get standard signs up at every crossings, at
9 every crossing.

10 And what Mr. Coleman doesn't tell you is that
11 Texas every year upgrades only 150 of its 12,000
12 crossings. Justice Breyer, you don't have to get down to
13 number 8,617 to figure out that the State has not stepped
14 in and determined what's adequate. You can get down to
15 number 1,000 or 2,000.

16 QUESTION: What's bothering me about your side
17 of this is I suspect Justice Scalia was right, and you
18 seem to agree with that, too, that it's pretty hard to
19 read the reg (b) (4) as talking about -- the way I wanted
20 to read it, I think that's not really possible, so you
21 just say, well, look, (b) (4) doesn't apply at all.

22 MR. GOLDSTEIN: That's right.

23 QUESTION: Nor does (b) (3). And what they come
24 back and say, this is really amazing, here's a new program
25 of the Department of Transportation we've never even heard

1 about, but we're in the railroad business. There seems,
2 according to the SG and you, to be a program of handing
3 out money to do this provisional thing. Well, that's
4 fine. Have such a program, but -- and write some regs for
5 it, and don't say they don't preempt, but we've never
6 heard of it up till now, so don't just bring it up for
7 this case.

8 I mean, I think that's roughly -- perhaps a
9 little unfairly, but I think roughly that's what their
10 case is -- what they're saying.

11 MR. GOLDSTEIN: Well, the truth of the matter is
12 that every single State has this program, and every single
13 State has taken money under it.

14 QUESTION: Well, are there some regs on this
15 other program, for example? Where are they?

16 MR. GOLDSTEIN: There is a directive from the
17 Federal Highway Administration. It is the next block
18 quote on the same page, and the directive explains, as --
19 and I'm starting -- you can start wherever you like in it,
20 but I'll start at the beginning.

21 Section 203(a) of the Highway Safety Act of
22 1973, which is 130(d), requires as a minimum that each
23 State's schedule of improvements shall provide signs at
24 all crossings. As a first priority, each State, in
25 cooperation with the involved railroad and any other

1 agency having jurisdiction, shall identify those grade
2 crossings at which they are either no signs, or
3 nonstandard signs, and institute an improvement program to
4 provide signing and pavement --

5 QUESTION: I get that point, but does it say
6 somewhere that (b) (4) doesn't apply to that kind of a
7 program?

8 MR. GOLDSTEIN: No, because (b) (3) is -- and
9 (b) --

10 QUESTION: Not (b) (3). (b) (3) we're not talking
11 about.

12 MR. GOLDSTEIN: Just Breyer, if I could just --

13 QUESTION: Does it say somewhere (b) (4) --

14 MR. GOLDSTEIN: -- point out, as Easterwood
15 twice explains, (b) (4) is just -- is triggered only by
16 (b) (3). It says, when these conditions in (b) (3) don't
17 exist, then you go to (b) (4).

18 QUESTION: Mr. Goldstein, the section you just
19 read, which in your brief you say the Federal Highway
20 Administration explained in 1974, and then it's cited
21 FHMP. Was this a regulation issued by the Secretary?
22 What sort of a thing was it?

23 MR. GOLDSTEIN: It's the Federal Highway Program
24 Manual.

25 QUESTION: Can you answer my question?

1 MR. GOLDSTEIN: It is not a regulation. It is a
2 program manual that is given as guidance to every single
3 State on administering the Federal --

4 QUESTION: Well now, that certainly doesn't have
5 nearly the status that a regulation issued by the
6 Secretary would.

7 MR. GOLDSTEIN: As a matter of deference to the
8 Secretary that may well be true, Mr. Chief Justice, but
9 let me just tell you what really is at issue. It is not a
10 question of whether you should defer to the Secretary's
11 interpretation. You are being asked to say what happened,
12 because this is over.

13 This program was administered by the Secretary
14 from 1973 to the early nineties, and it's now done.
15 They're not asking for permission to do this going
16 forward. They're explaining to you what did happen in the
17 seventies, eighties, and early nineties, and what they
18 were doing --

19 QUESTION: Well, how could something that was
20 issued in 1974 explain what happened in the eighties or
21 nineties?

22 MR. GOLDSTEIN: Because this was the guidance
23 that they issued, and this is the guidance --

24 QUESTION: Well --

25 MR. GOLDSTEIN: The regulation, for example, Mr.

1 Chief Justice --

2 QUESTION: Well, just a minute, Mr. Goldstein.
3 You said, as I understood it, that this thing that you
4 quoted here explained what happened in the eighties and
5 nineties, and I said how could it, when it was issued in
6 1974.

