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 IN OPPOSITION

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QUESTION PRESENTED

Where other concededly non-preempted causes of action exist and would affirm the judgment regardless of any decision by this Court, where the Petitioner conceded below that it had no proof that the specific crossbucks at issue here were erected with federal funds, and where the evidence overwhelmingly demonstrated that the subject crossbucks were *not* federally funded, does this fact-bound Petition present a certworthy issue on whether one claim within this case was preempted or provide a vehicle for determining the evidentiary prerequisites for preemption of an inadequate warning claim at a railroad crossing?

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BRIEF FOR RESPONDENTS IN OPPOSITION

Respondent Juanita Nye, personal representative for the estate of Jeffrey Nye, respectfully requests that the Court deny BNSF Railway Company's Petition for a writ of certiorari seeking review of the decision of the Supreme Court of Oklahoma.

COUNTERSTATEMENT OF THE CASE

A. Underlying facts.

Jeffrey Nye, a 51-year-old eighth-grade science teacher and football and track and field coach, was killed when his vehicle was hit by a BNSF train at the County Road 1660 railroad crossing in Pontotoc County, Oklahoma on December 29, 2008. A passenger in the vehicle, H.C. Rackley, was severely injured, but survived.

The crossing only had crossbucks[1] to indicate a track existed. At a passive grade crossing (crossbucks only) like this one, it is extremely important to be able to see the train or hear the train to react properly. Overgrown vegetation, however, obstructed any view of an approaching train. Moreover, as the evidence established, the train failed to blow its horn in warning.

B. Proceedings Below.

1. Trial Proceedings.

Respondent Juanita Nye, widow of decedent Jeffrey Nye, brought this wrongful death action

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[1] A crossbuck is a white sign with the words "RAILROAD CROSSING" in black lettering set in a x-shape. U.S. Dep't of Transportation, Federal Highway Admin., Manual on Uniform Traffic Control Devices § 8B–3 (2009).

against BNSF in the District Court of Pontotoc County, Oklahoma. She alleged that BNSF was negligent in three separate and distinct ways: (1) BNSF failed to remove vegetation overgrowth at the railroad crossing that obstructed any view of an oncoming train; (2) the approaching train failed to sound its horn to warn motorists; and (3) the warning sign that signaled that a motorist was approaching a railroad crossing was inadequate.

BNSF moved for summary judgment on the claim that the warning sign was inadequate on grounds of preemption. Nye opposed with her own evidence. BNSF relied on generalized documentary evidence that Oklahoma agreed to participate in a crossbuck program.

It also proffered the testimony of two witnesses: Hal Hofener and Earnest Wilson. Mr. Hofener, a retired state transportation engineer, admitted that not all crossings in Pontotoc County (the county where the crossing is located) had federally funded crossbucks. App. 18a. He also admitted he had not visited the crossing and did not have personal knowledge about the crossing. App. 17a-18a. Mr. Hofener also swore by affidavit that the crossing only had one crossbuck, only to testify at trial that he was mistaken in his affidavit, App. 18a, even though other evidence confirmed but one crossbuck, which signifies that there was no federal funding. App. 17a. Although Mr. Hofener was offered as a fact witness, he billed BNSF between $125 and $175 an hour throughout the litigation. *Id*. Mr. Wilson, a retiree previously employed by BNSF's predecessor company, while sure that all crossbucks were installed as part of the federal funding program, "testified that he neither could recall the subject crossing nor had any personal

knowledge about the crossing," while refusing to testify to how much he was paid for his testimony. *Id.*

The evidence also established that the project required, at each location, two identical, reflectorized crossbucks that were to be installed between late 1978 but before February 29, 1980. As a result, "[i]t was uncontested that if the crossbucks were in fact installed after February 29, 1980, the crossbucks could not have been part of the federally funded project." App. 18a. In addition, if, as the evidence showed, only one crossbuck was installed by February 1980, then it also would not have been placed through the federally funded project. App. 17a.

Official Federal Railroad Administration (FRA) inventories showed that only one crossbuck existed at the subject crossing until at least December 22, 1988, long after the federal program ended. Later, a second crossbuck was installed. The two crossbucks were not identical. One crossbuck was double sided and one was not. Different style posts, bolts, and screws were utilized. The characteristics of the crossbucks did not comply with the standard specifications required to participate in the federal funding program. App. 17a.

The federal funding documents described in *Norfolk Southern Ry. Co. v. Shanklin*, 529 U.S. 344 (2000), were not offered in this case. Normally, there is a receipt or proof of federal funds spent on a specific crossing. There was none in this case. Tr. Vol. 7 at 1669:12-1670:19. Additionally, no document was presented which showed the Oklahoma Department of Transportation ("ODOT") signed off on a "Quantities Installed List." Tr. Vol. 5 at 1143:17-25. For ODOT to get repaid for work it finished on a federal project, a Quantities Installed List had to be

completed. Tr. Vol. 7 at 1669:1-19. ODOT did not have any Quantities Installed List in its file for the crossing. Tr. Vol. 7 at 1667:14-18. BNSF proffered a purported Quantities Installed List, but it lacked credible foundation because it was unsigned and was not found in the ODOT files. Rather than receiving an authenticated document from the ODOT, BNSF's purported Quantities Installed List came into existence by way of a fax from a law firm representing BNSF in 2000, twenty years after the federal program ended. Tr. Vol. 7 at 1667:14-1668:20.

The trial court denied summary judgment, finding that there was an "overwhelming factual dispute concerning whether the warning signs at the subject crossing were federally funded." App. 4a. BNSF immediately filed a writ of prohibition, seeking review by the Oklahoma Supreme Court. During oral presentation, "BNSF admitted, however, that it did not have proof that the specific crossbucks at issue, here, were erected with federal funds." App. 4a. The Oklahoma Supreme Court denied BNSF's requested relief.

