

OFFICIAL TRANSCRIPT  
PROCEEDINGS BEFORE  
**THE SUPREME COURT**  
**OF THE**  
**UNITED STATES**

CAPTION: CSX TRANSPORTATION, INC., Petitioner v. LIZZIE  
BEATRICE EASTERWOOD; and LIZZIE BEATRICE  
EASTERWOOD, Cross-petitioner v. CSX  
TRANSPORTATION, INC

CASE NO: 91-790; 91-1206

PLACE: Washington, D.C.

DATE: Tuesday, January 12, 1993

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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 CSX TRANSPORTATION, INC., :

4 Petitioner :

5 v. : No. 91-790

6 LIZZIE BEATRICE EASTERWOOD; :

7 and :

8 LIZZIE BEATRICE EASTERWOOD, :

9 Cross-petitioner :

10 v. : No. 91-1206

11 CSX TRANSPORTATION, INC. :

12 - - - - - X

13 Washington, D.C.

14 Tuesday, January 12, 1993

15 The above-entitled matter came on for oral  
16 argument before the Supreme Court of the United States at  
17 10:09 a.m.

18 APPEARANCES:

19 HOWARD J. TRIENENS, ESQ., Chicago, Illinois; on behalf of  
20 the Petitioner/Cross-respondent.

21 MAUREEN E. MAHONEY, ESQ., Deputy Solicitor General,  
22 Department of Justice, Washington, D.C.; on behalf of  
23 the United States, as amicus curiae.

24 TAMBRA P. COLSTON, ESQ., Rome, Georgia; on behalf of the  
25 Respondent/Cross-petitioner.

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

2 (10:09 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument  
4 now in number 91-790, CSX Transportation, Inc. v. Lizzie  
5 Beatrice Easterwood, and vice versa.

6 Mr. Trienens.

7 ORAL ARGUMENT OF HOWARD J. TRIENENS

8 ON BEHALF OF THE PETITIONER/CROSS-RESPONDENT

9 MR. TRIENENS: Mr. Chief Justice, and may it  
10 please the Court:

11 This case arises from a railroad crossing  
12 accident in which respondent's husband died.

13 Every one of these crossing accidents is a  
14 serious matter, and when the number of accidents reached  
15 the thousands with the increase in highway traffic, this  
16 became a matter of national concern.

17 Congress faced up to this problem in the Federal  
18 Safety Act of 1970. It authorized the Secretary of  
19 Transportation to issue regulations and standards for all  
20 areas of railroad safety and it directed the Secretary to  
21 undertake a coordinated effort toward solutions to the  
22 grade crossing problem under his authority under both the  
23 Railway Safety Act and the highway legislation.

24 Congress went further. It directed that the  
25 Secretary's regulations shall be nationally uniform, and

1 Congress provided a sweeping preemption provision as  
2 follows. A State may adopt or continue in force any law,  
3 regulation, order, or standard relating to railroad safety  
4 until such time as the Secretary has adopted a rule,  
5 regulation, order, or standard covering the subject matter  
6 of such State requirement. Now, the until such time  
7 language was to avoid a lapse in responsibilities between  
8 the time the statute passed and the regulations were  
9 issued.

10 In 1973, Congress went further. It passed a  
11 highway safety act in which the States were required to  
12 survey all highway rail crossings and implement  
13 improvements.

14 Now, as authorized and directed by Congress, the  
15 Secretary has issued many, many regulations, and many of  
16 those include safety at grade crossings. As to each such  
17 regulation, the subject matter which it covers, the State  
18 laws covering the same subject matter are no longer in  
19 force under section 434.

20 QUESTION: At what time, at what date was the  
21 State law on grade crossings preempted in your view?

22 MR. TRIENENS: 1977.

23 QUESTION: And that was at the time of the first  
24 regulation was issued?

25 MR. TRIENENS: Yes.

1 QUESTION: What did that regulation require?

2 MR. TRIENENS: It provided that the  
3 responsibility for determining the selection of  
4 devices -- and we're talking now only about that State law  
5 tort duty, not all of them, but the State law tort duty of  
6 picking a reasonable selection of a device, gate, sign,  
7 flashing lights, which device shall be done. That  
8 responsibility was placed exclusively upon the State  
9 authorities.

10 QUESTION: Even there there was going to be a  
11 lapse between the time the State could implement its  
12 program and the time when the railroads might begin  
13 withdrawing from this field. Don't you think?

14 MR. TRIENENS: Well, possibly. I think the  
15 literal reading of this and the practical reading of the  
16 statute is that when the responsibility shifted, the  
17 responsibility shifted. Of course, this is now, 15, 20  
18 years ago. So the problem of the lapse doesn't apply in  
19 this case at all.

20 QUESTION: Well, except I think we should  
21 identify the point at which preemption occurred.

22 MR. TRIENENS: Under the statute, the preemption  
23 occurred when the Secretary issued a regulation covering  
24 the subject matter of the State requirement. That's what  
25 the statute says. That's what Congress did, and that's

1 the way it works.

2 QUESTION: The problem --

3 QUESTION: Go on.

4 QUESTION: I'm just pressing Justice Kennedy's  
5 point. I think it is an important point because although  
6 it's time past and it's not involved in this case, it does  
7 bear upon whether your interpretation of when the  
8 preemption occurs is a reasonable one. Your  
9 interpretation leaves a time period, namely the period  
10 after the promulgation of that regulation imposing upon  
11 the States the obligation to make that decision of what  
12 kind of mechanism you use and the point at which the State  
13 actually issues such a decision with respect to each  
14 crossing. During that time period, there's no regulation  
15 by anybody --

16 MR. TRIENENS: No, no. The --

17 QUESTION: -- railroads, State, Federal, nobody.

18 MR. TRIENENS: The question is who has got the  
19 responsibility and the duty. There are lots of duties at  
20 Federal -- at grade crossings. There's a duty to select  
21 the device. There's a duty to maintain the device.  
22 There's a duty to have a whistle, a duty to blow a  
23 whistle. Some are preempted, some aren't.

24 QUESTION: And you say that during that lapsed  
25 period --



1 MR. TRIENENS: No, no, not the --

2 QUESTION: -- if -- during that period, after  
3 the promulgation of that regulation, if there were an  
4 accident at a rail crossing, the person injured would not  
5 be able to sue the railroad because it was no longer the  
6 railroad's responsibility to guard the crossing by some  
7 device, nor could he sue the State because the State --

8 MR. TRIENENS: No.

9 QUESTION: He couldn't sue the State.

10 MR. TRIENENS: Why? Why not?

11 QUESTION: Because the statute had just been  
12 passed. You have to give the State a reasonable time.  
13 The State is certainly not negligent in failing to do it  
14 yesterday.

15 MR. TRIENENS: These things didn't happen  
16 overnight. The statute was in 1970. The statute putting  
17 the burden on the States was in -- saying that they should  
18 be responsible was in 1973. This regulation was proposed.  
19 The States knew about it for 4 years, 1977. It just  
20 didn't come out of nowhere. So, this isn't a question of  
21 all of a sudden, oh, my goodness, I'm responsible --

22 QUESTION: No. I'm talking about an accident  
23 that occurred a week after, a week after this regulation.  
24 Whose fault --

25 MR. TRIENENS: It's also 4 years after Congress

1 passed the Highway Safety Act and section 130 that said  
2 that the States had this responsibility. So, the answer  
3 is the triggering of the preemption comes at the time the  
4 Secretary issues the regulation. That's what the statute  
5 says. This is 4 years after Congress had said the States  
6 should have this responsibility. So, here's 4 years in  
7 which they could gear up for it. There is no problem with  
8 lapse here, certainly not applied here.

9 QUESTION: Mr. Trienens, I'm having a -- I guess  
10 a different problem about identifying the scope of the  
11 subject matter, and let me just give an example. This is  
12 not the only one that I have in mind, but let me just give  
13 this as an example.

