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 BREYER, concurring.

I agree with JUSTICE GINSBURG that "common sense and sound policy" suggest that federal *minimum* safety standards should not pre-empt a state tort action claiming that in the particular circumstance a railroad's warning device remains inadequate. *Post*, at 2 (dissenting opinion). But the Federal Government has the legal power to do more. And, as the majority points out, *ante*, at 8–12, the specific Federal Highway Administration regulations at issue here do, in fact, do more– when read in light of *CSX Transp., Inc.* v. *Easterwood*, 507 U. S. 658 (1993), which faithfully replicates the Government's own earlier interpretation. So read, they say that once federal funds are requested and spent to install warning devices at a grade crossing, the regulations' standards of adequacy apply across the board and pre-empt state law seeking to impose an independent duty on a railroad with respect to the adequacy of warning devices installed. *Id.*, at 671; *ante*, at 12. I see no need here to reconsider the relevant language in this Court's earlier opinion because the Government itself can easily avoid the pre-emption that it previously sought. It can simply change the relevant regulations, for example, by specifying that federal money is sometimes

used for "minimum," not "adequate," programs, which minimum programs lack pre-emptive force. The agency remains free to amend its regulations to achieve the commonsense result that the Government itself now seeks. With that understanding, I join the majority's opinion.