On December 2, 2013, the parties tried the case to a jury. Witnesses testified that the view of the crossing was obstructed by overgrown vegetation, trees, and brush. Ms. Nye's expert civil engineer testified the crossing was obstructed by more than 90 percent. App. 22a. It was not until Mr. Nye yelled "train," one second before impact, that Mr. Rackley, who testified that no horn was blown, became aware of the impending collision. App. 5a. Mr. Rackley, whose window was rolled halfway down, testified he was "110 percent sure" no horn was sounded. App. 27a. The data from the train's event recorder, or black box, indicated the horn was not sounded. BNSF

claimed that the horn was not plugged into the train's event recorder, but after finally producing the correct event recorder on the final day of trial, a placard on the device showed the horn was hooked up to the event recorder and enabled. A. Doc. 110 at 3297DD.[2]

On the issue of federal funding of the crossbucks, BNSF understood it had proof problems, telling the jury in its opening statement, "[s]ome of the records are not kept well." Tr. Vol. 2 at 401:15. Regarding its witness's affidavit that only one crossbuck was installed, BNSF told the jury "we messed up," and the "witness will explain why." Tr. Vol. 2 at 402:15-17.

In closing argument, BNSF admitted it had the burden of proof on the federal-funding issue. Tr. Vol. 9 at 2183:16-22. On December 17, 2013, the jury returned a verdict, finding BNSF 65 percent at fault and Nye 35 percent at fault and assessing the damages at $14,813,000. On April 21, 2014, the trial court entered judgment, after reducing the verdict for Nye's negligence to $9,628,450 in damages, along with $1,103,471.19 in prejudgment interest and costs. App. 5a-6a. BNSF strategically chose not to seek any remittitur. App. 6A.

2. Proceedings in the Oklahoma Supreme Court.

On June 19, 2018, the Supreme Court of Oklahoma affirmed the judgment. App. 40a. That court found BNSF's appeal to be:

> nothing more than a futile attempt at a re-trial by appellate brief. Its approach

[2] "A. Doc. ___" refers to the record in the Oklahoma trial court.

> to the numerous questions of material fact presented below is to deem each of them conclusively established as a matter of law and therefore beyond the purview of the jury as the finder of fact.

App. 6a.

Instead, the court, in line with consistent holdings in the state, said it was obliged "to review the jury's verdict as conclusive to all disputed facts and conflicting statements if 'there is any competent evidence reasonably tending to support the verdict.'" App. 7a.

On the preemption issue, the court recognized that the caselaw holds "uniformly that when federal funds pay for the installation of warning devices at a railroad crossing--that is, when a State participates in a Crossing Program--" federal law preempts state "tort claim[s] challenging the adequacy of those signs and crossbucks as a matter of law." App. 13a-14a. Consistent with prior state precedent and this Court's holdings, however, the supreme court held that a "railroad cannot avail itself of a regulation's preemptive effect over [the adequacy of] warning devices . . . unless the railroad can first demonstrate that federally funded warning devices were installed and operational before the accident occurred." App. 16a. After reviewing the evidence, it found no error in the trial court's submission of that factual question to the jury because material facts were in dispute.

The court also rejected BNSF's defense accusing the decedent of negligence per se because the train was not plainly visible due to obstructing vegetation and the train's failure to sound its horn provided no

warning, reviewing the substantial evidence in the record. App. 19a-28a.

The court also rejected BNSF's unanchored claim that the jury was activated by passion or prejudice in the damages awarded. App. 35a. It affirmed the judgment below, stating that "[i]t is not the province of this Court to sit as thirteenth juror and supplant the determination of the trier of fact." App. 40a. It acknowledged that BNSF did not seek remittitur. App. 6a.

C. Statutory and regulatory framework.

Congress enacted the Federal Railroad Safety Act (FRSA) in 1970. The preemptive language of the FRSA allows states to "adopt or continue in force a law, regulation or order related to railroad safety or security until expressly displaced by a federal rule. 49 U.S.C. § 20106 (App. 59a).

A subsequently enacted subsection, applicable to this action, clarifies that state law causes of action are not preempted over the railroad's "fail[ure] to comply with the Federal standard of care established by a regulation or order;" "fail[ure] to comply with its own plan, rule, or standard that it created pursuant to a regulation or order;" issued by either of the Secretaries;" or "fail[ure] to comply with a State law, regulation, or order that is not incompatible with subsection (a)(2)." *Id*. at § 20106(b).

The Highway Safety Act of 1973, created the Federal Railway–Highway Crossings Program, which makes funds available to States for the "cost of construction of projects for the elimination of hazards of railway-highway crossings." 23 U.S.C. at § 130(a). Eligible States must "conduct and systematically

maintain a survey of all highways to identify those railroad crossings which may require separation, relocation, or protective devices, and establish and implement a schedule of projects for this purpose." *Id.* at § 130(d).

Passive warning devices, like the crossbucks at issue here, are subject to approval by the Federal Highway Administration (FHWA). *See* 23 C.F.R. § 646.214(b)(4). In *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658 (1993), this Court held that regulations that "'establish the general terms of the bargain between the Federal and State Governments' for the Crossings Program, are not pre-emptive." *Shanklin*, 529 U.S. at 352 (quoting *Easterwood*, 507 U.S. at 667). However, where the Crossings Program funds the installation of particular warning devices, it establishes a requirement and "'state tort law is pre-empted.'" *Id.* at 352 (quoting *Easterwood*, 507 U.S. at 670).

D. Misstatements of fact and law in the petition.

The Petition contains a significant number of misstatements of fact and law.

1. "[T]here was no dispute that the crossing at issue was included in the project." Pet. 26.

In its Petition to this Court, BNSF inexplicably states "there was no dispute that the crossing at issue was included in the federal project." Pet. 26. In contrast, the Oklahoma Supreme Court carefully reviewed the record, including the trial court's finding "that there was an overwhelming factual dispute concerning whether the warning signs at the subject crossing were federally funded." App. 4a. Moreover, in

that court, "BNSF admitted, however, that it did not have proof that the specific crossbucks at issue, here, were erected with federal funds." *Id*. The court agreed with the trial court's assessment, writing, "material facts existed as to whether federal funds participated in the installation of the warning devices; and, thus, properly submitted this matter to the jury." App. 18a.

