No. 12-1448

IN THE

# Supreme Court of the United States

NORFOLK SOUTHERN CORPORATION,
*Petitioner,*

v.

ROBERT ZIMMERMAN,
*Respondent.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit**

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

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## QUESTIONS PRESENTED

1. Whether 23 U.S.C. §409, which prohibits the evidentiary use of reports "compiled or collected for the purpose of identifying, evaluating or planning" safety enhancements "pursuant to" three federal highway programs, bars the admission of National Crossing Inventory reports and railroad accident reports collected from railroads by the Federal Railroad Administration for the purpose of identifying railroads crossings in need of safety enhancements.

2. Whether 49 U.S.C. §20903, which prohibits the evidentiary use of a federally-mandated railroad accident report in an action "for damages resulting from a matter mentioned in the report" bars the admission of reports of accidents at a railroad crossing in a tort suit arising out of an accident at the crossing.

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## INTEREST OF *AMICUS CURIAE* [1]

The Association of American Railroads ("AAR") is an incorporated, nonprofit trade association representing the nation's major freight railroads and Amtrak. AAR's members operate approximately 82 percent of

[1] Counsel for *Amicus* AAR has timely notified the parties of AAR's intent to file this brief pursuant to Rule 37.2(a), and both petitioner and respondent have consented to such filing. Letters expressing such consent have been filed with the Clerk of the Court. Pursuant to Rule 37.6, AAR states that no person or entity other than AAR has made monetary contributions toward this brief, and no counsel for any party authored this brief in whole or in part.

the rail industry's line haul mileage, produce 97 percent of its freight revenues, and employ 95 percent of rail employees. In matters of significant interest to its members, AAR frequently appears before Congress, administrative agencies and the courts on behalf of the railroad industry, including participation as *amicus curiae*, frequently before this Court, in cases raising significant legal and policy issues.

Proper enforcement of 23 U.S.C. §409 is a matter of significant interest to railroads because it plays an important role in the federal government's effort to promote crossing safety. Section 409 specifically exempts from discovery or admission into evidence certain information "compiled or collected for the purpose of" promoting rail-highway crossing safety pursuant to 23 U.S.C. §130. Section 130 makes federal funds available for use in improving safety at railroad-highway crossings, and requires states to prioritize crossings for safety-related upgrades. Much of the information that is utilized to make decisions about the use of such funds is contained in crossing reports submitted to the National Crossing Inventory and in accident reports submitted to the Federal Railroad Administration ("FRA").

Congress enacted the §409 privilege to ensure that the §130 program, and other highway safety programs, work effectively by providing an evidentiary privilege designed to reduce inhibitions parties may have about supplying timely and thorough information. However, the Third Circuit has interpreted §409 in a rigid manner that creates uncertainty over what information is covered by the privilege, and that ultimately is inconsistent with the policy behind that statute. This is of great concern to railroads, to whom crossing safety is of utmost importance, and who

play a key role in the collection and compilation of information utilized to enhance crossing safety. AAR member railroads have a strong interest in seeing clarity restored to the scope of the §409 privilege and, consistent with the statute's intent, avoiding exposure to damages based on information that railroads themselves are required to collect and submit.

## STATEMENT OF THE CASE

AAR adopts the Statement of the Case in the Petition.

## REASONS FOR GRANTING THE PETITION

### I. The Grade Crossing Safety Program Relies on the Full and Timely Collection and Analysis of Grade Crossing Inventory and Accident Data So States Can Prioritize Crossing Improvement Projects

This case should be reviewed by this Court because it raises serious questions about a long standing federal safety program that has worked remarkably well to prevent injuries and deaths at railroad-highway grade crossings. The Third Circuit has interpreted a key component of this program in a manner that not only does violence to the statutory text, but also severely undermines the public policy on which the program is premised. This decision creates a great deal of uncertainty where clarity is demanded.

