No. 18-847

IN THE

Supreme Court of the United States

BNSF RAILWAY COMPANY,
Petitioner,
v.
JUANITA NYE,
Personal Representative of the Estate of Jeffrey Nye,
Respondent.

On Petition for a Writ of *Certiorari* to the Supreme Court of Oklahoma

BRIEF OF THE ASSOCIATION OF AMERICAN RAILROADS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST OF AMICUS CURIAE[1]

Amicus curiae Association of American Railroads (AAR) is an incorporated, nonprofit trade association representing the nation's major freight railroads, many smaller freight railroads, Amtrak, and some commuter authorities. AAR's members operate approximately 83 percent of the rail industry's line haul mileage, produce 97 percent of its freight revenues, and employ 95 percent of rail employees. In matters of significant interest to its members, AAR frequently appears on behalf of the railroad industry before Congress, the courts and administrative agencies. AAR seeks to participate as *amicus curiae* to represent the views of its members when a case raises an issue of importance to the rail industry as a whole.

This case, which arises out of an accident at a grade crossing between a train and a motor vehicle, raises an important issue about federal preemption that is of interest to all AAR member railroads. Railroad tracks intersect with public roads at 129,579 crossings in the United States.[2] While grade crossing safety has improved dramatically over the past few decades, there are still about 2,100 crossing accidents a year. U.S. Government Accountability Office, *Report to*

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[1] As required by Rule 37.2(a), counsel for AAR has timely notified the parties of AAR's intent to file this brief. Both parties have consented to AAR's filing of an *amicus* brief. Pursuant to Rule 37.6, AAR states that no person or entity other than AAR has made monetary contributions toward this brief, and no counsel for any party authored this brief in whole or in part.

[2] https://safetydata.fra.gov/OfficeofSafety/publicsite/downloadbf.aspx. (last visited on February 21, 2019; data as of January 31, 2019).

Congress: Grade Crossing Safety 5 (Nov. 2018) (GAO Report). These accidents often result in lawsuits against the railroad in which the plaintiff alleges that the railroad failed to install adequate warning devices at the crossing. This Court has held that where federal funds participate in the installation of warning devices at a crossing state-law claims alleging the warning devices were inadequate are preempted by federal law.

Preemption in the context of grade crossing litigation is an important and recurring issue for railroads. As petitioner BNSF Railway did here, when railroads are defending inadequate warning device claims they typically will produce project documents and authenticating testimony demonstrating that federal funds participated in the installation of warning devices in a project covering the crossing in question. Here, the trial court did not believe that evidence was sufficient to prove the participation of federal funding and sent that question to the jury, a ruling that was affirmed by the Oklahoma Supreme Court. The decision below exacerbates the confusion over the legal framework courts must use when evaluating this preemption defense, and undermines the Federal Grade Crossing Program. AAR's members have a strong interest in obtaining clarity, and uniformity in the lower courts, on this important question.

SUMMARY OF THE ARGUMENT

The Federal Grade Crossing Program embodies Congress' decision to address grade crossing safety at the national level. The Program requires state roadway officials to establish a uniform process, and undertake projects, to improve safety at grade crossings, including by installing and upgrading warning devices at grade crossings. With the approval of the

Federal Highway Administration (FHWA), federal funds may be used to pay for the implementation of these projects. The Federal Program superseded a patchwork of state laws that, in Congress' judgment, had been ineffective in addressing crossing safety. The Program has been remarkably successful, with crossing accidents and fatalities dropping dramatically since the Program's inception.

This Court has held that when federal funds have been used to install warning devices at a crossing, state law negligence claims alleging the warning devices were inadequate are preempted. In defending against such a claim here, BNSF presented official documents and authenticating testimony showing that the federal government funded a state-wide project to install crossbuck warning devices and that the crossing at issue was within the project. The plaintiff collaterally attacked the documents by arguing that two witnesses BNSF produced to confirm the use of federal funds did not have personal knowledge of the upgrades at the crossing in question. Notwithstanding introduction of the official project documents, and in conflict with several federal and state court decisions, the Oklahoma Supreme Court approved the trial court's submission of the question of federal funding to the jury.