The record extensively reflects this dispute. Even BNSF's own witness admitted that not all crossings in Pontotoc County contained federally funded warning devices. *Id*. Evidence was introduced that the characteristics of the crossbucks did not comply with the standard specifications required to participate in the federal program. App. 17a. It was also shown that four years following completion of the project, the Oklahoma Department of Transportation had not received any information from the railroad as to whether or where federally funded crossbucks had been installed. *Id*. The crossing inventory indicated the crossing was only equipped with one crossbuck (federally funded project required two crossbucks) until at least 1987, which was seven years after the deadline for completion of the federal program.

> *2. "The federal courts have uniformly held that proof of federal funding for the crossing improvement project is sufficient for FRSA preemption even if the railroad cannot specifically link the funds to the individual crossing signs." Pet. 23-24.*

BNSF tells this Court that "courts recognize that, if the federal government commits federal funds for a project, it has committed federal funds to all parts of

that project. Thus, the railroad does not need to trace the federal-aid funding specifically to individual crossing signs." Pet. 24. BNSF's disingenuous claim is not supported by the case law it cites. Moreover, this Court in *Easterwood*, rejected the precise argument BNSF makes. Despite proffering a receipt that demonstrated federal funding of a single project, this Court held that the evidence did not mean all crossings within the project were federally funded. 507 U.S. at 672.

Moreover, the Northern District of Oklahoma recently reviewed the very same documents at issue here, as well as an affidavit of BNSF witness Hal Hofener, in *Malinski v. BNSF Ry. Co.*, 2017 WL 1294438 (N.D. Okla. March 31, 2017). *Malinski* also found an "evidentiary gap linking FHWA's approval of Project RRO-00S(64) to the specific crossing at issue." *Id.* at *7. The court went on, "[t]o be clear, the record lacks evidence specifying the particular crossing approved by the FHWA under project RRO-00S(64), or in other words, whether the County Road 210 crossing was one of the crossing improved under project RRO-00S(64)." *Id.* The court was then "unable to conclude that plaintiff's inadequate crossing devices claim is preempted under FRSA." *Id.* Contrary to BNSF's assertion, courts have not uniformly held that proof of federal funding for the crossing improvement project is sufficient for FRSA preemption even if the railroad cannot specifically link the funds to the individual crossing signs and, as a party to *Malinski*, BNSF knows that. Pet. 23-24.

> *3. "Over BNSF's objection, Respondent introduced testimony that FRA's crossing database reflected only one crossbuck at the*

> *crossing from 1970 to 1987." Pet. 15.* (emphasis added).

BNSF did not object to introduction of the FRA inventories. Instead, BNSF itself introduced detailed testimony about the FRA inventories. BNSF fails to inform this Court that it was the first party to introduce the FRA inventories into evidence. *See* Tr. Vol. 3 at 850. BNSF cannot object to evidence it presented to the jury.

> *4. "BNSF presented official project documents reflecting federal funding for a state-wide project to install crossbuck warning signs at grade crossings. Those documents 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 with no exceptions, and paid the final voucher on the project." Pet. 3, 22; and,*
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> *"BNSF presented at trial every form of official document needed to prove that federal funds financed the warning devices, including the project agreement, certificate of completion, and payment voucher." Pet. 18.*

Key documents necessary to make that claim, including receipts for payment and a signed-off and authenticated "Quantities Installed List," were never introduced into evidence. The latter is required for

ODOT to be repaid for any work completed on a federal project. Tr. Vol. 7 at 1669:1-19. ODOT did not have any Quantities Installed List in its file for the crossing. Tr. Vol. 7 at 1667:14-18. BNSF's purported Quantities Installed List lacked credible foundation because it was unsigned, incomplete, and not found in the ODOT files. Instead, BNSF's purported Quantities Installed List came into existence by way of a fax from a law firm representing BNSF in 2000, twenty years after the federal program ended. Tr. Vol. 7 at 1667:14-1668:20. No explanation was offered for why the document was only available that way.

In addition, the Oklahoma Supreme Court noted "there was an evidentiary gap linking FHSA's approval and funding of the federal project to the specific crossing at issue here." App. 18a.

> *5. "State and railroad officials responsible for the crossing confirmed that the crossing was included in the federal-aid project." Pet. 3.*

Throughout this litigation, BNSF incorrectly claimed it had two witnesses with "personal knowledge" about this crossing and federal funding. A. Doc. 81, A. Doc. 1080. Before this Court, because neither witness had personal knowledge, BNSF now claims that it is not necessary. Pet. 31.

In fact, the jury heard one witness, Mr. Hofener, admit that BNSF's counsel came to his home, paid him, and typed an affidavit on Mr. Hofener's computer for him to sign in aid of BNSF's claim of federal funding. Tr. Vol. 7 at 1652:19-1653:7. That sworn affidavit, prepared by BNSF, states that only one

crossbuck sign was installed at the crossing. Tr. Vol. 7 at 1656:4-16. It was undisputed that if federal funds were used, there would have been two. Tr. Vol. 7 at 1657:14-18. Hofener never corrected his affidavit. Tr. Vol. 7 at 1658:19-22. Hofener also admitted that not every crossing in Pontotoc County participated in the federally funded project. App. 18a. The affidavit and testimony of BNSF's witness contradicts BNSF's claim before this Court.

> *6. "The FHWA submitted the final voucher for payment, thus confirming payment of federal funds for the crossing improvements." Pet. 23.*

The final voucher for payment does not specify the particular crossing approved by the FHWA under project RRO-000S(64). Recently, the Northern District of Oklahoma analyzed the very same documents at issue in this case and agreed that the record lacks evidence specifying the particular crossings approved by the FHWA . . ., or in other words, whether the County Road 210 crossing was one of the crossings improved under project RRO–000S(64), … [making it] impossible for the Court to conclude that the FHWA voucher, which demonstrates that federal funds were used for project RRO–000S(64), also shows that federal funds participated in the installation of the crossbucks at County Road 210.

Malinski, 2017 WL 1294438, at *7.

> *7. "The [Oklahoma Supreme] court did not acknowledge any of the*

project documents in the record." Pet. 17.

