SUPREME COURT OF THE UNITED STATES

Nos. 91–790 AND 91–1206

CSX TRANSPORTATION, INC., PETITIONER
91–790 *v.*
LIZZIE BEATRICE EASTERWOOD

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91–1206 *v.*
CSX TRANSPORTATION, INC.

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

[April 21, 1993]

JUSTICE THOMAS, with whom JUSTICE SOUTER joins, concurring in part and dissenting in part.

I believe that the Federal Railroad Safety Act and the Secretary of Transportation's implementing regulations pre-empt neither of respondent/ cross-petitioner Easterwood's state-law tort claims. I therefore concur in Parts I and II of the Court's opinion but dissent from the remainder.

In Part III of its opinion, the Court holds that the Secretary's regulation setting "maximum allowable operating speeds for all freight and passenger trains" pre-empts Easterwood's claim that CSX "breached its common-law duty to operate its train at a moderate and safe rate of speed" below the federally specified maximum speed at the Cook Street crossing. *Ante*, at 14 (citing 49 CFR §213.9(a) (1992)). The Court concedes, however, that "the provisions of §213.9(a) address only the maximum speeds at which trains are permitted to travel *given the nature of the track on which they operate*." *Ante*, at 15 (emphasis added). Likewise, CSX makes no effort to characterize any duty to reduce speed under Georgia law as a state-law obligation based on track safety, the precise "subject matter" "cover[ed]" by the Secretary's speed regulation. 45 U. S. C. §434. Indeed, CSX admits that it shoulders a state-law duty to take

measures against crossing accidents, including an "attempt to stop or slow the train if possible to avoid a collision."[1] Reply Brief for Petitioner in No. 91–790, p. 3. The Court effectively agrees, as is evident from its decision to limit its opinion to a common-law negligence action for excessive speed and from its refusal to address related state-law claims for the violation of a statutory speed limit or the failure to avoid a specific hazard. See *ante*, at 16–17, and n. 15. For me, these concessions dictate the conclusion that Easterwood's excessive speed claim escapes pre-emption. Speed limits based solely on track characteristics, see 49 CFR §§213.51–213.143 (1992), cannot be fairly described as "substantially subsum[ing] the subject matter of . . . state law" regulating speed as a factor in grade crossing safety. *Ante*, at 5.

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[1]See generally Ga. Code Ann. §46–8–190(b) (1992) (requiring an "engineer operating [a] locomotive" to "exercise due care in approaching [a] crossing, in order to avoid doing injury to any person or property which may be on the crossing"); *Georgia Railroad & Banking Co.* v. *Cook*, 94 Ga. App. 650, 651–652, 95 S. E. 2d 703, 706–707 (1956); *Atlantic Coast Line R. Co.* v. *Bradshaw*, 34 Ga. App. 360, 129 S. E. 304 (1925).

The Secretary's own explanation of his train speed regulation confirms my view that the federal speed standard does not pre-empt state regulation of train speed as a method of ensuring crossing safety. When the Secretary promulgated his speed regulation in conjunction with a set of track safety standards, he declined to consider "variable factors such as population density near the track" because these matters fell "beyond the scope of the notice of proposed rule making." 36 Fed. Reg. 20336 (1971). See also *id.*, at 11974 (notice of proposed rule-making).[2] By contrast, the state law supporting Easterwood's excessive speed claim would impose liability on CSX for "operating [a] train at a speed that was greater than reasonable and safe" at a crossing "adjacent to a busily traveled thoroughfare." App. 4–5. Because the Secretary has not even considered how train speed affects crossing safety, much less "adopted a rule, regulation, order, or standard covering [that] subject matter," Georgia remains free to "continue in force any law" regulating train speed for this purpose. 45 U. S. C. §434.

Only by invoking a broad regulatory "background" can the Court conclude that "§213.9(a) should be

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[2]I reject the Solicitor General's contention that "[t]he Secretary has concluded that reduced train speeds do not represent an appropriate method of preventing crossing accidents." Brief for United States as *Amicus Curiae* 29. The very source cited in support of this proposition states that "[i]f a collision [at a crossing] seems unavoidable," a locomotive engineer "must decide whether the train should be slowed or put into emergency mode." Rail-Highway Crossings Study, Report of the Secretary of Transportation to the United States Congress 5–10 (April 1989). The Secretary's original declaration that he did not consider crossing safety concerns therefore stands uncontradicted.

understood as covering the subject matter of train speed with respect to track conditions." *Ante*, at 16. It rests in part on the Manual on Uniform Traffic Control Devices for Streets and Highways, which has no pre-emptive effect by its own terms or under the federal regulations requiring compliance with it. See *ante*, at 9–11; 23 CFR §646.214(b)(1) (1992) (permitting "State standards" to "supplemen[t]" the Manual). The Court goes so far as to rely on a federal crossing gate regulation that concededly does not govern the Cook Street site. Compare *ante*, at 15 ("[A]utomatic gates are required for federally funded projects"), with *ante*, at 13 ("These facts do not establish that federal funds `participate[d] in the installation of the [warning] devices' at Cook Street") (quoting 23 CFR §646.214(b)(3)(i) (1992)). Rather than attempt to excavate such scant evidence of pre-emption, I would follow the most natural reading of the Secretary's regulations: the Federal Government has chosen neither to regulate train speed as a factor affecting grade crossing safety nor to prevent States from doing so. The Court's contrary view of these regulations' pre-emptive effect may well create a jurisdictional gap in which States lack the power to patrol the potentially hazardous operation of trains at speeds below the applicable federal limit.

Had the Secretary wished to pre-empt *all* state laws governing train speed, he could have more explicitly defined the regulatory "subject matter" to be "cover[ed]." Doubtless such a decision would be true to Congress' declared intent that "laws, rules, regulations, orders, and standards relating to railroad safety shall be nationally uniform to the extent practicable." 45 U. S. C. §434. To read the Secretary's existing maximum speed regulation as encompassing safety concerns unrelated to track characteristics, however, negates Congress' desire that state law be accorded "considerable solicitude." *Ante*, at 5. The "historic police powers of the States"

to regulate train safety must not "be superseded . . . unless that [is] the clear and manifest purpose of Congress." *Rice* v. *Santa Fe Elevator Corp.*, 331 U. S. 218, 230 (1947). Respect for the presumptive sanctity of state law should be no less when federal pre-emption occurs by administrative fiat rather than by congressional edict. See *Fidelity Fed. Savings & Loan Assn.* v. *De la Cuesta*, 458 U. S. 141, 153–154 (1982).

I would uphold Easterwood's right to pursue both of the common-law tort claims at issue. Accordingly, I respectfully dissent from the Court's conclusion that the excessive speed claim is pre-empted.