14 With respect to those cases in which, as I  
15 understand it, Federal funds are used to improve the  
16 condition of the -- the safety conditions at a grade  
17 crossing, and it is determined I guess in accordance with  
18 the manual that some kind of a device should be installed,  
19 as I understand the reg, the reg provides that the device  
20 is to include automatic gates.

21 Well, the provision that it should include  
22 automatic gates leaves open -- in fact, it seems to imply  
23 -- that other devices and other means of warning might be  
24 appropriate and might be imposed, which I assume refers  
25 back to imposed under State law.

1           And I further assume, since I don't see anything  
2 to the contrary, that it does not -- that that assumption  
3 does not distinguish between State law in the sense of law  
4 under which the State as a government might decide what  
5 the devices should be or State law, such as common law or  
6 tort law, which might decide the duty incumbent on the  
7 railroad which they could only satisfy by certain devices.

8           So with respect to that particular example,  
9 doesn't the regulation itself imply that there is going to  
10 be some State law relating to the safety at the grade  
11 crossing which survives even that regulation?

12           MR. TRIENENS: No, no. What it does imply is  
13 there is a State responsibility to select and determine  
14 the appropriate device at each crossing. That  
15 responsibility is a responsibility imposed by Federal law.

16           QUESTION: Why does it imply a responsibility as  
17 opposed simply to a remaining power? We don't know what  
18 the -- we can't tell what the responsibility is for the  
19 reg, and it seems to leave it simply open, and I suppose  
20 the answer would have to be an answer under State law.

21           MR. TRIENENS: No, because the reg in question  
22 -- you're referring to I believe part 646 of the manual.

23           QUESTION: Yes, that's right.

24           MR. TRIENENS: The one I'm talking about is 924  
25 and 655. The one I'm talking about is pursuant to section

1 130 of the railway -- of the Highway Safety Act of '73 and  
2 particularly on the regulations, which are the  
3 regulations, after all, which trigger the preemption. 924  
4 and 1204 are the ones that put the responsibility on the  
5 States.

6 And if there were ever any doubt about that, the  
7 manual, which is also a -- part 655, as incorporated in  
8 the CFR, says the determination of need and selection of  
9 devices at grade crossings is made by the public agency.  
10 And if there's any doubt about that one, it goes on in a  
11 later section, 8(d), and says under the heading selection  
12 of systems and devices.

13 QUESTION: Well, does the manual have the force  
14 and effect of law?

15 MR. TRIENENS: It's a regulation. It's a  
16 regulation and a standard. It so says in the CFR issued  
17 by the Secretary.

18 QUESTION: But even assuming that, isn't it  
19 still -- number one, your argument basically is that by  
20 placing a responsibility on a State or local agency, that  
21 that is a regulation on the subject matter within the  
22 meaning of the Federal statute. And I guess I still have  
23 the problem that later and more detailed regulations seem  
24 to suggest that more has been left open than your argument  
25 would conclude.



1           MR. TRIENENS: Well, the manual and the way the  
2 States wanted it, because there was a -- there was an  
3 effort to have further detail and elaborate formulas on  
4 whether gates or not gates -- the way the States wanted  
5 it, knowing they had this responsibility, was to say there  
6 was a variety of circumstances, and they wanted more  
7 flexibility.

8           The regulations I'm talking about not only  
9 impose the responsibility for selection of devices upon  
10 the State officials, but tells them how to go about it.  
11 It says based on an engineering study at the particular  
12 crossing, you shall decide what's appropriate.

13           And then in case you were wondering whether that  
14 was exclusive responsibility, the regulation also says  
15 traffic control devices shall be placed only by the  
16 authority of a public body. They have the authority,  
17 responsibility, and the exclusive responsibility.

18           Now, is this -- what's the State law duty we're  
19 talking about here that -- prior to preemption? And I  
20 won't invent it myself. I'll read you from plaintiff's  
21 brief. It says the railroad's common law duty is  
22 determining that improved grade crossing devices are  
23 needed and implementing devices. That's the common law  
24 duty or actually Georgia's statutory duty which they would  
25 impose on the railroad.

1           Now, these regulations I've been reciting put  
2 exactly that, the responsibility, the exclusive  
3 responsibility for determining the need for a device and  
4 implementing the device on the State authority.

5           QUESTION: How do we know that the subject  
6 matter is the subject matter of all State rules affecting  
7 safety at grade crossings as opposed to State rules or  
8 simply rules affecting the need for devices, which is  
9 simply a subset of the former?

10           MR. TRIENENS: Well, I'm only talking now about  
11 the duty to select the appropriate device. I'm not  
12 talking about lots of other duties that a railroad has at  
13 a crossing. Railroads are going to continue to be sued at  
14 crossings, and in fact, of the five issues that Mrs.  
15 Easterwood raised, three of them are going back for trial  
16 or disposition in the trial court one way or the other.  
17 Whatever this Court does on the two narrow duties we're  
18 talking about, this case goes back for trial, or it goes  
19 back for further proceedings at least, on the three duties  
20 that we admit are duties at crossings which were not  
21 preempted. Or at least there was no claim in this case  
22 they were preempted, and it goes back.

23           We're talking about the duty to select as  
24 between gates, lights, and signs. Who makes that  
25 determination? The plaintiff says under Georgia law, the

1 railroad is responsible. The Secretary has issued  
2 regulations saying that the States are exclusively  
3 responsible.

4 QUESTION: Mr. Trienens, why don't -- why isn't  
5 a better explanation of what you're arguing for that this  
6 is conflict preemption? I have the same trouble that  
7 Justice Souter does, squeezing this within the terms  
8 regulation, order, or standard relating to railroad  
9 safety. I mean, there's no standard contained in that  
10 regulation. It just allocates the responsibility for  
11 issuing the standard.

12 Now, I can -- if you're making the argument that  
13 it is inconsistent with placing that responsibility upon  
14 the State itself to instead, by State common law, impose  
15 that responsibility upon the railroad, then I can  
16 understand. That's a conflict preemption argument.

17 MR. TRIENENS: Well, our argument in our brief  
18 makes both the conflict point and the point that the 434  
19 covers the subject matter. It certainly -- nobody on the  
20 other side has ever argued this wasn't a matter relating  
21 to railroad safety, whether you have a gate or a sign or a  
22 light. That's a matter relating to safety. No question  
23 about that.

24 The question is whether the Secretary has issued  
25 a regulation covering the subject matter, and he has

1 covered it like a blanket on the narrow question of who  
2 determines whether it's a gate or a light. He covered the  
3 subject matter. How can -- how more can you cover it?  
4 That's why --

5 QUESTION: Do you think --

6 MR. TRIENENS: That's why I emphasized that  
7 point.

8 QUESTION: Is it sufficient to say that the  
9 subject matter of the State requirement is who's  
10 responsible?

11 MR. TRIENENS: No, no. It's more than that.

12 QUESTION: That's a strange subject matter.

13 MR. TRIENENS: No, no. It's more than that.

14 It's not only who's responsible, but how you go at it. It  
15 tells the State how to go at deciding -- how to go to the  
16 particular grade crossing and how to decide whether to  
17 have a gate or not have a gate. It tells them how to make  
18 the engineering judgments.

19 Your question is whether the Secretary went far  
20 enough in the detail. You know, you could have formulas.  
21 There's mathematical formulas that people -- you know, if  
22 there's X trains times Y trucks, there ought to be a gate,  
23 and if not, no gate. The States resisted that and said  
24 no, no, that isn't the way to do it. The way you've got  
25 it in the regulations is the way it ought to be. It tells



1 them what to do. It tells them who's responsible, and it  
2 tells them how to do it. What more -- how more can you  
3 cover it?

4 QUESTION: Does the plaintiff's theory include a  
5 failure -- a theory that somehow the railroad failed to  
6 identify the existence of a hazardous crossing?