The court did acknowledge the project documents in the record, stating that the

> record reveals the existence of a Crossbuck Project Agreement from 1978 to 1980. The standard specifications of the agreement required participating railroad crossings to install two crossbucks. ... Specifically, the federally funded project required two crossbucks to be placed at every crossing.

App. 17a.

REASONS FOR DENYING THE PETITION

BNSF Railway Company is a disappointed litigant, who presents to this Court a fact-bound issue that would not change the ultimate outcome of this litigation while, at the same time, hoping that speculation is sufficient to overcome BNSF's failure to muster proof that it met the prerequisites for preemption on that one issue. The Oklahoma Supreme Court did not get the legal question wrong; it recognized that a claim of an inadequate railroad crossing warning sign is preempted if the signs were federally funded. BNSF failed to prove that they were and conceded it had no specific proof of it to the court below.

To overcome the record, BNSF does not present a legal issue as much as asks this Court for dispensation from its evidentiary failures. BNSF also strains to fashion a circuit split on the preemption issue. The cases it proffers either do not stand for the

propositions asserted or rely on legal concepts immaterial to this case. As such, they do not support the exercise of this Court's discretion to take this case.

At bottom, BNSF asks this Court to override the findings of the jury, the trial court, and the Oklahoma Supreme Court. Those findings confirm what BNSF conceded in the Oklahoma Supreme Court: that "it did not have proof that the specific crossbucks at issue, here, were erected with federal funds." Pet. App. 4a. BNSF further asks this Court to excuse its failure to prove federal funding at the subject crossing in favor of a plenary rule that an offer of flimsy circumstantial evidence that *could* support preemption if considered in isolation and without weighing contrary evidence is sufficient. Such an unwarranted rule would create an irrebuttable presumption of preemption, in violation of due process and the respect state law deserves.

BNSF also asks this Court to adopt a novel application of preemption doctrine that would protect railroad companies from lawsuits for "warning signs installed over 30 years ago" because it is "virtually impossible for railroads to prove" the signs were federally funded. Pet. 3. It thus seeks a standardless form of field preemption that relies on speculation and is inconsistent with the statutory scheme Congress adopted and that this Court has previously outlined.

Nothing in our jurisprudence sanctions such a leap of faith, particularly when the record is prodigious that the necessary federal funding to claim preemption was absent. That other claims not subject to preemption support BNSF's liability and would be unaffected by any decision of this Court further impels denial of the Petition.

I. PETITIONER SEEKS AN ADVISORY OPINION BECAUSE LIABILITY WILL STILL EXIST REGARDLESS OF THIS COURT'S DISPOSITION OF THE QUESTION PRESENTED.

This Court has regularly acknowledged that its authority rests on the existence of a case or controversy, pursuant to Article III, § 2. *See, e.g., Preiser v. Newkirk*, 422 U.S. 395, 401 (1975). In fact, the *Preiser* Court reaffirmed that "judgments must resolve 'a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts.'" *Id.* (quoting *North Carolina v. Rice*, 404 U.S. 244, 246 (1971)). At bottom, this Court, like all federal courts, "has neither the power to render advisory opinions nor 'to decide questions that cannot affect the rights of litigants in the case before them.'" *Id.* (quoting *Rice*, 404 U.S. at 246).

The decision below upheld the jury's negligence finding against BNSF, which was based on three factually distinct and independent grounds. Only one is potentially covered by preemption: the adequacy of the crossbucks in warning of approaching trains. In fact, the preemption issue only takes up a small portion of the Oklahoma Supreme Court's opinion. Instead, other state law issues, not subject to preemption, were the principal issues addressed.

Those primary liability issues were: (1) BNSF's failure to clear vegetation within its sight triangle and assure visibility of the train; and (2) BNSF's failure to blow the train's horn in warning to crossing vehicles.

A. BNSF's Failure to Clear Vegetation Provides an Independently Sufficient Basis for the Jury's General Verdict.

The evidence established that overgrown vegetation that BNSF was responsible for removing, concealed the crossbuck and the train by more than 90 percent, so that a driver proceeding at 15 mph could not react in time to avoid an approaching train. App. 22a. The Oklahoma Supreme Court held the evidence of overgrowth sufficient so that "a reasonable jury could find under the circumstances that the train was not plainly visible." App. 28a.

This ground for finding negligence is not subject to federal preemption. *See MD Mall Assocs., LLC v. CSX Transp., Inc.*, 715 F.3d 479, 490 (3d Cir. 2013) ("a state law claim is not preempted if it alleges negligence in allowing vegetation to obscure safe lines of sight at a railroad crossing"). It remains a valid basis for the verdict, regardless of the preemption issue's outcome.

B. The Train's Failure to Blow its Horn Provides an Independently Sufficient Basis for the Jury's General Verdict.

The jury was entitled to conclude on the evidence presented that the train did not blow its horn to warn of its approach, as it was required to do. App. 27a, 28a. The train's "event data recorder indicated that no horn was blown." App. 26a. Two witnesses, a passenger and a person traveling behind the vehicle struck, testified that the horn was not blown. App. 27a. Residents living near the tracks testified that

trains frequently failed to sound their horns. *Id*. BNSF employees provided contradictory accounts. App. 26a-27a. At trial, BNSF produced the wrong event data recorder, bringing the correct one in only on the last day of trial. App. 27a.

The Oklahoma Supreme Court surveyed the evidence and held that the jury was entitled to believe that the horn was not sounded, in violation of Okla. Stat. § 47-11-701(A)(3), which requires a train to sound a signal within 1,500 feet of a highway crossing, and constitutes negligence. *See Kurn v. Maxwell*, 151 P.2d 386, 388 (Okla. 1944).

A negligence case based on failure to sound a horn in warning is not subject to federal preemption. *See Bouchard v. CSX Transp., Inc.*, 196 F. App'x 65, 71 (3d Cir. 2006); *Bryan v. Norfolk & W. Ry. Co.*, 154 F.3d 899, 901 (8th Cir. 1998).

C. BNSF's Failure to Request Special Findings Waived Any Right to Separate its Preemption Claim from State Law Claims Not Subject to Preemption.