The decision below will undermine the Federal Grade Crossing Program. As a practical matter, the standard employed by the Oklahoma Supreme Court on the question of participation of federal funding in the installation of warning devices ultimately will render it nearly impossible to establish federal preemption as to any given crossing. Because many crossing upgrades undertaken with federal funds occurred several decades ago, as time passes it will

become more likely that officials who have personal knowledge of those projects will not be available. As a result, contrary to the way Congress intended to address grade crossing safety, decisions about the adequacy of crossing warning devices will devolve back to jury determinations made in the context of state negligence lawsuits.

ARGUMENT

I. THE FEDERAL GRADE CROSSING PROGRAM IS A SUCCESSFUL SAFETY PROGRAM WHOSE EFFECTIVENESS NEEDS TO BE PRESERVED.

This case involves an important federal program that has saved thousands of lives since its inception. 23 U.S.C. §130; *see* GAO Report at 43-44, Appx. IV. The Federal Grade Crossing Program calls for state roadway officials to establish a process, and undertake projects, to improve safety at grade crossings, including by installing and upgrading warning devices that alert a motorist to the presence of railroad tracks and/or the approach of a train. State officials may seek federal funds to pay for the implementation of these projects. The FHWA approves the funding for state grade crossing improvements and has oversight responsibilities over use of federal funds. GAO Report at 6-7.

A. Congress Considered Grade Crossing Safety to be a National Problem Requiring a Federal Solution.

The Federal Grade Crossing Program is the culmination of public officials' attempts to deal with the problem of accidents between trains and members of the public (usually operating motor vehicles) where

railroad tracks and public roadways intersect. It embodies a decision by Congress to devote federal resources to improving safety at the nations' grade crossings. That decision has paid off: since the program's inception, fatalities at grade crossings have declined by 70% and accidents by 83%. GAO Report at 5; *see also* U.S. Dept. of Transp., *Audit of the Highway-Rail Grade Crossing Safety Program* 8 (2004) (noting the "substantial progress in improving grade crossing safety" from 1994 through 2003).

During the early years of the railroad industry, grade crossing accidents did not present a significant issue, for the simple reason that roads and highways were scarce in many areas of the nation. By the early years of the twentieth century, however, the confluence of a mature railroad industry and an emerging automobile industry began to present public policy makers with new challenges. The proliferation of motor vehicles increased dramatically the public's interaction with railroads at grade crossings and resulted in a significant increase in crossing accidents. At the time, regulation of grade crossings was generally a subject of state law, and states typically assigned the primary financial responsibility for the protection of the public at crossings to the railroads, often with approval of the courts. *See e.g., Erie R.R. v. Bd. of Pub. Utility Comm'rs.*, 254 U.S. 394, 410-11 (1921) (it is within the state's police powers to regulate safety at grade crossings).

The new environment confronting public policy makers led to a shift in thinking with respect to grade crossings. In *Nashville, C. & St. L. Ry. v. Walters*, 294 U.S. 405, 422-23 (1935), this Court observed that, as a result of railroad-supported crossing improvements, a shifting of benefits had occurred from the railroads to

highway users and the public. The Court concluded that "[t]he railroad has ceased to be the prime instrument of danger and the main cause of accidents" and that "[i]t is the railroad which now requires protection from dangers incident to motor transportation." *Id.*

The policy that emerged was that the financial burden for crossing safety should be allocated in accordance with the benefits derived. This concept was codified in §5(b) of the Federal-Aid Highway Act of 1944, ch. 626, 58 Stat. 839 (1944) (now codified at 23 U.S.C. 130(b)) ("The Secretary . . . may set for each [project for the elimination of hazards at highway-rail grade crossings] a percentage of the costs of construction which shall be deemed to represent the net benefit to the railroad or railroads for the purpose of determining the railroad's share of the cost of construction."). Moreover, the overall outlook of public policy makers continued to shift. The Interstate Commerce Commission (ICC), which had jurisdiction over railroad safety until the creation of the Department of Transportation in 1966, concluded that grade crossing safety had become a public concern which should be addressed through public initiative and funding. The ICC explained that

> [i]n the past it was the railroad's responsibility for protection of the public at grade crossings. . . . Now it is the highway, not the railroad, and the motor vehicle, not the train, which creates the hazard. . . . [H]ighway users are the principal recipients of the benefits following from rail-highway grade crossing separations and from special protection at rail-highway grade crossings. For this reason the cost of installing and maintaining such

> separations and protective devices is a public responsibility and should be financed with public funds the same as highway traffic devices.