Beginning with the Highway Safety Act of 1966, Pub. L. No. 89-564, 80 Stat. 731, Congress focused its attention on improving safety on the nation's roads. Title 23 of the United States Code established several programs that promote national transportation safety by providing funding to states to reduce the number

and severity of traffic accidents within their respective jurisdictions. Under these programs, state and local governments are required to engage in extensive analysis and evaluation of road conditions and other relevant information if they wish to apply for federal funds for transportation safety improvement projects.

Most relevant to railroads and rail safety is the Grade Crossing Safety Program, 23 U.S.C. §130 ("Crossing Program"), which is aimed at improving safety at intersections where roadways and railroad tracks meet, a configuration which invariably creates the potential for collisions between trains and motor vehicles. Crossing safety was not a significant issue during the first three quarters of a century of the rail industry's existence, a period which predated the invention of the automobile. However, as motor vehicles began to fill the nation's roads and highways in the twentieth century, crossing safety rose to prominence, including questions about who bore the primary responsibility for enhancing safety at grade crossings. *See Nashville, C. & St. L. Ry. Co. v. Walters*, 294 U.S. 405, 423-24 (1934).

Ultimately, congressional alarm over the number and severity of grade crossing accidents led to a statutory requirement that the Secretary of Transportation study the issue of grade crossing safety and report to Congress with recommendations for solutions.[2] In response, the Secretary issued two

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[2] Railroad Safety Act of 1970, Pub. L. No. 91-548, §204, 84 Stat. 971; H.R. REP. NO. 91-1194 (1970), *reprinted in* 1970 U.S.C.C.A.N. 4104, 4116. ("The Committee is aware that grade crossing accidents constitute one of the major causes of fatalities connected with rail operations. The need to do something about [grade crossing accidents] . . . necessitates an immediate attack on the grade crossing problem as soon as possible.")

comprehensive reports which laid the groundwork for enactment of the Crossing Program. U.S. Dept. of Transp., *Railroad-Highway Safety Part I: A Comprehensive Statement of the Problem* (1971); U.S. Dept. of Transp., *Railroad-Highway Safety Part II: Recommendations for Resolving the Problem* (1972). The Secretary concluded that rather than the current "fragmented approach," an effective effort to improve railroad crossing safety would require "national coordination." *Railroad-Highway Safety Part II* at iii. Congress agreed, noting "the necessity for improved coordination and cooperation on a program and project level between Federal, State and local authorities, and between the public and private sectors"; only such a coordinated approach could provide the "multi-pronged attack on those highway-related factors which contribute most to accidents." H.R. REP. NO. 93-118 (1973), *reprinted in* 1973 U.S.C.C.A.N. 1859, 1889.

The goal of the Crossing Program is to "provide federal funds for the states' efforts to reduce the incidents of accidents, injuries and fatalities at public railroad crossings." U.S. General Accounting Office, *Report to Congressional Requesters, Railroad Safety: Status of Efforts to Improve Railroad Crossing Safety* 2 (Aug. 1995) ("GAO Report"). The Program, which was established through the existing statutory framework of federal oversight and funding of highway improvement projects in each state,[3] is designed to facilitate a rational, deliberative decision-making process for allocating scarce federal resources to the

[3] *See* 23 U.S.C. §402, requiring each state to have a highway safety program, approved by the Secretary, and complying with uniform guidelines promulgated by the Secretary; *See* 23 U.S.C. §104, apportioning federal funds for state highway safety improvement programs.

states to improve crossing safety. It established, for the first time, a nationally uniform grade crossing safety policy, which required states to (1) maintain an inventory of all crossings to identify those in need of additional traffic control devices; and (2) establish a rational objective basis for evaluating and comparing crossings using criteria deemed appropriate by the state, and schedule upgrade projects on the basis of relative hazard ranking. Under §130, states must "conduct and systematically maintain a survey of all highways to identify those railroad crossings which require separation, relocation, or protective devices, and establish and implement a schedule of projects for this purpose." 23 U.S.C. §130(d).