7 MR. TRIENENS: Well, I -- their theory  
8 apparently, as stated in their brief, is that the railroad  
9 had the responsibility -- and presumably implicitly we  
10 failed to perform this duty -- of determining that  
11 improved grade crossing devices are needed and to  
12 implement them. In other words, it was our duty to decide  
13 that there should have been a gate there and we didn't do  
14 it. I think that's their case.

15 QUESTION: Or to at least identify and call to  
16 the attention of the State authorities the hazards?

17 MR. TRIENENS: Well, they make that point, but  
18 it's -- first place, if it's their responsibility -- and  
19 after all, the railroads work with these people all the  
20 time. The work -- the railroads do have an obligation,  
21 when called upon, to work with these diagnostic teams that  
22 go out to each of these crossings. So, the railroads are  
23 on top of this.

24 It also has nothing to do with this case because  
25 what happened here was there was a diagnostic team, and

1 the railroads were fully in on it. The diagnostic team  
2 went to Cartersville, Georgia. It went -- there are five  
3 crossings in Cartersville, Georgia. They went and they  
4 looked at all of them, and they said all right, let's --  
5 tentatively let's have gates at all of them.

6 The City of Cartersville said wait a minute. At  
7 Cook Street, it's too wide. You got to build an island in  
8 the middle of it in order to accommodate a gate. Putting  
9 that island in will cause a hazard to trucks, and  
10 therefore, the State authorities who are responsible for  
11 selecting devices weighed the highway safety alone, the  
12 highway safety in relation to the railroads, and it  
13 decided at Cook Street they wouldn't make them build the  
14 island. They would have flashing lights, in fact, six  
15 flashing lights on signs and booms, and that they decided  
16 -- they decided -- that there would not be gates at Cook  
17 Street. The railroads didn't decide this.

18 QUESTION: Well, would that give rise to a State  
19 law defense in the cause of --

20 MR. TRIENENS: Well, what it does give rise to  
21 is that the States are responsible. The States are not  
22 immune. The Secretary has made a survey and found that  
23 most States there's no immunity.

24 QUESTION: Well, excuse me. Do you think it  
25 would give rise to a State law defense?

1 MR. TRIENENS: To whom? The railroad?

2 QUESTION: To the railroad?

3 MR. TRIENENS: I don't know because all I'm  
4 concerned about here is the fact that having this process,  
5 having the Federal regulations prescribing the process,  
6 and having a statute that says that when you cover this  
7 very subject matter, it's preempted, we don't get to that.

8 They say, well, you know, maybe you would have a  
9 nice State law defense, and maybe a jury would find for  
10 you. But on this narrow issue, this is not for a State  
11 court or a State jury.

12 QUESTION: Mr. Trienens, are you going to talk  
13 at all about the speed issue? I have one question or two  
14 questions about that if you're not.

15 MR. TRIENENS: Well, the -- on the speed issue,  
16 that's the one where we are the respondent. The court  
17 below found there was preemption. The Solicitor General  
18 agrees on preemption on that. The Secretary has a  
19 regulation on speed that has the allowable speed over this  
20 and other tracks. We're not dealing with train operations  
21 generally. We're not talking about lookout here. We're  
22 talking about speed alone, and also speed is not a  
23 separate subject. Speed is not a subject separate from  
24 what device do you have at the grade crossing because  
25 they're interrelated under the Secretary's regulations.

1 But any event, our position is the subject  
2 matter of train speeds has been covered and it's  
3 preempted.

4 QUESTION: What happens if the train went  
5 70 -- went over the speed limit? Would that be a matter  
6 of Federal law or State law? Could they --

7 MR. TRIENENS: It would be a violation of  
8 Federal law, but you could sue in the State court on a  
9 common law basis under a case Justice Brennan wrote called  
10 Crane. In other words, there would be a violation of this  
11 regulation and the railroad would be subject to a suit.

12 QUESTION: You could be covered.

13 And what if the plaintiff claimed that the local  
14 -- that the speed that the train traveled at was  
15 incompatible with essentially a local hazard? What -- how  
16 does that play out in your view?

17 MR. TRIENENS: Well, the local hazard -- I think  
18 the court of appeals below and the Solicitor General, we  
19 all agree. The local -- essentially the local hazard is  
20 not implicated in this case because if you had said every  
21 grade crossing is a local crossing, that would just  
22 swallow the national rule that they got out.

23 QUESTION: Well, but what would be? What if the  
24 plaintiff thought that because of the dense population and  
25 a lot of bushes around or something that the



1 60-mile-an-hour limit was dangerous? Is there any  
2 way -- is that -- is a claim of that kind preempted, or  
3 how does that play out?

4 MR. TRIENENS: Preempted, but there's the City  
5 of Cartersville. If they thought that not only could have  
6 gone, but had right sitting in their lap gates at that  
7 crossing and they didn't want them. But if they -- under  
8 your question, if a city thinks there ought to be gates  
9 there, they go to the State department of transportation  
10 and say give us a gate.

11 QUESTION: No, not a gate problem, just that  
12 because of the particular local conditions, the  
13 60-mile-an-hour speed -- it seems to me you could read the  
14 statute as saying the speed limit is not always going to  
15 be -- there could be an essentially local safety hazard  
16 which would indicate that a lower rate of speed would be  
17 necessary to avoid the danger at that local place.

18 MR. TRIENENS: Well, if a State -- not the city,  
19 but if a State were to come along and say because there's  
20 something very unusual about the Horseshoe Curve -- and I  
21 picked that because that's in the legislative history --  
22 and therefore, somehow there ought to be a special speed  
23 limit there, then I think -- then that local exception  
24 would apply, but nobody has tried --

25 QUESTION: And that could apply even in a jury

1 trial, even without a regulation.

2 MR. TRIENENS: No. No, no. It has got to be a  
3 State who identifies something extraordinary and then has  
4 a statewide --

5 QUESTION: It's a more stringent law, rule,  
6 regulation, order, or standard. That can't be by  
7 adjudication in your view.

8 MR. TRIENENS: No. It has got to be a State  
9 that has got to get it out.

10 QUESTION: I guess I have a problem that goes  
11 one step beyond Justice Stevens', and again it's a textual  
12 problem. The regulation on speed -- it was at 213.9 --  
13 speaks simply in terms of the maximum allowable speed  
14 which again, by its terms, seems to imply to me that there  
15 may be some source of authority that could appropriately  
16 set a speed as appropriate, but less than that which is  
17 allowable, which again implies that there is some State  
18 authority left to do this.

19 MR. TRIENENS: Well, we don't agree that there's  
20 any such implication, and one of the reasons is that the  
21 Secretary of Transportation has a number of motives, one  
22 of which is to get the trains through. Congress has  
23 beaten on the Amtrak to speed up the trains, and the speed  
24 is -- the allowable speed is the speed you're allowed to  
25 go at, period, as far as we're concerned. That's what we

1 think the Secretary -- regulations call for, and once he  
2 has covered that subject matter, it's preempted.

3 QUESTION: Suppose the railroad knows that the  
4 main road is closed and that a lot of school buses are  
5 taking a detour over an unmarked crossing. Does the  
6 railroad have a duty to slow down?

7 MR. TRIENENS: The railroad -- no, no. The  
8 question of the --

9 QUESTION: Snowstorm, fog, no duty to slow down?

10 MR. TRIENENS: No. They got a duty to look out,  
11 but not as -- speed as such.

12 QUESTION: Suppose they see the school bus  
13 stalled. Do they have a duty to slow down then?

14 MR. TRIENENS: That's a lookout question. Then  
15 you have to take all appropriate measures to avoid the  
16 collision. And of course, there's a problem there. You  
17 got this heavy train and you can't swerve. But, yes. Oh,  
18 I don't say that at all. We've got a lookout problem. He  
19 sees the bus. He has got to everything he can --

20 QUESTION: Do the regulations talk about a  
21 lookout problem, or is this something --

22 MR. TRIENENS: No. That's not preempted.

23 QUESTION: Why? Can you tell me why that is?

24 MR. TRIENENS: Well, the Secretary, not having  
25 issued a regulation on that, the State law continues in

1 force.