Interstate Commerce Comm'n, *Prevention of Rail-Highway Grade-Crossing Accidents Involving Railway Trains and Motor Vehicles*, 322 ICC 1, 82, 87 (1964).

Less than a decade later, in the face of steady and unabated casualties at crossings, Congress took decisive action. In 1970, comprehensive rail safety legislation was enacted which provided the Secretary of Transportation with authority to issue regulations in all areas of rail safety. Federal Railroad Safety Act (FRSA), Pub. L. 91-458, 84 Stat. 971 (1970), 45 U.S.C. §421 *et seq*., *see* 45 U.S.C. §431(a) (now codified at 49 U.S.C. §20103(a)).[3] Special attention was focused on grade crossing safety.

> The Committee is aware that grade crossing accidents constitute one of the major causes of fatalities connected with rail operations. The need to do something about these terrible accidents . . . necessitates an immediate attack on the grade crossing problem as soon as possible.

H.R. Report No. 91-1194 (1970), *reprinted in* 1970 U.S.C.C.A.N. 4104, 4116. FRSA mandated the Secretary to submit to Congress within a year, "a comprehensive study of the problem of eliminating and

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[3] FRSA has since been recodified at 49 U.S.C. §20101 *et seq*. Since its inception, FRSA has contained an express preemption provision directing that "laws, rules, regulations, orders and standards relating to railroad safety shall be nationally uniform to the extent practicable." 45 U.S.C. §434 (now codified at 49 U.S.C. §20106).

protecting grade crossings" to include "recommendations for appropriate action." 45 U.S.C. §433(a).

Responding to the congressional mandate, the Secretary of Transportation submitted a two-part report to Congress, which crystallized the emerging consensus among public policy makers.[4] The Secretary found that responsibility over rail-highway intersections typically was divided among state agencies and the railroads. Report to Congress: Part II, at 33. The Secretary concluded that

> the net effect of the current division of responsibility and authority among the private and public interests involved at the State and local level results in a fragmented approach to grade crossing safety. . . . *The need for national coordination of an issue that affects the Nation's railroad and highway systems is apparent.*

Id. at 34 (emphasis supplied). The Secretary concluded that rather than simply being a railroad problem, "[t]he grade crossing safety problem today . . . is part of a national traffic safety problem." Report to Congress: Part I, at A30. Consequently, "the original concept that railroads have the primary or sole responsibility, financial or otherwise, for the elimination or protection of grade crossings has gradually changed, particularly in situations where Federal participation or Federal funds are involved." *Id.*

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[4] *See* U.S. Dept. Of Transp., *Report to Congress: Railroad-Highway Safety Part I: A Comprehensive Statement of the Problem* (1971) (hereinafter "Report to Congress: Part I"); U.S. Dept. Of Transp. *Report to Congress: Railroad-Highway Safety Part II: Recommendations for Resolving the Problem* (1972) (hereinafter "Report to Congress: Part II").

B. The Federal Grade Crossing Program Was Established By Congress to Require a Uniform, Effective and Rational Approach to the Problem of Crossing Accidents.

Congress promptly responded to the Secretary's Report by creating the Federal Grade Crossing Program as part of the Federal-Aid Highway Act of 1973. This Program established for the first time a national, uniform and consistent method for determining the need for, and providing for the installation of, warning devices at railroad grade crossings. The Program was established through the existing statutory framework of federal oversight and funding of highway improvements projects, with specific roles for each of the involved entities.[5] Each state is required to have a highway safety program approved by the Secretary in accordance with uniform guidelines promulgated by the Secretary. 23 U.S.C. §402(a).

The heart of the Federal Program is 23 U.S.C. §130(d), which requires each state to "conduct and systematically maintain a survey of all highways to identify those railroad crossings which may require separation, relocation, or protective devices, and

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[5] When the Program began, for the most part, only crossings located on the Federal-aid highway system were eligible for improvements using federal funds, which had been available since 1916. Report to Congress: Part I, at 37. At the time, there were about 223,000 public grade crossings, which the Report noted, varied greatly in terms of quantity of both rail and highway traffic and other pertinent characteristics. Report to Congress: Part II, at 8-9 (Table 2). About 48,900 crossings were on the Federal-aid highway system. *Id.* at 6. In 1976, Congress created a specific program that authorized funds for roads off the Federal-aid system. Federal-Aid Highway Act of 1976, Pub. L. No. 94-280, §203(c), 90 Stat. 452 (1976).