7 MR. GOLDSTEIN: Just as the regulation was
8 issued in 1975, this is the guidance that the agency gave
9 in response to the statute, and it hasn't been repealed in
10 any sense, Mr. Chief Justice. That's what the States were
11 supposed to do, and as the testimony collected here
12 explains, that's in fact what the State did.

13 Justice Stevens, if I could also return to your
14 question about, well, what would happen to Texas and to
15 the other States if the railroad were to prevail. The
16 real answer is the -- that State regulation and State
17 decisionmaking about what's necessary to protect crossings
18 would be preempted.

19 Texas -- remember that the statute preempts all
20 State orders, laws, or regulations. This is section
21 201.06, the preemption provision at issue, and it would
22 tell Texas they cannot regulate this crossing any more
23 because they, like Tennessee, like every other State,
24 spent Federal money to put out minimum protection signs
25 without any indication that those signs would be adequate

1 to protect the crossing.

2 What Tennessee did not do, and it is
3 unquestioned that they didn't --

4 QUESTION: Well, it wouldn't prevent the State,
5 would it, from coming back later and saying this crossing
6 deserves a better mechanism and we're going to use some of
7 the Federal money, or at least propose to use it, to
8 upgrade?

9 MR. GOLDSTEIN: That would be the only way.
10 They could only --

11 QUESTION: But that could be done.

12 MR. GOLDSTEIN: They could, but for example,
13 Justice O'Connor, what they could not do would be to come
14 in and say, we've determined that several thousand
15 crossings actually need a fourth or a fifth warning sign.
16 They can only act from henceforth as the delegatee of the
17 Federal Government. Their own independent decisionmaking
18 and regulatory authority is displaced.

19 QUESTION: You were saying that what the State
20 did not do here was?

21 MR. GOLDSTEIN: What they did not do is send out
22 anyone on their own or on behalf of the Federal Government
23 as the delegatee under the --

24 QUESTION: Well, isn't that disputed by some
25 later lodging, the Cantrell deposition?

1 MR. GOLDSTEIN: There is one letter that is not
2 in the record, but it does not dispute my point.

3 What (b) (3) would require, and this hazard
4 program would require, is at the time you go out --

5 QUESTION: I thought Farris was an employee of
6 the Tennessee Department of Transportation, and he wrote
7 that after he visited the crossing no signs were needed.
8 Why are you telling me that they -- there was no visit by
9 a State employee?

10 MR. GOLDSTEIN: Justice Kennedy, what (b) (3) and
11 (b) (4) require is someone go out and determine what
12 warning devices are necessary. The letter simply doesn't
13 say what it is that you're -- what your adverting to.

14 It is set forth in the supplemental lodging of
15 the petitioner at the end of tab C, and what it says is
16 only -- there's a letter from a Congressman that asks
17 Tennessee, is this high enough up on your priority program
18 to spend the limited Federal funds available to install
19 lights and gates, and he answers, this crossing does not
20 have sufficient train-vehicle exposure to qualify for
21 active warning devices. He does not say that minimum
22 protection devices would be adequate, and he doesn't say
23 that we actually looked and decided what was necessary to
24 protect this crossing.

25 QUESTION: Mr. Goldstein, you know, normally

1 when we interpret a statute it's interpreted. We don't
2 come back and reinterpret it. We go on to the next
3 mistake.

4 (Laughter.)

5 QUESTION: What you have -- what we said in
6 Easterwood was this, and how does it fit in with your
7 theory? In short, for projects in which Federal funds
8 participate, not --

9 QUESTION: What page are you reading?

10 QUESTION: I'm reading on page 11 from -- what I
11 have is from lawyer's edition. I don't --

12 MR. GOLDSTEIN: 671 of the U.S. Reports.

13 QUESTION: For projects in which Federal funds
14 participate in the installation of warning devices, not
15 just those which involve Federal highways, the Secretary
16 has determined the devices to be installed and the -- has
17 determined devices to be installed and the means by which
18 railroads are to participate in their selection.