Oklahoma is a "general verdict" state, which means that the jury pronounces "generally upon all or any of the issues, either in favor of the plaintiff or defendant." Okla. Stat. § 12-587. Although a general verdict is required in all cases, "the court may in any case at the request of the parties thereto, or either of them, in addition to the general verdict, direct the jury to find upon particular questions of fact, to be stated in writing by the party or parties requesting the same." Okla. Stat. § 12-588. Thus, if a party desires special findings of fact, it is up to that party to

request them. *Medlock v. Admiral Safe Co.*, 122 P.3d 883, 889 (Okla. App. 2005).

When a general verdict exists without requested special findings, Oklahoma courts are "constrained to review the jury's verdict as conclusive to all disputed facts and conflicting statements if 'there is any competent evidence reasonably tending to support the verdict.'" App. 7a (citing *Barnes v. Okla. Farm Bureau Mut. Ins. Co.,* 11 P.3d 162, 166 (Okla. 2000)).

BNSF made the strategic litigation choice to refrain from asking for special findings of fact by the jury as to each of the independent factual bases that would support a finding of negligence and a general verdict in favor of Nye. That "failure to request a special verdict as to each factual theory . . . prevents [BNSF] from challenging the sufficiency of the evidence supporting these factual theories on appeal." *Pratt v. Petelin*, 733 F.3d 1006, 1011 (10th Cir. 2013) (citing cases from multiple jurisdictions for the same proposition). The *Pratt* Court properly characterized a defendant's subsequent appeal as a form of "procedural brinkmanship with the jury system" that seeks to "take advantage of uncertainties they could well have avoided" and that would not be tolerated by a court. *Id.* at 1012 (citing *McCord v. Maguire,* 873 F.2d 1271, 1274 (9th Cir. 1989)).

In Oklahoma, as in many other general verdict jurisdictions, the absence of a defendant's request for special findings is deemed to render the resulting general verdict inclusive of all special findings necessary to sustain the verdict if the verdict is later challenged**.** *See Eversole v. Oklahoma Hosp. Founders Ass'n*, 818 P.2d 456, 459 (Okla. 1991) ("A jury verdict and judgment will not be reversed for error, if there is

substantial evidence to support the verdict on any theory of law.") (citations omitted). Contrary to BNSF's slanted portrayal of the facts, it is firmly established under Oklahoma law that the "verdict of a jury is conclusive as to all disputed facts and all conflicting statements." *Id.*

Because the jury's verdict can be sustained on multiple alternative grounds that do not implicate preemption or federal law more generally, this case presents a poor vehicle for consideration of the proffered Question Presented, and this Court should deny the petition for certiorari.

II. THE DECISION BELOW DOES NOT CONFLICT WITH THIS COURT'S PRECEDENTS.

A. The Decision Below Conforms to *Easterwood*.

In *Easterwood*, this Court denied a preemption defense in a railroad crossing case despite the defendant's production of an affidavit from the Georgia Department of Transportation that attested to the receipt of federal funding for warning devices at a specific crossing. The relevant question in the case was "whether the preconditions for the application of [the preemptive] regulation [for warning devices] have been met." 507 U.S. at 671. The Court engaged in a "review of the record" and held "that they have not." *Id.* This Court looked past the government affidavit at evidence that established that the "only equipment installed was the motion-detection circuitry," which was insufficient to "meet the definition of warning devices." *Id.* at 672. This Court further rejected the railroad's argument that the

funding covered "a single project to improve the five Cartersville crossings, and that the regulations were applicable because federal funds participated in the installation of gates at the other four crossings." *Id*.

Here, BNSF assays the same inapposite argument. While it conceded that there was no evidence of that "the specific crossbucks at issue, here, were erected with federal funds," Pet. App. 4a, BNSF argues that the crossing at issue was part of a statewide project that was approved as completed. Pet. 22-23. Just as the District Court in *Easterwood* properly considered rebuttal evidence to that of the railroad there, which showed that "the funds earmarked for this crossing were ... transferred to other projects" and the installation of gate arms "was placed on a list of projects to be considered at a later time," there was nothing improper about the Oklahoma courts considering evidence, *inter alia*, that showed only one crossbuck was installed at the crossing (indicating no federal funding, App. 17a) and that the subject crossbucks did not comply with the standard specifications required by the federal program. App. 17a. Either fact, installation of one crossbuck or installation at different times, indicates that federal funding was not involved and is like the evidence this Court found dispositive in *Easterwood* so that no conflict can be ascribed between the two decisions.

BNSF also accuses the Oklahoma Supreme Court of inventing a "stringent" standard for preemption to apply. Pet. 18. This assertion mischaracterizes the decision below. The Oklahoma Supreme Court merely acknowledged that this Court stated that the "standards for preemption are stringent." App. 14a (citing *Easterwood*, 507 U.S. 658). The relevant

passage from *Easterwood* denies "pre-emption solely on the strength of the general mandates" of the applicable law, given "the relatively stringent standard set by the language of § 434 and the presumption against pre-emption, and given that the regulations provide no affirmative indication of their effect on negligence law." *Easterwood*, 507 U.S. at 675. Even so, there was no reliance on the type of "stringent burden" that BNSF assigns to the court below. Pet. 18.

Because generalized assertions of inclusion in a project were deemed insufficient to warrant preemption by this Court, the decision here is in accord with *Easterwood*.

B. The Decision Below Conforms to *Shanklin*.

Shanklin confirmed *Easterwood's* holding that, where federal funding exists, the adequacy of the funded signs or crossbucks, as in this situation, cannot be questioned under state law. *See* 529 U.S. at 353. *Shanklin* specified that preemption occurs only "once the FHWA has funded the crossing improvement and the warning devices are actually installed and operating." *Id.* at 354. Of course, the Oklahoma Supreme Court did not hold differently. *Shanklin*, however, does not hold that the existence of federal funding can be presumed without proof, as BNSF asks this Court.

Shanklin held preemption attaches "[1] once the FHWA has funded the crossing improvement and [2] the warning devices are actually installed and operating." *Id.* at 354; *see id.* at 359. Plainly, the holding presupposes that there is proof of these two

factual predicates to preemption – and that is all the Oklahoma Supreme Court required. In *Shanklin*, it was "undisputed that the signs at the Oakwood Church Road crossing were installed and fully compliant with the federal standards for such devices at the time of the accident." *Id.* at 350. Implicitly, this acknowledgement suggests a different result would potentially obtain if the federal funding of the relevant warning signs was in dispute.