2 QUESTION: Well, I'm not sure when a lookout  
3 problem begins and when a speed problem ends.

4 MR. TRIENENS: Well, if he's going at the  
5 allowable speed, he looks, and under your question, he  
6 sees a school bus sitting there, he has got to take every  
7 step to -- first, he has got to maintain an adequate  
8 lookout, and secondly, he has got to take every feasible  
9 step to avoid the accident. That's a State law question,  
10 not preempted, not involved.

11 I just want to say one thing about this  
12 Federally funded problem that the Solicitor General  
13 injected in this case after cert. It doesn't make any  
14 sense under 434. There's no basis for the distinction,  
15 and it produced entirely goofy results. If you have three  
16 crossings identically protected, one with Federal funds,  
17 one previously erected, and one built with State funds,  
18 one is preempted. Two aren't. That makes no sense at  
19 all. Besides it's -- ironically, all of them in this  
20 case, all the Cartersville ones were improved with Federal  
21 funds. So this argument created for this case doesn't  
22 apply to this case.

23 Thank you.

24 QUESTION: Thank you, Mr. Trienens.

25 Ms. Mahoney, we'll hear from you.



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ORAL ARGUMENT OF MAUREEN E. MAHONEY  
ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE

MS. MAHONEY: Mr. Chief Justice, and may it please the Court:

This is the first time in 20 years that this Court has had an opportunity to interpret the preemptive scope of the FRSA, and we'd like to make three basic points about how we think that it needs to be interpreted.

And the first is that we share the view of the parties that 434 should not be interpreted to preempt common law tort actions against railroads for violations of their duties to operate trains in a safe manner.

Second, we think that it is also important, however, to recognize that under the language when the Secretary has covered the subject matter of a railroad's duty, that standard of care must govern. It is a Federal standard of care defining the railroad's -- the content of the railroad's safety obligations under the circumstances that must control in this case and in other cases.

So, the critical question becomes whether, in fact, the Secretary has covered the subject matter of the particular claims that are at issue.

As to those claims, on the grade crossing issue, we do not think that the regulations cover the subject matter of these claims. On the speed issue, we think that

1 they do, and let me explain why.

2 QUESTION: Well, Ms. Mahoney, on the grade  
3 crossing area --

4 MS. MAHONEY: Yes, Your Honor.

5 QUESTION: -- how should we view the Manual on  
6 Uniform Traffic Control Devices which says the  
7 determination of need and selection of devices at a grade  
8 crossing is made by the public agency?

9 MS. MAHONEY: We do not disagree that the  
10 determination has to be made by the public agency. What  
11 this is referring to is final authority. It has always  
12 been the case --

13 QUESTION: Well, so, could there be a State tort  
14 law obligation on the railroad then to identify the need?

15 MS. MAHONEY: Absolutely, Your Honor. We think  
16 that the way the manual works, it's simply talking about  
17 the system that's in place. We have to recognize that  
18 when we're dealing with grade crossings, although the  
19 railroad has the right-of-way across the tracks, the  
20 highway is there as well, and the State has to have  
21 authority over whether a gate arm is going to be installed  
22 on its highway. It can't allow railroads to go and put up  
23 gate arms because they think it's good for safety.

24 QUESTION: Authority over it, Ms. Mahoney, but  
25 not responsibility for it. The regulation does not simply

1 repeat the situation in place. At common law, the State  
2 has no responsibility to assure the safety of each  
3 intersection. The State has the final word. The railroad  
4 could not put up a gate or a flashing signal without the  
5 State's consent.

6 But it seems to me an enormous change for the  
7 Federal Government to say henceforth the State shall have  
8 a positive responsibility to assure the safety of these  
9 intersections, whereas before under State law, it was the  
10 railroad's responsibility. And it seems to me quite a  
11 different system and a system that seems to me in conflict  
12 with the old common law rule.

13 MS. MAHONEY: Your Honor, we don't see what you  
14 -- we do not see anywhere in the statutes or the  
15 regulations that say that it is the State's responsibility  
16 to ensure that the grade crossings are safe. In fact --

17 QUESTION: It does not say that? Don't they  
18 have a responsibility to make studies and to determine  
19 what should be put up?

20 MS. MAHONEY: That's different than the MUTCD.  
21 Now we're talking about the Federal funding program, and  
22 yes, to use Federal funds, they have a responsibility to  
23 make sure that Federal funds are used properly to survey  
24 and prioritize projects for the use of those Federal  
25 funds. The language of the regulations and the language

1 of the statute does not speak in any way to what the  
2 State's obligations are with respect to grade crossings  
3 that are not improved with Federal funds.

4 And, in fact, the regulation, 646.210,  
5 specifically says that State laws that govern the  
6 railroad's share of grade crossing improvements shall not  
7 be applied when there are Federal aid projects. The clear  
8 import of that language is that State laws requiring  
9 railroads to pay for grade crossing improvements, to  
10 undertake the duty to do so, are still in place.

11 QUESTION: I'm not talking about payment. I'm  
12 talking about responsibility to make the decision. Is it  
13 not the case that for both Federally funded and  
14 non-Federally -- is it the Government's position that the  
15 State has no responsibility under the regulations to  
16 inspect grade crossings and to make a determination of  
17 what safety features are necessary at those crossings  
18 unless Federal funds are being used? Is that the  
19 Government's position?

20 MS. MAHONEY: Unless -- only when Federal funds  
21 are being used.

22 QUESTION: Only when Federal. The State has no  
23 responsibility to inspect other crossings at all.

24 MS. MAHONEY: No, not under Federal law. Under  
25 State law, they ordinarily do, but not under Federal law.



1 The Federal Government did not say as a condition of  
2 getting Federal funds, you must go out and implement  
3 improvement projects at grade crossings that you're not  
4 going to use Federal funds for.

5 QUESTION: Doesn't the Federal Government --

6 MS. MAHONEY: That would be a Pennhurst problem.

7 QUESTION: Ms. Mahoney, doesn't the Federal  
8 Government --

9 QUESTION: Let her finish her answer.

10 MS. MAHONEY: I'm sorry. Under Pennhurst, to  
11 say to the States that you now will share all of the --  
12 you will have the entire responsibility for improving  
13 grade crossings throughout your State, you'll not only  
14 have to pay for them, but you'll have to assume whatever  
15 tort liability there is, would be a condition that is  
16 certainly not explicit in the Federal funding statute. We  
17 have consistently interpreted that, the Federal funding  
18 provisions, to apply solely to Federally funded projects.  
19 The --

20 QUESTION: But, Ms. Mahoney, this Manual on  
21 Uniform Traffic Control Devices is not speaking about  
22 Federally funded projects.

23 MS. MAHONEY: No, it is not, Your Honor.

24 QUESTION: It just says the determination of  
25 need and selection of devices at a grade crossing --

1 MS. MAHONEY: Yes.

2 QUESTION: -- is made by the public agency --

3 MS. MAHONEY: Yes, it does.

4 QUESTION: -- I take it, meaning the State.

5 MS. MAHONEY: This was adopted by virtue of --  
6 the history is important here. A bulletin in 1977 adopted  
7 this, incorporated into part of the manual. And we think  
8 that our interpretation is perfectly consistent. In other  
9 words, need and selection. A railroad identifies a  
10 hazardous crossing. It comes to the State as every  
11 citizen must do when it needs approval, and it says I need  
12 a gate arm here. The State has to determine whether a  
13 gate arm is needed there and whether it's appropriate to  
14 have it installed. That's what this language speaks to.

