

GINSBURG, J., dissenting

SUPREME COURT OF THE UNITED STATES

No. 99–312

NORFOLK SOUTHERN RAILWAY COMPANY,
PETITIONER v. DEDRA SHANKLIN, INDIVIDUALLY, AND
AS NEXT FRIEND OF JESSIE GUY SHANKLIN

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

[April 17, 2000]

JUSTICE GINSBURG, with whom JUSTICE STEVENS joins,
dissenting.

A fatal accident occurred on October 3, 1993, at a railroad crossing in Gibson County, Tennessee. The crossing was equipped not with automatic gates or flashing lights, but only with basic warning signs installed with federal funds provided under the Federal Rail-Highway Crossings Program. See 23 U. S. C. §130. This federal program aimed to ensure that States would, “[a]t a minimum, . . . provide signs for all railway-highway crossings.” §130d. No authority, federal or state, has found that the signs in place at the scene of the Gibson County accident were adequate to protect safety, as distinguished from being a bare minimum. Nevertheless, the Court today holds that wholesale federal funding of improvements at 196 crossings throughout 11 west Tennessee counties preempts all state regulation of safety devices at each individual crossing. As a result, respondent Dedra Shanklin cannot recover under state tort law for the railroad’s failure to install adequate devices. And the State of Tennessee, because it used federal money to provide at least minimum protection, is stopped from requiring the installation of adequate devices at any of the funded crossings.

The upshot of the Court’s decision is that state negli-

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gence law is displaced with no substantive federal standard of conduct to fill the void. That outcome defies common sense and sound policy. Federal regulations already provide that railroads shall not be required to pay any share of the cost of federally financed grade crossing improvements. 23 CFR §646.210(b)(1) (1999). Today the railroads have achieved a double windfall: the Federal Government foots the bill for installing safety devices; and that same federal expenditure spares the railroads from tort liability, even for the inadequacy of devices designed only to secure the “minimum” protection Congress envisioned for all crossings. See 23 U. S. C. §130d. Counsel for petitioner Norfolk Southern Railway correctly conceded at oral argument that the relevant statutes do not compel releasing the railroads when the devices installed, though meeting federal standards for “minimum” protection, see *ante*, at 5, fail to provide adequate protection. The road is open for the Secretary of Transportation to enact regulations clarifying that point. See *ante*, at 2 (BREYER, J., concurring).

As persuasively explained by the Court of Appeals for the Seventh Circuit in *Shots v. CSX Transp., Inc.*, 38 F. 3d 304 (1994) (Posner, C. J.), and reiterated by the Court of Appeals for the Sixth Circuit in the instant case, 173 F. 3d 386 (1999), our prior decision in *CSX Transp., Inc. v. Easterwood*, 507 U. S. 658 (1993), does not necessitate the ouster of state law the Court now commands. *Easterwood*, in which the tort claimant prevailed, dispositively held only that federal funding was necessary to trigger preemption, not that it was sufficient by itself to do so. Because federal funds did not in fact subsidize the crossing at issue in that case, *id.*, at 671–673, any statement as to the automatic preemptive effect of federal funding should have remained open for reconsideration in a later case where federal funds did participate. I do not read the admittedly unclear language of 23 CFR §§646.214(b)(3)

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and (4) to dictate that Federal Highway Administration authorization of federal funding to install devices is tantamount to approval of each of those devices as adequate to protect safety at every crossing so funded. And I do not think a previous administration's argument to that effect as *amicus curiae* in *Easterwood* estops the Government from taking a different view now. I agree with the sound reasoning in *Shots* and would affirm the Court of Appeals' judgment.