Just as the *Shanklin* Court rejected any attempt to "presuppose[] that States have not fulfilled their obligation to comply with [relevant regulations]" where the warning signs were indisputably installed with federal funds, *id.* at 357, this Court should reject BNSF's invitation to presuppose that the crossbucks at issue here were installed with federal funds, particularly in light of what the trial court found to be an "overwhelming factual dispute" based on significant contrary evidence. App. 4a.

Despite the state supreme court's description of the contrary evidence and Oklahoma law that credits the jury's general verdict as settling all disputed facts, BNSF claims it presented "overwhelming evidence to satisfy the two parts of this Court's bright-line test." Pet. 22; *see also* Pet. 3. Yet, the trial court, the jury, and the Oklahoma Supreme Court were plainly underwhelmed. In fact, the Oklahoma Supreme Court took specific note that "BNSF admitted, however, that it did not have proof that the specific crossbucks at issue, here, were erected with federal funds." App. 4a. BNSF attempts to excuse its evidentiary failure by asserting that its lack of credible evidence on the federal funding of these crossbucks is due to the

"fragmented and incomplete" federal database.[3] Pet. 10. Yet, the inability to muster evidence, along with BNSF's admission of its failure to obtain evidence, should be dispositive of the Petition and merit denial. BNSF's own description of its evidentiary failures fully rebuts its claim of "overwhelming evidence."

As the Petition makes clear, the evidence BNSF did produce was of the generalized nature of the federally funded state program to install crossbucks. Pet. 21-22. That the state undertook such a program and that the completed program was certified complete does not answer the question of whether this particular crossing had federally funded crossbucks. BNSF asks this Court to extrapolate that it probably was, but that does not satisfy the test expressed in *Shanklin*.

As part of its request that it prevail on the basis of speculation, BNSF asserts that "it is undisputed that the subject crossing had two crossbucks at the time of the accident" and that "they were 'installed and operating,'" claiming that those two facts, unrelated to federal funding, should be sufficient to meet "the second-part of the *Shanklin* test." Pet. 23. Yet, as the record shows, only one crossbuck existed at this crossing well past the time the federal project ended and that the two crossbucks that were eventually installed were not the same. This persuasive evidence supported the conclusion that the jury and every judge reviewing this record apparently drew that the crossbucks were installed at different times and therefore could not have been part of the federally funded program. *See* App. 3A, 17A, 18A.

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[3] BNSF thus complains about the FRA inventories it placed in the record.

BNSF acknowledges that the Oklahoma Supreme Court found an "evidentiary gap linking FHWA's approval and funding of the federal project to the specific crossing at issue here." Pet. 23 (citing Pet. App. 18a). It labels this statement a requirement for "conclusive proof tracing the federal-aid funds to the specific crossing" and then argues that this Court should adopt a new and different standard. *Id.* Yet, the Oklahoma Supreme Court did not adopt a conclusive proof standard, but merely indicated that, where the evidentiary gap is substantial, as it was here, other evidence could be considered. The trial court considered that evidence and found that the summary-judgment standard required the dispute be submitted to the trier of fact for resolution. No decision of this Court advises otherwise.

III. THE ASSERTED CONFLICTS BETWEEN CIRCUITS IS UTTERLY ILLUSORY.

A. BNSF Cites No Case Holding that Rebuttal Evidence Cannot Overcome Generalized Proof that Requires Judicial Speculation about the Facts.

BNSF's asserted circuit conflicts are illusory. The railroad relies heavily on *O'Bannon v. Union Pacific R. Co.*, 169 F.3d 1088 (8th Cir. 1999), which it characterizes as the "lead case" holding that a "railroad does not need to trace the federal-aid funding specifically to individual crossing signs." Pet. 24. *O'Bannon*, decided in the posture of a summary-judgment motion, does not stand for that proposition.

In *O'Bannon*, competent evidence showed that an "order was entered for installation of a crossbuck and a warning device at Sellers Road[, the specific crossing

at issue in the case], Missouri Pacific billed the State for that installation, and an employee of the State requested that the bill be paid." *Id.* at 1090. It was the *plaintiff's contrary evidence* that was *speculative*. The plaintiff argued that the amount billed was too small to cover all crossings that were part of the overall project so that some warning devices must not have been installed and offered affidavits from neighbors living near the crossing who claimed the crossbucks appeared to be the same ones that had been there since the 1960s, so that the federally funded project had changed nothing. *Id.*

The Eighth Circuit found the evidence that the warning signs for this crossing, even if not "free from doubt," sufficient to establish that the signs were federally funded, because "[w]e do not think that there is any substantial likelihood that the State would pay the Railroad for work that the Railroad had not done." *Id.* Unlike BNSF's characterization of *O'Bannon* eschewing contrary proof, the Eighth Circuit considered the plaintiff's rebuttal evidence and found it unpersuasive. It found the small amount of the payment sufficient to include the warnings at the crossing at issue and that the affidavits only showed that the crossbucks *appeared* the same to the neighbors, one of whom "conceded that he was only speculating when he testified that the crossbucks had never been replaced." *Id.* at 1090-91. The Eighth Circuit concluded that this contrary evidence raised no genuine issue of fact so that summary judgment was properly granted.

BNSF's reliance on *Hesling v. CSX Transp., Inc.*, 396 F.3d 632 (5th Cir. 2005), fares no better. *Hesling* upheld the exclusion of testimony from the railroad's Rule 30(b)(6) representative, concerning delays in

upgrading the crossing gates. *Id.* at 644. Upholding that ruling, it unremarkably held that the "FRSA preempted any state tort claims based on the choice of, or installation of, warnings devices." *Id.* The Fifth Circuit stated that the testimony was proffered "to prove the inadequacy of the signalizations at the subject crossing at the time of the accident and bolster the negligence claim," but was not material because *there was no dispute* that the "warning devices at the White Harbor Road crossing were federally funded." *Id.* at 646. *Hesling* therefore does not support BNSF's proposition that non-specific proof cannot be rebutted and is sufficient.