establish and implement a schedule of projects for this purpose." *See* 23 C.F.R Part 924. There must be a data-driven process for addressing safety problems, with an emphasis on areas and strategies that have the greatest potential for reducing fatalities and injuries. *Id.* at §924.9(a)(3); *see* GAO Report at 18 ("The risk of crashes at public grade crossings . . . factors into states' selection of [ ] new Section 130 Program projects. . . ."). Importantly, there must be a process for establishing priorities for implementing highway safety improvements. 23 C.F.R. §924.9(a)(6). To develop priorities, states must utilize a hazard index formula to determine the relative risk at each crossing. *Id.* at §924.9(a)(4)(ii)(A). Each state must have a process for scheduling and implementing safety improvement projects in accordance with the priorities developed under §924.9. *See id.* at §924.11(a).

With the carrot of federal money and the stick of federal oversight, the Program was designed to ensure that the states utilize their tools in a nationally uniform, rational and efficient way. In the context of the Federal Program, uniformity does not mean that every crossing should be treated alike—clearly they should not be—but rather that the states are uniformly implementing a consistent, comprehensive approach, on a prioritized basis, to enhance safety at railroad-highway grade crossings. To maintain federal oversight, each state is to report annually to the Secretary on the progress it is making to implement the Program and the effectiveness of improvements being made. 23 U.S.C. §130(g). In turn, the Secretary is to report to Congress with an analysis and evaluation of each state's program, including identification of states not in compliance. *Id.*

The Program lays out a process for the states to make evaluations and decisions, which are subject to federal approval when a state decides to use federal funds. Federal law mandates that federal funds may not be used on a planned highway safety improvement unless the project meets all federal requirements, including being adequate and sufficient from a safety standpoint. *See* 23 U.S.C. §109(d)&(e). However, "FHWA does not evaluate the appropriateness of individual grade-crossing projects, but instead helps states determine that projects meet program eligibility requirements." GAO Report at 10. Before a state highway agency may proceed with an improvement project using federal funds it must obtain authorization from FHWA. 23 C.F.R. §630.106(a)(1). Authorization may be given "only after applicable prerequisite requirements of Federal laws and implementing regulations and directives are satisfied." *Id.* at §630.106(a)(2); *see* 23 U.S.C. §109(e)(1) ("[P]roper safety protective devices complying with the safety standards determined by the Secretary at that time as being adequate" are required.). Federal regulations contain comprehensive requirements for FHWA authorizations at all stages of the project, including approval of the project or state-railroad agreement, and approval of all plans, estimates and specifications. 23 C.F.R. §646.216.

Different crossings warrant different solutions. Some projects involve the installation of active devices—such as bells, lights and gates—that warn motorist of the approach of a train. Others involve the installation or upgrade of passive devices—such as signs and crossbucks—which alert the motorist to the presence of tracks and the need to be on the lookout for a train. The latter projects would cover the many crossings where the volume of train and/or motor

vehicle traffic, and other factors, do not warrant active devices. *See* Report to Congress: Part I, at v (observing that at many crossings there is no justification for more than passive warning devices).

By all accounts the Federal Grade Crossing Program is a success story. "Grade-crossing safety has improved significantly since 1975." GAO Report at 5. The Program's carefully crafted federal-state balance, in which federal preemption has played an important role, has contributed to that success. The federal government, states, railroads and the public all have a stake in its continued success. When divergent judicial decisions create, or exacerbate, confusion over the Program's implementation, only this Court can reinstate the necessary clarity.