19 The Secretary's regulations therefore cover the
20 subject matter of State law.

21 MR. GOLDSTEIN: Justice Scalia, that is a
22 description of how (b) (3) and (b) (4) work when it is
23 applied. You have to look at the eight sentences, the
24 entire paragraph that precedes it. It explains that when
25 (b) (3) and (b) (4) are applicable, then the Federal

1 Government won't send out the money unless they've
2 determined that the warning devices are adequate.

3 QUESTION: For projects in which Federal funds
4 participate is what it said. It did not draw a
5 distinction between those projects that involve Federal
6 highways and those that don't involve Federal highways.

7 MR. GOLDSTEIN: What I'm saying, Justice Scalia,
8 is, the sentence that you are reading describes (b)(3)-
9 (b)(4). It is not setting forth a rule of law, and I will
10 give you an example. If the Federal Government gave the
11 petitioner a loan of \$50 million and therefore Federal
12 funds would participate in the installation of warning
13 devices, the Court was not saying that would be
14 preemptive.

15 What the Court is saying is, when the
16 decisionmaking process set out in (b)(3) and (b)(4) is
17 followed, when we do look at the crossings, then we really
18 have done what the common law does. We have gone out and
19 determined what warning devices will adequately warn the
20 individuals of the approach of a train, but when all you
21 do is go to tens of thousands of crossings, and without
22 regard to the circumstances simply stick up signs which
23 warns that a track is ahead, not that a train is ahead,
24 and you don't care at all what the conditions were at the
25 crossing, then you haven't done that.

1 To return --

2 QUESTION: What is it, then -- if (b) (4) doesn't
3 apply to this minimal program, what requires the
4 Secretary's approval for the minimal program?

5 MR. GOLDSTEIN: Section 924, and the other
6 regulations that simply deal with issuing Federal funds.
7 There are --

8 QUESTION: Is there something in some other
9 regulation that says, for the minimal program you have to
10 get the Secretary's approval to it?

11 MR. GOLDSTEIN: It says -- I apologize. It says
12 simply that if the Federal Government is going to spend
13 money, the Secretary has to authorize the spending of the
14 money.

15 QUESTION: What says that?

16 MR. GOLDSTEIN: The part 924 regulations.

17 QUESTION: What's the regulation that says it
18 for this other -- well, maybe we'll -- I'll look it up.

19 MR. GOLDSTEIN: There is no reference to the --
20 the difficulty is only that there is -- it doesn't say,
21 minimum protection program, but the only thing that would
22 trigger (b) (3) and (b) (4), just to look again at its
23 text --

24 QUESTION: Well, I think what they're saying is
25 for 45 years we thought it governed the whole thing.

1 QUESTION: Thank you, Mr. Goldstein.

2 Ms. Millett, we'll hear from you.

3 ORAL ARGUMENT OF PATRICIA A. MILLETT

4 ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE,

5 SUPPORTING THE RESPONDENT

6 MS. MILLETT: Mr. Chief Justice, and may it
7 please the Court:

8 For 25 years, the Secretary has administered the
9 minimum warning sign requirement in section 130(d), a
10 congressional mandate, as a distinct program separate and
11 apart from its regulatory scheme under (b)(3) and (b)(4)
12 that determines what level of protection is adequate at an
13 individual crossing to make it safe.

14 QUESTION: Ms. Millett, would this have been
15 relevant to our decision in Easterwood?

16 MS. MILLETT: Easterwood was so far beyond the
17 minimum program -- it was a situation where individual
18 study had already been done --

19 QUESTION: Whether there are two programs, a
20 minimum program and then some supplemental program, was
21 certainly relevant to the preemption decision in
22 Easterwood, wasn't it?

23 MS. MILLETT: Well, it wasn't remotely at issue
24 in the case. It hadn't come up. No one had addressed --

25 QUESTION: Well, it was at issue -- it was

1 relevant to the general issue of preemption and when
2 preemption occurs.

3 MS. MILLETT: There are an awful lot of highway
4 programs that are covered and administered by the
5 Secretary. They weren't addressed.

6 Now, perhaps it would have been better for us to
7 have spent some time discussing this in our brief in
8 Easterwood. We did, at the end of our discussion section,
9 note that crossbucks have a special status, that
10 crossbucks had a special status in the manual for purpose
11 of preemption.