BNSF's next case, *Hatfield v. Burlington N. R. Co.*, 64 F.3d 559 (10th Cir. 1995), involves a different question about what evidence is sufficient to demonstrate a federal government commitment to a project to install active warning devices and the expenditure of "significant federal resources on such a project," even though the warning devices were not installed at the time of the accident. *Id.* at 562. The standard utilized has no bearing on whether warning devices were installed at a specific crossing with federal funding. *Cf. Armijo v. Atchison, Topeka & Santa Fe Ry. Co.*, 87 F.3d 1188, 1192 (10th Cir. 1996) (holding the "fact that the federal government has changed its opinion regarding what warning devices are needed at a particular crossing at some point after making a prior determination a lesser warning system is sufficient is of no real significance" to the preemption question). *Shanklin* changed this standard. *See* 529 U.S. at 354 (requiring actual installation).

Without a real circuit conflict on this issue, BNSF offers a handful of state cases that are equally

inapposite. For example, in *Gochenour v. CSX Transp., Inc.*, 44 N.E.3d 794 (Ind. Ct. App. 2015), the plaintiffs merely claimed the railroad's evidence of federal funding was inadequate but did not offer "any evidence in opposition to CSXT's motion for summary judgment that would so much as suggest that the County Line Crossing crossbucks were not federally funded." *Id.* at 807. There simply is no conflict this Court must resolve.

B. BNSF's Second Asserted Conflict about Whether the Installation Complied with Federal Law Was Not an Issue in this Case.

BNSF claims a second conflict exists over whether a party may collaterally attack the FHWA's actions. Pet. 26-30. Yet, there is no collateral attack on any federal agency's determination in this case. Unlike the "fraud on the Food and Drug Administration claim" at issue in *Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341 (2001), in which the plaintiffs sought to challenge representations made to the FDA because of a claim the medical device would not have been approved had the FDA received truthful information, this case involves no attempt to do the FHWA's job or to question a decision it made.

Instead, the Oklahoma Supreme Court merely observed that evidence showed "the characteristics of the crossbucks did not comply with the standard specifications required to participate in the federal program." App. 17a. This evidence corroborated substantial other evidence that the crossbucks were not part of the federal program and thus not approved by the FHWA. It therefore reinforced the plaintiff's proof that only one crossbuck existed at the time of the

federal program and thus could not have been part of that program, which required two crossbucks. *See* App. 17A. The cumulative nature of that evidence undermines the claim that the plaintiff attacked any FHWA determination and that the Oklahoma Supreme Court approved the attack.[4]

BNSF's "conflicting cases" all involve *Buckman*-like claims, where plaintiffs challenged warning devices solely on the basis that the devices did not comply with federal regulations or mistakenly approved the device. *See* Pet. 26-28. In none of those cases did the plaintiff offer evidence that the devices were never federally funded, and none of those cases prohibited such evidence. The asserted "conflict" simply does not figure in this case.

C. BNSF's Alleged Conflict over Testimony Based on Personal Knowledge Raises No Federal Issue.

Both paid fact witnesses BNSF produced to testify that the subject crossbucks were federally funded admitted that they had never been to the crossing and lacked any personal knowledge of it. BNSF asserts that discounting testimony not based on personal knowledge deepens a conflict over whether a witness supporting the existence of federal funding must testify out of personal knowledge, citing two state cases from two decades ago that it claims departs from

[4] BNSF makes the attenuated claim that because the FHWA approved the final payment, indicating that the project was complete, that necessarily means that the specific crossbucks at issue were approved by the FHWA. However, extrapolating specific approval from such meager evidence contradicted by other proof, including an affidavit proffered by BNSF that only one crossbuck was erected, attributes too much to the FHWA payment approval.

federal cases. *See* Pet. 31-32. Even if the contrasting cases were comparable, which they are not, the age of these state cases strongly suggests that any conflict is both rare and unconcerning.

The requirement that a witness testify from personal knowledge is a common evidentiary requirement. *See* Okla. Stat. § 12-2602 (a "witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter."). *Cf.* Fed. R. Evid. 602 (same); Me. R. Evid. 602 (same); Tex. R. Evid. 602 (same); Colo. R. Evid. 602 (same).

Under Oklahoma law as well, a "supporting or opposing affidavit must be made on personal knowledge" to be utilized in a summary-judgment proceeding. Okla. Stat. § 12-2056(E).

The allegedly different treatment that BNSF advances between the state and federal cases are artifacts of the nature of the proof in these cases. For example, BNSF cites *Bonacorsi v. Wheeling & Lake Erie Ry. Co.*, 767 N.E.2d 707 (Ohio 2002), as an example of a state court resisting proof of federal funding through the personal-knowledge requirement. The issue came up in a summary-judgment motion where the witness claimed personal knowledge of the funding of all Ohio railroad crossings in her affidavit, but testified at deposition that "her knowledge that federal funds were used to install signs at railroad crossings came from other people." *Id.* at 713.

BNSF compares *Bonacorsi* with *Byrne v. CSX Transp., Inc.*, 617 F. App'x 448 (6th Cir. 2015), where the same witness filed an affidavit with extensive

claims of personal knowledge and worked for a state relevant agency, while relying on official documents that the Sixth Circuit found self-authenticating. *Id*. at 452. The plaintiff complained that the personal-knowledge requirement was not met, but the court, in the absence of any contradictory evidence, held that the plaintiff had "not established a genuine factual issue." *Id*. The evidentiary records in *Bonacorsi* and *Byrne* were not comparable and explain the outcomes' differences.

In BNSF's other alleged conflict, the Mississippi Supreme Court held that the railroad did not meet its burden when it relied entirely on "the memory of one retired [state transportation] employee who claims to remember federal funds being spent at this particular crossing," unaccompanied by any documentary evidence, under a standard utilizing the *Frye* test. *Kansas City S. Ry. Co. v. Johnson*, 798 So. 2d 374, 379 (Miss. 2001). The validity of that ruling was subsequently cast in doubt when Mississippi adopted a modified version of the test from *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993). *See Mississippi Transp. Comm'n v. McLemore*, 863 So. 2d 31, 39 (Miss. 2003).