15 QUESTION: Well, that is certain State  
16 responsibility --

17 MS. MAHONEY: State --

18 QUESTION: -- imposed by Federal regulation.

19 MS. MAHONEY: But it doesn't say that the State  
20 must go out on its own and determine what crossings need  
21 to be improved. It doesn't say that it has a financial  
22 responsibility or duty to go out and do that. That was  
23 left to State law, and in fact, even in the '89 report to  
24 Congress, the Secretary was quite clear that the extent of  
25 responsibilities, the joint responsibility, for improving

1 grade crossings still rested with the States.

2 QUESTION: Ms. Mahoney, does the -- are you  
3 finished with your answer?

4 MS. MAHONEY: Yes.

5 QUESTION: Does the State have an obligation  
6 under Federal statutes to make a survey of all grade  
7 crossings?

8 MS. MAHONEY: To get Federal funds, yes, it  
9 does, Your Honor, but it is not required to use that  
10 survey for implementing projects that are not Federally  
11 funded. It is solely so that the Federal monies can be  
12 used in an appropriate way.

13 QUESTION: And this State, the State of Georgia,  
14 I take it, has undertaken that survey, has it not?

15 MS. MAHONEY: Yes, it has.

16 QUESTION: And your position is that they are  
17 required to survey these nonfunded intersections just for  
18 the fun of it.

19 MS. MAHONEY: No, Your Honor. It's not for the  
20 fun of it. It's so that when Federal monies are used,  
21 there can be a determination about where they ought to be  
22 used within the State.

23 QUESTION: But they're not used. I mean, why  
24 can't -- they would save a lot of money to say we will  
25 decide in advance which ones we'll use Federal money on

1 and we'll survey those. But that's not what this says.  
2 It says --

3 MS. MAHONEY: Well, you can't --

4 QUESTION: -- you shall survey every one in the  
5 State.. Right?

6 MS. MAHONEY: Your Honor, how can you decide  
7 which ones you're going to use it on, if the whole point  
8 is you want to prioritize, unless you survey all of them?  
9 Yes, they have to survey them, but we do not tell them,  
10 unlike -- contrary to what the railroads have said, we do  
11 not tell them what hazard index they have to use, how they  
12 have to rank them, and we certainly don't tell them --

13 QUESTION: No, you don't, and your position on  
14 the requirement that they shall determine the need is that  
15 they shall determine the need if the railroad comes and  
16 says there's a need. Otherwise, they have no  
17 responsibility.

18 MS. MAHONEY: We're talking about under the  
19 MUTCD.

20 QUESTION: That's right.

21 MS. MAHONEY: That's right. The MUTCD says  
22 nothing can be --

23 QUESTION: That's a very strange interpretation.

24 MS. MAHONEY: Nothing can be installed on a  
25 public roadway unless the responsible local authority says



1 that it's appropriate. That is true not only with respect  
2 to crossing devices, but also with respect to every kind  
3 of stop sign that a business may want to have at its  
4 corner or at its driveway. All determinations of this  
5 kind --

6 QUESTION: But there may be a need when no one  
7 asks to put up anything. The railroad doesn't ask a  
8 thing. In that case, nobody determines the need. Right?

9 MS. MAHONEY: That's right. No one determines  
10 needs under those circumstances except that under State  
11 law, the regulatory authorities do assume responsibility  
12 for this.

13 So, the problem that we're describing, it  
14 doesn't really happen, but it occurs under the regime of  
15 State law, not under Federally mandated duties. We are  
16 not telling the States that they must improve their  
17 Federal -- their grade crossings without the use of  
18 Federal funds.

19 And I would emphasize that throughout the  
20 history of this problem, that the reports to Congress that  
21 the Secretary has done have been quite clear that this is  
22 the scheme that was in place before the funding statutes  
23 were enacted or supplemented in 1973, and did not  
24 recommend any changes in that existing scheme. In the '89  
25 report, for instance, 3-1, that was submitted to Congress,

1 the Secretary specifically said that the railroads'  
2 responsibilities are governed by Federal standards when  
3 Federal funds are used, but otherwise there is joint  
4 responsibility at the crossings, and that that is not  
5 necessarily a wrong concept.

6 We do -- thank you very much, Your Honor.

7 QUESTION: Thank you, Ms. Mahoney.

8 Ms. Colston, we'll hear from you.

9 ORAL ARGUMENT OF TAMBRA P. COLSTON

10 ON BEHALF OF THE RESPONDENT/CROSS-PETITIONER

11 MS. COLSTON: Mr. Chief Justice, may it please  
12 the Court:

13 The railroad has gained numerous benefits  
14 already from the Federal Railroad Safety Act. They now  
15 ask this Court to benefit you -- benefit them further by  
16 finding that two traditional common law duties are  
17 preempted.

18 And we have to get to the subject matter of what  
19 is preemptive because the regulation is so clear. The  
20 regulation in this case, section 434, bears repeating. It  
21 starts out, Congress declares --

22 QUESTION: Where can we find this in your brief,  
23 Mrs. Colston?

24 MS. COLSTON: Your Honor, it is all the way  
25 through there. At the very beginning -- page 9, Your

1 Honor, at the very bottom it begins.

2 QUESTION: Thank you.

3 MS. COLSTON: Congress declares that the laws,  
4 rules, regulations, orders, and standards relating to  
5 railroad safety should be nationally uniform to the extent  
6 practicable, thus beginning the section with a recognition  
7 that all laws relating to railroad safety can't be  
8 completely uniform.

9 Then the second section. A State may adopt or  
10 continue in force any law, rule, regulation, order, or  
11 standard relating to -- relating to -- railroad safety.  
12 That's preservative of the State's powers.

13 Then the preempting provision. Until the  
14 Secretary covers the subject matter.

15 This statute is drawn very narrowly. Therefore,  
16 it must be construed very narrowly and especially in light  
17 of the presumption against preemption when you've got such  
18 traditional State police powers.

19 QUESTION: Why do you say the statute is drawn  
20 very narrowly, Mrs. Colston?

21 MS. COLSTON: Your Honor, without 434 -- the  
22 preemption might have even been broader without it, but it  
23 preserves State laws relating to railroad safety until the  
24 Secretary covered the subject matter, and that --

25 QUESTION: Well, yes, but that doesn't strike me

1 as either a narrow or a broad statute. It strikes me as a  
2 fairly common preemption provision.

3 MS. COLSTON: Yes, Your Honor, it is fairly  
4 common, but the language used -- the language Congress  
5 chose -- we have to assume they knew the meaning of what  
6 they were saying.

7 QUESTION: Well, that's exactly the language I'm  
8 referring to, and I'm telling you I don't see how you can  
9 classify that as a narrow preemption provision.

10 MS. COLSTON: Your Honor, I classify it as such  
11 because it says that State law is preserved relating to  
12 railroad safety, and then when it says what's preempted,  
13 what does it say? The Secretary has to cover the subject  
14 matter, not -- the Secretary didn't say, well, when the  
15 Secretary passes a regulation that relates to railroad  
16 safety. The Congress said cover the subject matter.  
17 That's why I say the statute is narrowly drawn.

18 It's also supported by the legislative history,  
19 Your Honor. The legislative history in a railroad  
20 congressional hearing addressing Federal and State roles  
21 under the FRSA -- this is what Congress said. The States  
22 may adopt or continue in force any law, rule, regulation,  
23 et cetera, until the Secretary has promulgated a specific  
24 rule. This prevents the mere enactment of a broad  
25 authorizing Federal statute from preempting the field.



1           Then to ensure even more that State law wouldn't  
2 be arbitrarily displaced, they included the local safety  
3 hazard exception, which says States may adopt rules,  
4 regulations that the Secretary has already covered when  
5 there's a local safety hazard and it's not incompatible  
6 with the Federal rule and it's not an undue burden on  
7 interstate commerce.

8           Reading this and then reading it as this Court  
9 always does in light of its stated purpose, the purpose of  
10 the FRSA, not as CSX would have you believe, is not  
11 uniformity. Congress described the purpose as this act to  
12 promote safety in all areas of railroad operations and  
13 reduce accidents and deaths and injuries caused by  
14 railroad related accidents and to reduce damage caused by  
15 any accidents involving any carrier of hazardous  
16 materials. And that's very important when we talk about  
17 speed.