12 QUESTION: Did you --

13 MS. MILLETT: We did do that in our brief, but
14 we did not go on at length about this program.

15 But the issue is that we now are sitting here in
16 the year 2000 looking back at what happened for 25
17 years --

18 QUESTION: Well, they're saying for 25 years we
19 thought (b) (3) and (b) (4) governed this minimal -- we're
20 not saying there wasn't some minimal thing. Maybe there
21 was a minimal program. But we thought it was governed,
22 just like the whole rest of the program, by (b) (3) and
23 (b) (4), so was there anything that made -- you know, that
24 says that wasn't so?

25 MS. MILLETT: Absolutely, and the first thing is

1 the practice of the State. If, if they thought it was
2 governed by (b) (3) and (b) (4), they would have to, as
3 Texas' brief explains quite well, have sent out a
4 diagnostic team to do an engineering study --

5 QUESTION: So they say sometimes you do,
6 sometimes you don't. Why do you have to send out a
7 diagnostic team in Nevada to see if it's clear, for
8 example, if there's 45 miles of track without a curve, and
9 the same thing is true of the highway, and there's no
10 mountain. It's a desert. I mean, why would you have to
11 send out a team to show that there's nothing obstructing
12 the view?

13 MS. MILLETT: For purposes of a (b) (3) and
14 (b) (4) determin -- because you're not going to get the
15 money from the Secretary unless you submit an engineering
16 study of that individual crossing. 23 C.F.R. 924.9(a) (3)
17 requires the engineering study.

18 The manual on Uniform Traffic Code devices says
19 engineering studies will be done. The Railway-Highway
20 Grade Crossing Handbook, which all the States have, says
21 the engineering study will be done. You do not get funds
22 under (b) (3) - (b) (4) without going out, looking at the
23 individual crossing, and deciding what is needed, not for
24 minimum protection, but to make that crossing safe.

25 That is not what happened under the minimum

1 program. That was the normal operating procedure of the
2 Department of Transportation, but when Congress said in
3 130(d) at a -- this is going to take a long time. It's
4 going to -- Congress -- Texas has 11,500 crossings, do
5 about 150 crossings a year. It would take them 100 years
6 just to get to every crossing and just to put up the
7 minimum if they studied it the way you do for (b)(3)-
8 (b)(4).

9 QUESTION: They need the Secretary's approval --

10 MS. MILLETT: That didn't happen.

11 QUESTION: -- for minimal program expenditure.

12 MS. MILLETT: They need the Secretary's approval
13 for that --

14 QUESTION: And what says that?

15 MS. MILLETT: The -- well, first of all, 23
16 C.F.R. part 630 addresses the general need for a
17 Secretary's authorization for Federal funds.

18 QUESTION: What --

19 QUESTION: Where is that?

20 QUESTION: Where do we find what you're talking
21 about now?

22 MS. MILLETT: I don't believe it's reproduced in
23 the briefs. It's just the general regulations
24 governing -- this is a big highway contract program. The
25 general regulations saying that you need Federal aid

1 project authorization are at -- reproduced at -- are at 23
2 C.F.R. --

3 QUESTION: You see, this is why I have some
4 sympathy for the railroad. You're arguing that there's a
5 separate program, and we don't even have the regulations
6 in front of us.

7 MS. MILLETT: It's not that it's a separate
8 program. That's the general requirement that to get money
9 under a highway program out of the Secretary, it has to be
10 authorized by the Secretary.

11 QUESTION: Ms. Millett --

12 QUESTION: You're making a distinction between
13 authorized and approval, then. You say everything has to
14 be authorized.

15 MS. MILLETT: Uh-huh.

16 QUESTION: But approval relates to a specific
17 crossing. That's what you seem to be saying. Authorize,
18 the Secretary must authorize any spending of Federal
19 funds, but the word approval has a narrower meaning, and
20 it relates to a specific crossing. That's what you seem
21 to be saying.

22 MS. MILLETT: Unfortunately I'm not even --
23 that's -- those aren't the words, either. I don't mean to
24 split on words. Everything has to be authorized and has
25 to be approved, but the question is, what was approved?