BNSF contrasts *Johnson* with *Hester v. CSX Transp., Inc.*, 61 F.3d 382 (5th Cir. 1995), where the same witness testified. Pet. 32. However, in *Hester*, the witness was not testifying about his memory of federal funding but about a visibility issue after having personally visited the crossing site. 61 F.3d at 388. The two decisions are entirely compatible.

Even if the conflict BNSF fails to establish did exist, this Court has acknowledged that state and federal courts need not apply their identical rules the

same way, and federal courts are obliged to respect those different constructions. *See Smith v. Bayer Corp.*, 564 U.S. 299, 312 (2011) (concerning different approaches to class certification under respective rules 23). The alleged conflict between state and federal courts over the personal-knowledge requirement for witnesses simply does not exist and does not justify certiorari.

IV. NO REASON EXISTS TO HOLD THIS CASE.

A. The SG's Views Will Not Aid this Court.

BNSF seeks to delay resolution of this case by suggesting that "[i]t may be appropriate to seek the views of the U.S. Solicitor General" to help "clarify the criteria for establishing federal approval and hence federal preemption at a grade crossing." Pet. 19. That question about competent proof, however, is an entirely fact-bound inquiry for which BNSF has not demonstrated either confusion or conflict among the circuits or state courts. The lack of difficulty that courts have experienced on the question demonstrates that it is not one of sufficient national importance to merit the attention of this Court or inquiry into the views of the United States.

B. Any Decision in *Merck Sharp & Dohme Corp. v. Albrecht* Will Not Affect this Case.

Alternatively, BNSF suggests this Court hold this Petition for possible remand in light of the forthcoming decision in *Merck Sharp & Dohme Corp. v. Albrecht*, No. 17–290. The question in *Albrecht* concerns whether a state-law failure-to-warn prescription drug claim is preempted when the Food

and Drug Administration rejected a drug manufacturer's proposed warning of a different but related risk, or whether a jury should decide "why the FDA rejected the proposed warning?" Brief for Petitioner, *Merck Sharp & Dohme Corp. v. Albrecht*, No. 17-290, Question Presented, at i.

Unlike what was presented in *Albrecht*, the jury here was not asked to delve into anything remotely comparable to whether the agency's mindset in rejecting a proffered labeling also covered a different proposed label. Unlike the type of issue about gleaning intent in *Albrecht*, the jury in this case was presented with an issue of objective fact over which the evidence conflicted: were these crossbucks installed pursuant to the federally funded program? BNSF could not offer evidence specific to the crossbucks, but only circumstantial evidence. On the other hand, significant independent and credible evidence was offered by Nye to demonstrate otherwise. As judges of the facts, the jury was unquestionably competent to decide that issue. *See Putt v. Edwards Equip. Co.*, 413 P.2d 559, 563 (Okla. 1966) ("It is settled that all law questions must be decided by the trial court, but disputed questions of fact, clear or obscure, must be decided by the jury.") (citation omitted). *Cf. Dimick v. Schiedt*, 293 U.S. 474, 486 (1935) ("Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care.").

The evidence that the jury was presented with was not different in kind from that which juries are regularly asked to review. Both the trial court and the Oklahoma Supreme Court found nothing untoward in

the jury's determination. Where the evidence is in conflict about a factual predicate to a legal question, juries regularly determine the underlying facts -- and whether the crossbucks were federally funded was a pure question of fact, as opposed to a question of law. In doing so, however, the jury was not substituted for the legal determination on preemption that is within the judicial province. *Albrecht* will not clarify that established legal proposition, which was followed here.

V. PETITIONER SEEKS A RULE THAT WOULD EXCUSE ITS FAILURE TO PRODUCE EVIDENCE OF FEDERAL FUNDING AND CONSTITUTE AN IRREBUTTABLE PRESUMPTION.

"[T]he purpose of Congress is the ultimate touchstone in every pre-emption case." *Wyeth v. Levine*, 555 U.S. 555, 565 (2009) (quoting *Medtronic, Inc. v. Lohr*, 418 U.S. 470, 485 (1996)). Here, Congress intended to improve safety at railroad crossings and expressly preempted all railroad safety legislation with specific exceptions set out in what is called the state participation exemption. 49 U.S.C. §§ 20101, 20106(a)(2). It exempted from preemption "state laws which are more strict than federal regulations when stricter regulation is necessary to address a specifically local problem," as long as the state requirements do "not unreasonably burden interstate commerce." *Michigan S. R.R. Co. v. City of Kendallville*, 251 F.3d 1152, 1154 (7th Cir. 2001) (citing 49 U.S.C. § 20106).

The statutory scheme, thus, evinces respect for state law requirements. Similar respect for our federalist system animates much of our preemption

jurisprudence and operates to "preserve[] the integrity, dignity, and residual sovereignty of the States." *Bond v. United States*, 564 U.S. 211, 221 (2011). We thus apply a presumption against preemption under "'the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'" *Wyeth*, 555 U.S. at 565 (quoting *Lohr*, 518 U.S. at 485). Here, Congress was entirely specific about what it sought to preempt and what it was leaving alone.

BNSF's proposal of a one-sided, irrebuttable presumption of preemption based on circumstantial evidence is not consistent with the congressional scheme and raises serious due process issues. *See Vlandis v. Kline*, 412 U.S. 441, 446 (1973). Here, BNSF does not question that it has the burden of proof to show that these crossbucks were federally funded. Yet, it still asks that it be excused from carrying that burden and that this Court deny the opposing party the opportunity to put on rebuttal evidence that the trial court, jury, and Oklahoma Supreme Court found sufficient to demonstrate that federal funding was not used to install these cross-bucks. It is only fair that a party seeking to utilize the affirmative defense of preemption be put to its proof that it qualifies and that it defend its proof against contrary proof. After all, the plaintiff has a constitutionally protected right of access to the courts, *see Christopher v. Harbury*, 536 U.S. 403, 415 (2002), that BNSF's proposal would deny based on speculation, rather than proof.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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