18           The Secretary has not covered the two subject  
19 matters at issue here under the express terms of section  
20 434 read in light of its stated purpose. With regard to  
21 speed, first of all, section 213 does not regulate what  
22 the State's common law regulates. It does not cover it.  
23 It may relate to speed, but it doesn't completely cover  
24 the subject matter. The scope of the act -- the beginning  
25 of it says --

1 QUESTION: The statute does not say completely  
2 cover the subject matter.

3 MS. COLSTON: No, Your Honor.

4 QUESTION: It said -- it says it has to be  
5 a -- have adopted a rule, regulation, order, or standard  
6 covering the subject matter of such State requirement.

7 MS. COLSTON: Yes, Your Honor. Only the  
8 congressional history says completely, but it doesn't say  
9 relating to either, and it doesn't say addressing. And  
10 Congress could have chosen those words. Congress said  
11 cover. And that does not cover the subject matter. The  
12 beginning of section 213, Your Honor, says this is all  
13 about track safety standards, and it says, well, we're  
14 going to govern the geometry. We're going to govern the  
15 roadbed. We're going to govern the number and the quality  
16 of crossties along a section of track.

17 Then Congress comes up and says now, based on  
18 these factors, how many crossties you have, based on how  
19 much -- how many joints and rails and all this kind of  
20 stuff, they say we're going to classify this section of  
21 track right here at Cartersville, Georgia as class 4. A  
22 class 4 track you can travel across based on track  
23 structure, geometry, and all that -- you can travel across  
24 it at 60. Now, if the railroad wants to upgrade it to a  
25 class 6, they can travel at 110.

1           Now, then you can see that they were addressing  
2   one thing. You can read it from the text of that act.  
3   They were governing how fast a train can travel and not  
4   derail, and that's all --

5           QUESTION: Ms. Colston, I thought about this  
6   when I was reading it. Do these speeds -- these speeds  
7   you say are totally determined by the character of the  
8   roadbed.

9           MS. COLSTON: Absolutely.

10          QUESTION: Does that mean that in these rail  
11   yards that are near Union Station down here if the roadbed  
12   is good enough, the speed would be 60 or 110?

13          MS. COLSTON: Yes, Your Honor. Yes, Your Honor.  
14   According to section --

15          QUESTION: Are they shown that way on the  
16   national maps, that if you want to, you can do 110 in the  
17   rail yard?

18          MS. COLSTON: Your Honor, I don't know what the  
19   national maps show. I will tell you that if this Court  
20   finds that speed is preempted under this section, the only  
21   thing that has to be considered in traveling 110 is  
22   whether you're sitting on a class 6 track, and that  
23   doesn't have anything to do with grade crossing safety,  
24   weather, fog, schools in the nearby area, high volumes of  
25   traffic going across the area, nothing that the common law

1 controls. You can see also --

2 QUESTION: You say that common -- under your  
3 view, I take it, every municipality in the State of  
4 Georgia could pass a speed limit for trains passing  
5 through it?

6 MS. COLSTON: Yes, Your Honor, and in most cases  
7 they do. Ours is -- our case is common law. There's a  
8 lot of cases out there that did deal with municipal  
9 ordinances, and those cases held that it was preempted,  
10 but not preempted for the reasons --

11 QUESTION: Those cases held what was preempted?  
12 That the local ordinances --

13 MS. COLSTON: The local speed ordinances because  
14 they said they --

15 QUESTION: That the local ordinances were  
16 invalid?

17 MS. COLSTON: In the lower courts. That's what  
18 the lower courts were saying, but they were --

19 QUESTION: I'm asking what is your position if a  
20 municipality passes an ordinance regulating the speed of  
21 trains.

22 MS. COLSTON: I believe, Your Honor, that  
23 ordinance is not preempted. It does not -- this section  
24 213 does not cover the subject matter of that requirement  
25 because that requirement would be based on the same



1 factors as the State's common law, the traffic --

2 QUESTION: And different municipalities could  
3 have different speed limits in the State of Georgia.

4 MS. COLSTON: Yes, Your Honor, and I understand  
5 the concern that you're getting at. But the purpose of  
6 the FRSA is not to burden interstate commerce -- to place  
7 -- take a burden away. The purpose is to promote safety.  
8 Wouldn't it be counterproductive to allow the railroads to  
9 travel at 110 miles an hour through Cartersville, Georgia  
10 at a crossing with 150 feet of sight distance, that they  
11 have these trucks going over all the time?

12 QUESTION: Well, you don't deny that the  
13 Secretary could do that if he wanted to.

14 MS. COLSTON: He sure could.

15 QUESTION: Your point here is just that this  
16 particular regulation doesn't do it.

17 MS. COLSTON: That's absolutely right, Your  
18 Honor.

19 QUESTION: So, if your -- I mean, you  
20 acknowledge, do you not, that if the Secretary wanted to  
21 establish uniform speed limits for trains, he could.

22 MS. COLSTON: He certainly could. I'm not --

23 QUESTION: You just say he hasn't done it here.

24 MS. COLSTON: No, sir, he has not, and I'm not  
25 certain how long he'd be Secretary if he did because the

1 headlines, if they said -- can you imagine saying Congress  
2 says we can travel 110 miles an hour across -- through  
3 grade crossings on all railroad tracks in the United  
4 States. How likely would it be that it would have been  
5 passed?

6 Then, also to support that this regulation only  
7 covers derailments and track classification is Senate  
8 report 91-6 --

9 QUESTION: I wonder if you're right about that.  
10 Supposing they had adequate -- the gates went down. When  
11 the gates are down and the lights are flashing, how -- why  
12 do you care how fast the train is going?

13 MS. COLSTON: That would be great, Your Honor,  
14 but 65 percent of the crossings out there have no active  
15 protection at all.

16 QUESTION: But what I'm suggesting is that  
17 perhaps the protection against the particular accidents  
18 you describe must rely on the crossing problem rather than  
19 the speed of the train.

20 MS. COLSTON: It's both very important, Your  
21 Honor. As far as --

22 QUESTION: But if the crossing is adequately  
23 protected, I don't know why, if I'm sitting there in my  
24 car, I wouldn't rather have the train go by real fast  
25 rather than slow.

1 MS. COLSTON: Yes, sir.

2 (Laughter.)

3 MS. COLSTON: I know what you mean. One of the  
4 witnesses in this case was kind of upset because she  
5 didn't get to get her free bag of coffee by getting to the  
6 grocery store at a certain time, and so she was very  
7 aggravated by this.

8 But, Your Honor --

9 QUESTION: It's a safety factor too, is it not?

10 MS. COLSTON: Yes, it is.

11 QUESTION: I mean, not everybody is as patient  
12 as Justice Stevens and would sit there if it was a  
13 slow --

14 (Laughter.)

15 MS. COLSTON: Absolutely, Your Honor, and it is  
16 a safety factor.

17 However, the Secretary noted in the reports to  
18 Congress that it's also a safety factor to have these  
19 trains slow down because of the common sense involved.  
20 The slower the train is going, the more time that the  
21 motorist has to perceive the train's presence and to react  
22 to it, like at this crossing with only 150 feet of sight  
23 distance. At 35 miles an hour, it was upon Mr. Easterwood  
24 in 3.2 seconds. Imagine if you doubled that to 60 miles  
25 an hour.

1           Your Honor, as far as if a gate arm always were  
2           in place at every crossing in Georgia, and we had  
3           unlimited Federal funds and could just put them  
4           everywhere, and they always worked properly, they didn't  
5           ever malfunction, and they didn't ever give false  
6           warnings, and they didn't ever do any of those things,  
7           you're right. Speed would not be an issue, but that's not  
8           the reality of it, sir.