II. THE DECISION BELOW WILL UNDERMINE THE FEDERAL GRADE CROSSING SAFETY PROGRAM.

The use of federal funds to install warning devices triggers the application of federal regulations that "specify warning devices that must be installed." *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 666 (1993); *see* 23 C.F.R. §646.214(b). When federal funds are used, the regulations at §646.214(b)(3) & (4) establish standards for adequate warning devices that "displace state and private decisionmaking authority by establishing a federal-law requirement that certain protective devices be installed or federal approval obtained." *Id*. at 670. These regulations cover the subject matter of the adequacy of crossing warning devices and, pursuant to FRSA's express preemption

provision, preempt state law, including state tort law. *Id*.; 49 U.S.C. §20106.[6]

When accidents occur between trains and motor vehicles at grade crossings state-law negligence actions often follow. Among other things, plaintiffs typically allege that the railroad, and sometimes the state as well, failed to install adequate warning devices at the crossing. In *Easterwood*, this Court held that such state claims are preempted when federal funds have been used to install or upgrade the warning devices at the crossing. For several years after the *Easterwood* decision questions remained about the necessary preconditions for preemption to apply. *Compare Shots v. CSX Transp., Inc.*, 38 F.3d 304 (7th Cir. 1994) (in the absence of evidence that the Secretary of Transportation approved the devices at a crossing as adequate, federal funding alone does not trigger preemption), *with Elrod v. Burlington N. R.R.*, 68 F.3d 241, 244 (8th Cir. 1995) ("Federal funding is the touchstone of preemption in this area because it indicates that the warning devices have been deemed adequate by federal regulators."). However, in *Norfolk S. Ry. Co. v. Shanklin*, 529 U.S. 344 (2000), this Court clarified that preemption of state law applies once federal funds have been approved for installation of warning devices and those devices have been installed. Preemption does not depend on "any individualized determination of adequacy" of the devices or on "the State's or the FHWA's adherence to the standards set out in" the regulations. *Id*. at 356-57. The Court

[6] Section 20106(a)(2) permits states to "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."

concluded that "[w]hat States cannot do—once they have installed federally funded devices at a particular crossing—is hold the railroad responsible for the adequacy of those devices." *Id*. at 358.

Easterwood, as clarified by *Shanklin*, clearly establishes that when federal funds participate in the installation of crossing warning devices "the Secretary [of Transportation] has determined the devices to be installed and the means by which railroads are to participate in their selection" and that states may not "impose an independent duty on a railroad." 507 U.S. at 671. Preemption promotes uniformity in the process and criteria for selecting warning devices at the grade crossings by prohibiting states from imposing their own, ad hoc standards through the guise of negligence law. Thus, the question whether federal funds participated in the installation of the warning devices, and the legal standards for proving the participation of federal funds, are key issues in many crossing accident cases.

They were key issues in this case. As BNSF explains, it presented "official project documents reflecting federal funding for a state-wide project to install crossbuck warning signs at grade crossings." The documents also "showed that federal authorities agreed to a project encompassing the crossing at issue, authorized the project to proceed using federal funds, certified completion of this project [ ] and paid the final voucher on the project." Pet. at 3; *see also* Pet. at 12-14 (listing the facts about the funding of the project established by documentary evidence introduced at trial by BNSF). Respondent challenged BNSF's evidence, including whether two witnesses BNSF produced to confirm the use of federal funds based on their review of the documents had personal knowledge

of the upgrades at the crossing in question. Respondent also raised questions about whether the required warning devices had been installed within the project time frame. Pet. at 15.

The trial court denied BNSF's motion for summary judgment on the question of whether federal funds participated in the installation of the warning devices at the crossing in question and submitted that question to the jury. The jury resolved that question against BNSF and returned a verdict of nearly $15 million, reduced by 35 percent to account for the plaintiff's contributory negligence, and then increased to account for prejudgment interest. Pet. at 16.

The Oklahoma Supreme Court affirmed the judgment. The Court held that the question of federal funding was properly sent to the jury because there was "an evidentiary gap linking FHSA's approval and funding of the federal project to the specific crossing at issue here." Pet. App 18a. In reaching that conclusion, the Court focused on BNSF's witnesses' lack of "personal knowledge" about the funding of the specific crossing in question. *Id*. at 17a–18a.

This decision, and several other similar decisions, create confusion and uncertainty about how a preemption defense may be asserted under the Grade Crossing Program. As BNSF points out, the Oklahoma Supreme Court's decision conflicts with a number of federal Courts of Appeals' decisions as well as several state court decisions. Pet. at 23-25. For example, in *O'Bannon v. Union Pac. R.R.*, 169 F.3d 1088, 1089-90 (8th Cir. 1999), the Court ruled that documentary evidence establishing that federal funding was approved for a state-wide crossing improvement project, that the crossing in question was included in the project, and that federal funds had been paid, was

sufficient to warrant a grant of summary judgment despite the plaintiff's assertions that the funds had not been conclusively linked to the crossing in question. Here, in the face of similar evidence, the Oklahoma Supreme Court approved submission of the question to the jury. In conflict with *O'Bannon*, the Oklahoma Supreme Court permitted the plaintiff to collaterally attack the federal project documents in a negligence action against a railroad.