1 Did we approve under (b) (3) - (b) (4) determination of what
2 is adequate to protect an individual crossing --

3 QUESTION: But you authorized something. You
4 authorized --

5 MS. MILLETT: Right. Right.

6 QUESTION: -- the spending of Federal funds.

7 MS. MILLETT: There's two things that we can
8 approve. We can approve an authorization under (b) (3) -
9 (b) (4) for funding to install the protective devices at a
10 crossing that will make that individual crossing safe,
11 based on individualized study. We can also, pursuant to
12 congressional mandate, authorize the installation of a
13 fuller Federal protection --

14 QUESTION: Okay. Ms. Millett --

15 MS. MILLETT: -- but it doesn't make it
16 adequate, and this is -- I'm sorry.

17 QUESTION: No, I -- finish your sentence.

18 MS. MILLETT: I just want to say, this is -- we
19 have a directly different response to your question to
20 Mr. Phillips, and that was does the Secretary have the
21 ability to approve just a Federal minimum program that
22 doesn't determine what is adequate, and that, yes we have
23 the ability because Congress said so in 23 U.S.C. 130(d),
24 so that is the exception to the normal rule.

25 The normal rule is, you want the money, you do

1 an individualized study and show us what's going to make
2 it safe. The exception is the minimum protection program.

3 QUESTION: All right. Now, the problem that I
4 have in drawing the distinction that you're drawing is
5 this, and it's essentially the problem that I have with
6 your argument from 25 years of administrative experience.

7 In Easterwood, which was what, 7 or 8 years ago,
8 this Court laid down -- wisely or unwisely it laid down a
9 preemption rule, and the preemption rule turned on the
10 participation of Federal funds, and the formulation that
11 the Court used, if I remember correctly, was just about
12 exactly what the Solicitor General at the time said was
13 the formulation we ought to use.

14 It seems to me that at that point the Federal
15 Highway Administration had some kind of an obligation to
16 say, if the Court means what it says in adopting the
17 language which we told it to adopt, there's no longer a
18 distinction between minimum programs under (d), whatever
19 it is (d), and the subsection (3) and subsection (4)
20 programs. The Court has laid down a clear rule, and it
21 turns on whether Federal money is involved.

22 Therefore, we better do one of several things.
23 We better revise our regs. Maybe we better get statutory
24 authority. Maybe we better send more people out to look
25 at the intersections. But the truth is, there has been a

1 simple rule, announced by this Court for 7 or 8 years ago,
2 and I don't know why that does not trump the
3 administrative experience that you refer to that preceded
4 it.

5 MS. MILLETT: Two answers. First is, we don't
6 read Easterwood as making everything turn on Federal
7 funding and, in fact, the Court didn't. There was Federal
8 funding of the crossing. It said it wasn't protected.
9 The question is -- the question in Easterwood that this
10 Court adopted I think was a quite pragmatic and correct
11 rule that was consistent with our position here, and that
12 is, was money spent to make an individual crossing safe?

13 They tried to argue in Easterwood, well, there
14 was a grouping here of crossings, and that was enough to
15 make it safe, and this Court said the program cast doubt
16 on that, that the individual crossing hadn't been made
17 safe with the Federal funds.

18 The second part --

19 QUESTION: But there's no question that when the
20 minimal sawbuck signs are installed the purpose of
21 installing them is to make the crossing safe.

22 MS. MILLETT: No --

23 QUESTION: It may not succeed, but that's the
24 purpose.

25 MS. MILLETT: NO, it is not to make that

1 crossing safe in the same way that State tort law makes
2 that crossing safe, or any State law --

3 QUESTION: No --

4 MS. MILLETT: -- that makes a crossing safe. It
5 is to make it less unsafe. Any interim --

6 QUESTION: Okay. That's what I meant. It may
7 not succeed in its objective, but its objective is clear,
8 and that's why the money is being spent.

9 QUESTION: Ms. Millett --

10 QUESTION: Do you distinguish between making a
11 crossing safe and making it less unsafe?

12 MS. MILLETT: Well, what -- for purposes of
13 (b) (3) and (b) (4) what adequate warning devices are, are
14 designed to address what makes an individual crossing safe
15 in the same way that State law had for hundreds of years
16 before.