9           The reality of it is that there's not gate arms  
10          at every crossing. In fact, most of them there's not.  
11          Many of the crossings are not even a recipient of Federal  
12          funds because they're not public crossings to begin with.

13          QUESTION: What's your position if a grade  
14          crossing has been improved with the crossing gate using  
15          Federal funds?

16          MS. COLSTON: Your Honor, if the crossing has  
17          been improved --

18          QUESTION: Or pardon me. Let's say crossing  
19          lights using Federal funds.

20          MS. COLSTON: We look at those, the gate arm  
21          regulations, strictly as funding regulations. That's all  
22          they are. Every one of them --

23          QUESTION: So, your answer is no preemption.

24          MS. COLSTON: No preemption, sir.

25          And as Justice O'Connor pointed out, they would



1 have an excellent defense if they did what was required by  
2 646.214 in State law -- in State court. And what jury is  
3 going to hold them liable for doing no more than they were  
4 allowed to do? That's the way our system works.

5 QUESTION: What jury is going to hold a railroad  
6 liable for doing everything that the railroad --

7 MS. COLSTON: Your Honor, I believe in the jury  
8 system.

9 QUESTION: Come on.

10 (Laughter.)

11 MS. COLSTON: I believe in the jury system  
12 completely, and I do believe that more times than not they  
13 do the right thing. And they know that when you put gate  
14 arms up and the State says that's enough, they have enough  
15 sense to know that you don't hold them liable just because  
16 you got a poor, little old lady over here that doesn't  
17 have a husband anymore. They have sympathy, but not that  
18 much. I know because I'm in front of juries all the time.

19 Now, these are funding regulations, and funding  
20 regulations, Your Honor, do not displace State tort law  
21 unless they do so with such explicitness that the States  
22 know by accepting Federal funds how much of their law was  
23 going to be displaced.

24 That's not the case here. Every regulation  
25 cited applies to Federal fund projects. The

1 prioritization is to receive Federal funds; even the  
2 Secretary states her position -- or his position as  
3 overseer to ensure that Federal money is appropriately  
4 spent. The regulations that were promulgated by the  
5 Secretary did just that, ensure that Federal money is  
6 appropriately spent and, of course, the Federal Government  
7 wants to do that.

8           And why do they give it to the States? You all  
9 were asking that question earlier. Why do they give it to  
10 the States and doesn't that preempt? No. They don't have  
11 a mechanism for giving it directly to the railroad. It  
12 has to go through the States.

13           QUESTION: As I understand it, they have to  
14 survey every one of the crossings in the State. Right?  
15 Private as well as public ones.

16           MS. COLSTON: No, sir, not the private crossings  
17 at all.

18           QUESTION: No, not the private, just the public  
19 ones.

20           MS. COLSTON: Just the public crossings. That  
21 would be possible --

22           QUESTION: But they can't look at a map and just  
23 say, well, we know. You know, this is a little rinky  
24 rural road. No big deal.

25           It's hard to believe that every crossing was

1 required to be examined solely in order to, quote,  
2 prioritize. Certainly you could have eliminated 80  
3 percent of the crossings in the State knowing that those  
4 are not the most important ones where you're going to need  
5 Federal money.

6 MS. COLSTON: Well, maybe they do. Maybe they  
7 do take the rinky-dink ones, and they don't worry about  
8 those, the ones that are out in the country.

9 QUESTION: They're not allowed to. They have to  
10 -- under the regulations --

11 MS. COLSTON: Well, they're supposed to look at  
12 them all.

13 QUESTION: -- they have to do all of them.

14 MS. COLSTON: They're supposed to look at them  
15 all. I don't know how in practice it actually works.

16 But think about that, Your Honor. Think about  
17 if you accept the Solicitor General's argument, is that  
18 once that Federal money is spent, you're preempted. Then  
19 every time that diagnostic team walks down a section of  
20 track, down any area in, say, 10 miles and they see three  
21 or four crossings, just because they walked down there and  
22 their salaries were paid with Federal funds, you're  
23 preempted according to the Solicitor General, which would  
24 -- that can't be. It can't be.

25 Take the situation here where a motion detector

1 was --

2 QUESTION: Mrs. Colston, were there Federal  
3 funds involved in the site of this case?

4 MS. COLSTON: Your Honor, Mr. Trienens was  
5 correct up to a point, that they did decide -- they did  
6 put it -- well, let me say this. They put a motion  
7 detector years ago, and the reason why they put the motion  
8 detector is they were upgrading four crossings. When they  
9 upgraded those four crossings, they decided to put gate  
10 arms at all of them, and that included Cook Street. They  
11 wanted to do that.

12 But they started at West Avenue.

13 QUESTION: No. My question was were Federal  
14 funds involved at the site in this case. Surely you can  
15 give a simpler answer than that.

16 MS. COLSTON: I wish I could. There were, but  
17 they were used to improve the West Avenue crossing because  
18 the motion detector at Cook Street wouldn't work with the  
19 new circuitry at West Avenue. So, yes, Federal funds were  
20 spent to put a motion detector at Cook Street some years  
21 ago, but it wasn't for the safety of Cook Street. It was  
22 to make the West Avenue circuitry work because you have to  
23 change it all. It's all tied in together. So --

24 QUESTION: And the accident occurred at Cook  
25 Street?



1 MS. COLSTON: Yes, sir. That's why it's such a  
2 complicated answer.

3 Now, as far as the gate arms and the city saying  
4 no, you're not going to do that, I want to tell you what  
5 happened. What happened was is it is big, and they said  
6 you can't put an island here because we have lots of  
7 tractor-trailer traffic. And it is. It's an industrial  
8 area, and you know how wide they have to turn when making  
9 a turn. If they put an island in the middle of it, they  
10 couldn't have negotiated that turn.

11 So, they said you got to put extended gate arms  
12 on, the longer ones. And the railroad said, well, then we  
13 got to raise our communication lines because they're going  
14 to interfere. And they said, okay, we'll do it, and  
15 everybody went on their merry way.

16 And nobody ever did anything. The railroad  
17 never reported back that they had completed raising their  
18 communication lines. Then Mr. Easterwood is killed, and  
19 they're saying, boom, you're preempted because you  
20 wouldn't let us do it. It's not the case. That's  
21 definitely not the case.

22 And that shows that if you find that these are  
23 anything other than funding regulations how difficult the  
24 question is going to be in the lower courts as to when  
25 preemption starts, when it ends, what it turns on, the

1 lapse. Is there a lapse? Is that a problem? It's just  
2 common sense that these are nothing but funding  
3 regulations that do not supplant State tort law.

4 QUESTION: Are Federal funds --

5 QUESTION: Excuse me.

6 QUESTION: Are Federal funds used to conduct the  
7 survey?

8 MS. COLSTON: Yes, sir, they are. The States  
9 are given a certain amount of funds, and part of it's used  
10 for the surveying process, some to pay the diagnostic  
11 team. And so there you go. The diagnostic team walks  
12 down the track. Boom, you're preempted under that  
13 analysis.

14 The Secretary in the reports to Congress noted  
15 that because the railroad does have tort liability in  
16 cases such as -- in railroad crossing accidents, this  
17 continues, a just -- a continuing interest -- excuse me.  
18 This justifies a continuing interest on the part of the  
19 railroad in the total safety effort.

20 If they were to be preempted, Your Honors, from  
21 placing gate arms at a hazardous crossing, it would remove  
22 all incentive to improve safety, and that would be in  
23 direct opposition to the purpose of the Federal Railroad  
24 Safety Act.

25 I'm sorry, Justice Scalia, you had a question.

1           Okay.

2           Neither in this case is there implied  
3 preemption, and I -- correct me if I'm pronouncing this  
4 wrong, but in Cipollone, it -- you all agreed that if you  
5 have an express preemption provision, this causes you to  
6 not have to look at whether it occupies the field because  
7 just by there being a provision, it's assumed that  
8 Congress did not want to go any further than what was  
9 stated in the provision.