As a practical matter, the standard employed by the Oklahoma Supreme Court on the question of participation of federal funding in the installation of crossing devices ultimately will render it nearly impossible to establish federal preemption as to any given crossing. Many crossing upgrades undertaken with federal funds occurred several decades ago. As time passes, railroad and state transportation officials who were involved in those projects will inevitably retire or die. This has already happened in many cases and the problem will only become more acute in the future. There simply will not be any individuals possessing personal knowledge of many of the crossing upgrade projects that have utilized federal funds. And since many projects involve multiple crossings, individuals with the personal knowledge to tie funding to a particular crossing will not be available. The only viable means of establishing federal funding will be through the introduction of official documents that reflect approval of federal funds on a project and installation of the devices at the crossings covered by the project. It will be necessary to have those documents interpreted by officials who, while having personal knowledge of the implementation of the Grade Crossing Program in a particular state, may not have personal knowledge of the specific project in question.

The different legal frameworks utilized by courts for determining whether federal funding was used have resulted in different outcomes on the application of preemption even when similar evidence is presented to show federal funding. *See e.g., Byrne v. CSX Transp., Inc.*, 617 Fed. Appx. 448, 450-51 (6th Cir. 2015) (affirming summary judgment for the railroad despite plaintiff's contention that the state official submitting an affidavit supporting the use of federal funds did not have sufficient personal knowledge); *Enriquez v. Union Pac. R.R.*, 2004 U.S. Dist. LEXIS 28989 (E.D. Tex. 2004) (denying summary judgment to the railroad because its witnesses did not have personal knowledge of the funding of the crossing in question); *McDaniel v. Southern Pac. Transp.*, 932 F. Supp. 163, 167 (N.D. Tex. 1995) (granting summary judgment to the railroad, rejecting the argument that the state official offering evidence to prove federal funding had "no knowledge . . . whether the crossbucks at the [crossing in question] were reflectorized using federal funds"); *Nutt v. Union Pac. R.R.*, 2019 WL 453771 at *4 (Wisc. App. 2019) (affirming grant of summary judgment for the railroad based on documentary evidence despite plaintiff's contention that "there is no indication that [the Crossing] was included in that project"); *Union Pac. R.R. v. Cezar*, 293 S.W.3d 800, 816 (Tex. App. 2009) (affirming denial of summary judgment to the railroad because Union Pacific's "witnesses may not have had personal knowledge of whether the State actually obtained federal funds on the project to reinstall the crossbucks"); *Hargrove v. Missouri Pac. R.R.*, 925 So.2d 25 (La. App. 2006) (affirming summary judgment for the railroad, rejecting plaintiff's argument that railroad witnesses lacked personal knowledge of the upgrading of the specific crossing);

Bonacorsi v. Wheeling & Lake Erie Ry. Co., 767 N.E.2d 707 (Ohio 2002) (reversing summary judgment for the railroad because the railroad employee and state official who provided affidavits about federal funding lacked personal knowledge).

Sometimes the affidavit of a witness that is accepted by one court will be rejected by another court. *Compare Bonacarsi*, 767 N.E.2d at 713-14 (the court rejected the affidavit of Susan Kirkland, an employee of the Ohio Rail Development Commission, for "lacking personal knowledge"), *with Byrne*, 617 Fed. Appx. at 452 (finding Ms. Kirkland's affidavit and testimony sufficient, over plaintiff's objection that she lacked personal knowledge).

The lack of clarity and uniformity in the standard for proving federal funding will undermine the Grade Crossing Program. If the official documents that reflect the funding of a project, interpreted by officials with knowledge of, and experience in, administration of the Federal Program, are deemed insufficient to prove federal funding, this Court's *Easterwood* and *Shanklin* decisions will no longer be meaningful. In the absence of preemption, decisions about the adequacy of crossing warning devices will devolve back to jury determinations made in the context of state negligence lawsuits. That is not how Congress intended to address grade crossing safety.

CONCLUSION

For the foregoing reasons the petition should be granted.

Respectfully submitted,

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