17 The question is whether that has been displaced.
18 When -- in Easterwood you set up a rule that said, when
19 there's been Federal funding on a particular crossing that
20 makes that crossing safe, we will not allow -- we'll have
21 preemption because you don't want a jury second-guessing
22 that federalized decision.

23 QUESTION: That might have been the holding, but
24 that was not our general language. Our general language
25 was Federal funding, it's covered.

1 Can I ask you about (4)? If there is this two-
2 level thing, minimum plus, one would have expected (4) not
3 to say, for crossings where the requirements of (3) are
4 not applicable the type of warning device to be installed,
5 whether the determination is made by a State, blah, blah,
6 blah, blah, is subject to the -- it makes it sound as
7 though the determination of what warning device to be
8 installed is up to the State, or you know, so long as it
9 gets the approval of HW -- FHWA.

10 You would think it would have said somewhere in
11 (4), the type of warning device to be installed, so long
12 as it meets the minimum requirements of 130 whatever it
13 is, but it doesn't make any reference to the minimum at
14 all. It says, the type to be installed, as though it's
15 entirely up to the State agency. Why isn't there some
16 reference to the minimum in (4)?

17 MS. MILLETT: May I answer?

18 QUESTION: Yes, you may.

19 MS. MILLETT: Because (b) (3) and (b) (4) --
20 (b) (4) is a direct outgrowth of (b) (3). It is only
21 focused on determining what is adequate to make a
22 particular crossing safe under the circumstances and
23 conditions of that crossing. It has no application to the
24 uniform floor of safety accomplished by the minimum
25 program.

1 QUESTION: Thank you, Ms. Millett.

2 Mr. Phillips, you have 2 minutes remaining.

3 REBUTTAL ARGUMENT OF CARTER G. PHILLIPS

4 ON BEHALF OF THE PETITIONER

5 MR. PHILLIPS: Thank you, Mr. Chief Justice.

6 Obviously concerned that the Court may actually
7 conclude that what it said is what it meant in Easterwood,
8 the Government and the respondents have asked you to
9 create an entirely different regulatory scheme, and that
10 is a scheme that no one has ever seen or identified.

11 There is no regulatory footprints. There are no
12 regulatory fingerprints that even remotely suggest that
13 there is a distinction between a minimum safety program
14 and the (b) (3) - (b) (4) adequate warning program which is
15 the basis on which this Court decided preemption would
16 turn in Easterwood.

17 And I would ask the Court to look at 130(d),
18 which is the basis for the minimum safety program the
19 Government identifies, and recognize that the language of
20 130(d), which is at 42a of the appendix to the petition,
21 at a minimum such a schedule -- it doesn't say anything
22 about sites or anything. The schedule has to provide for
23 that, and the reason for that is, this is not a provision
24 that creates an entirely new regulatory scheme.

25 If the Secretary had wanted to do so, it

1 certainly would have been within the Secretary's
2 discretion. That's not the regulatory scheme that the
3 Secretary adopted. The one the Secretary adopted is the
4 one the Court identified in Easterwood, and if it simply
5 applies the language of Easterwood to this case, the
6 outcome of this case seems to me to be foreordained.

7 QUESTION: -- that the floor is in the
8 regulations, that there's no lack of statutory authority
9 for the Secretary to do what Mr. Goldstein contends the
10 Secretary did do?

11 MR. PHILLIPS: I think there's clearly statutory
12 authority, and I think it's important to recognize that
13 (b) (3) and (b) (4) are designed to implement 109, which is
14 what's going to preserve the Government's ability to
15 decide what State, and what it's going to fund, and if the
16 Secretary chooses to apply that in a different way, that's
17 fine, but that's not the system that the Secretary
18 employed in this particular case, and it's not the system
19 the Court identified in Easterwood.

20 QUESTION: What do you do with the argument that
21 109 only applies to Federal aid highways?

22 MR. PHILLIPS: 109 -- well, first of all,
23 there's a serious question about whether they intend that,
24 but the bottom line about 109 is, the regulation still
25 implements 109. Adequate is adequate for both of those,

1 otherwise you make a mish-mash, and they can spend money
2 on things that the Government would regard as unsafe. No
3 basis for that.

4 CHIEF JUSTICE REHNQUIST: Thank you,
5 Mr. Phillips. The case is submitted.

6 (Whereupon, at 11:07 a.m., the case in the
7 above-entitled matter was submitted.)

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