10           So far as conflict preemption, there is no  
11 conflict here either, Your Honors. CSX, first of all, can  
12 easily comply with both of the State requirements at issue  
13 here. First of all, the Solicitor General and the  
14 railroad makes the argument that -- its counter on the  
15 speed argument is because emergency braking will place  
16 them in a position where that would cause a derailment,  
17 and they all concede that this was aimed at derailments.  
18 Section 213 was aimed at derailments. Emergency braking  
19 is not the question here. If you slow down to what's  
20 reasonable, you shouldn't ever have to emergency brake.

21           And a point that came out earlier during Mr.  
22 Trienens' argument was very interesting, the fact that the  
23 proper lookout claim still remains in this case. The  
24 proper lookout claim couldn't possibly remain if the speed  
25 is preempted because --

1 QUESTION: You have to look out. You just don't  
2 have to reduce your speed.

3 (Laughter.)

4 MS. COLSTON: Yes, Your Honor. That kind of  
5 makes the State requirement superfluous. You know, well,  
6 there he goes.

7 (Laughter.)

8 QUESTION: And that would not make sense. I'm  
9 sorry.

10 The Secretary -- well, let me state then also it  
11 is supported in the legislative history that these were  
12 just for derailments, and that's all they were for is for  
13 derailments.

14 In Senate report 91-619, the Senate members were  
15 talking about recent catastrophes that had happened from  
16 derailments, and they cited one case, one example, where a  
17 car derailed. And it was carrying hazardous chemicals,  
18 and it caused an explosion. The explosion destroyed the  
19 city's major industry. It destroyed several homes, and it  
20 contaminated the water supply for several months. Then  
21 they found out that a \$50 track repair would have  
22 made -- caused that derailment not to occur, that that  
23 would have happened.

24 If -- Congress, the Senate members, noted that  
25 because of that, they thought that the derailments were



1 caused by poor track conditions combined with higher  
2 average speeds. Mr. Parker pointed out to me this morning  
3 in the USA Today, the bottom, left-hand corner, an article  
4 says 69 percent of train accidents are derailments. The  
5 Secretary in section 213 was only regulating Congress'  
6 perceived cause of these terrible derailments that happen  
7 so frequently, poor track conditions combined with higher  
8 average speeds.

9 Thank you.

10 QUESTION: I guess it's a little unfair to say  
11 that lookout is inconsistent with the speed limit. I  
12 mean, you have a speed limit of 30 miles in residential  
13 areas, let's say. Certainly that doesn't mean if you see  
14 a pedestrian walking in front of you, you can maintain  
15 your 30-mile speed, does it?

16 MS. COLSTON: Well, Your Honor, under their  
17 interpretation, they say that they don't. In fact, in  
18 their reply brief -- it amazed me -- they said we still  
19 have the duty to slow down to avoid a collision. What's  
20 the difference between slowing down to avoid a collision,  
21 a specific collision --

22 QUESTION: I hope you slow down in residential  
23 areas when you're driving a car --

24 MS. COLSTON: Yes, Your Honor.

25 QUESTION: -- and it says 30 miles or 25 miles

1 and you see a pedestrian. You, nonetheless, slow down,  
2 don't you?

3 MS. COLSTON: Yes, Your Honor, and --

4 QUESTION: But you'd say what's the maximum  
5 speed. The maximum speed is 25 or 30 miles an hour.  
6 Right?

7 MS. COLSTON: Right, but --

8 QUESTION: That's all they're saying here I  
9 guess.

10 MS. COLSTON: That is all they're saying, but  
11 what we're doing with the railroad is no more than we're  
12 doing with a truck driver on I-75. If he comes to an area  
13 where the lanes narrow down into one because they're doing  
14 construction, we require him to slow down, to not kill  
15 somebody. We don't pat him on the back and say that's  
16 okay.

17 QUESTION: Maybe I don't understand the speed  
18 issue, but -- your answer. I thought their position was  
19 they could go 60 miles an hour.

20 MS. COLSTON: It is, and now they're saying in  
21 their reply brief that they have the duty to slow down.  
22 And that's what's inconceivable to me, Your Honor, is I  
23 don't see what the difference is in slowing down to avoid  
24 a specific collision and slowing down to avoid a collision  
25 because you're in a dangerous area. But they --

1 QUESTION: I suppose it's the difference between  
2 when you're on an interstate highway that has a posted  
3 speed limit of 55 and there's a major curve. You are not  
4 negligent if it's good weather and everything else is okay  
5 and you go 55 miles an hour. Right?

6 MS. COLSTON: Right.

7 QUESTION: But you would be negligent if there  
8 were, you know, somebody fallen down in the road and you  
9 continued at that same speed.

10 MS. COLSTON: Or --

11 QUESTION: That's all they're saying --

12 MS. COLSTON: Yes, Your Honor.

13 QUESTION: -- that the normal track conditions  
14 allow them to continue to go at whatever that speed is.

15 MS. COLSTON: That's right.

16 QUESTION: And if they see an obstruction, of  
17 course, they have the duty to slow.

18 MS. COLSTON: And if they knew -- by that same  
19 reasoning, if they knew that there was a little path there  
20 because it was a national park and pedestrians, people,  
21 frequently and bicyclers frequently went over the tracks  
22 there to go into the other part of the national park,  
23 would they then not have a duty to know that that hazard  
24 is up there and that it's very likely that an accident  
25 could occur because the conditions are so bad and not slow

1 down. It's inconceivable, Your Honor, that the Secretary  
2 would pass a regulation like that in the name of safety.

3 Thank you.

4 QUESTION: Thank you, Mrs. Colston.

5 Mr. Trienens, you have 2 minutes remaining.

6 REBUTTAL ARGUMENT OF HOWARD J. TRIENENS

7 ON BEHALF OF THE PETITIONER/CROSS-RESPONDENT

8 MR. TRIENENS: I'd like to devote that entirely  
9 to the confusion on Federal funding.

10 The States, as everybody knows, get a lot of  
11 Federal money for all kinds of purposes on the highways,  
12 and the States accept certain responsibilities to get all  
13 that money. And one of them is, imposed in the 1973 act,  
14 each State shall conduct and maintain a survey of all  
15 highways, to identify rail crossings which may require  
16 separation or protective devices, and establish and  
17 implement a schedule of projects for this purpose. States  
18 have done that. They haven't objected to it. They're  
19 doing it. The Federal funds it.

20 And my point is that quite apart from this  
21 myopic view on part 646, that this requirement is now  
22 embraced not only in the statute, but also in the Federal  
23 regs. It's in 924. It's in 1204. These are regulations  
24 and they trigger the preemption. The manual, which  
25 counsel for the Solicitor General said, oh, that's a mere



1 bulletin -- it is a regulation. It's in the CFR, and the  
2 R stands for regulation. It's described in the CFR as a  
3 regulation and a standard, and it specifically puts the  
4 responsibility for this narrow question of who determines  
5 gates or no gates on the States. Period. And once they  
6 do that, 434 kicks in.

7 Having covered that narrow subject matter, not  
8 liability generally at grade crossings -- we'll keep  
9 getting sued every time there's an accident, but as to  
10 this determination, the Secretary has covered that subject  
11 matter and that preempts expressly.

12 Thank you.

13 CHIEF JUSTICE REHNQUIST: Thank you, Mr.  
14 Trienens.

15 The case is submitted.

16 (Whereupon, at 11:08 a.m., the case in the  
17 above-entitled matter was submitted.)

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## CERTIFICATION

*Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:*

CSX Transportation, Inc., Petitioner v. Lizzie Beatrice Easterwood; and

Lizzie Beatrice Easterwood, Cross-petitioner v. CSX Transportation, Inc.

Case No: 91-790 and 91-1206

*and that these attached pages constitutes the original transcript of the proceedings for the records of the court.*

BY *Lona M. May*

(REPORTER)