Each state's highway safety program must include a planning, implementation and evaluation component. *See* 23 C.F.R. Part 924; Federal Highway Administration, *Rail-Highway Crossing Study* 3-3 (1989). This process involves prioritizing safety hazards and making judgments about where federal money should be spent first. As part of the planning component, each state is required to collect and maintain data on the characteristics of highway and train traffic, as well as accidents, at railroad grade crossings. 23 C.F.R. at §924.9 (a)(1). Each state's program must consider the relative risks created at each public crossing based on a hazard index formula. *Id*. at §924.9 (a)(3)(i)(B).

A key component of the Crossing Program is the collection and analysis of relevant information on grade crossings throughout the nation, a task that is essential to rational safety-related decision-making. The Secretary's Report to Congress recommended "the development of an adequate information system" because "[a]lthough various local, State and Federal agencies have collected and maintained information

about railroad-highway crossings, most crossing information systems have been fragmented and incomplete." U.S. Dept. of Transp., *National Railroad-Highway Crossing Inventory Update Manual* B-1 (1976) ("Update Manual"). The Secretary pointed out that "[t]o assist in a systematic approach to the planning and evaluation of programs for the improvement of railroad-highway crossings, certain information is essential, both for individual crossings and groups of crossings . . . fit[ting] into two categories, (1) inventory data and (2) accident statistics." *Railroad-Highway Safety Part II*, at 58. Specifically, the Report recommended that the "Department of Transportation, in conjunction and cooperation with the railroad industry and appropriate State agencies [ ] (1) undertake to develop a national inventory of grade crossings, (2) undertake to develop and implement a uniform national numbering system, and (3) [ ] expand railroad company accident reporting." *Id.* at iv.

"The major goal of the National Railroad-Highway Crossing Inventory and Numbering Project is to provide information to Federal, State and local governments as well as the railroad industry for the improvement of safety at railroad-highway crossings." Update Manual, at A-1. Following submission of the Secretary's Report, the FRA assumed principal responsibility for the development of a national inventory containing data on various characteristic of each crossing. To carry out that role, FRA entered into a contract with AAR to develop a "Comprehensive National Railroad-Highway Crossing Information and Numbering System." Under this cooperative arrangement, railroads were assigned the responsibility for making a site-specific inventory of each crossing and for installing a unique identification number at each

location. State highway departments assisted by providing site-specific highway locational and use data. *Id.* at B-1. "[S]ite specific information is necessary to provide a systematic approach to the planning and evaluation of programs for the improvement of railroad-highway crossing safety, at both the state and federal level." *Id*. The Inventory "will satisfy the legislative requirement" [of §130] that each state highway agency maintain an inventory of all crossings. *Id.* at A-1.

Accident reports, which railroads must submit to FRA, also are an integral component of the Crossing Program. These reports must include information on the "nature, cause and circumstances" of the accident. 49 U.S.C. §20901(a). Together with crossing inventory information, accident reports provide the basis for states to plan, implement and evaluate their crossing programs. As FRA recently explained, "[t]he Crossing Inventory is intended to provide a uniform inventory database which can be merged with highway-rail crossing collision files and used to analyze information for planning and implementation of crossing improvement programs by public and private agencies." Federal Railroad Administration, *National Highway-Rail Crossing Inventory Reporting Requirements, Notice of Proposed Rulemaking*, 77 Fed. Reg. 64077, 64079 (Oct. 18, 2012).

By any measure, the Crossing Program has been remarkably effective. Approximately 20 years after the Crossing Program began, the federal government estimated that crossing accidents and fatalities had declined by 61 and 34 percent respectively, and that the Crossing Program had "prevented more than 7,600 fatalities and 33,500 nonfatal injuries." GAO Report at 18. The success continues. Collisions at grade

crossings have declined by 82 percent since 1980, and by 44 percent since 2000; fatalities have declined by 72 percent since 1980, and by 45 percent since 2000; and injuries at crossings have declined by 76 percent since 1980, and by 24 percent since 2000. Federal Railroad Administration, *Highway/Rail Crossing Accident/Incident & Inventory Bulletin*, 1980-1996, Table S; Federal Railroad Administration, *Railroad Safety Statistics Annual Report*, 1997-2011, Tables 1-1, 1-3; for 2012 data see http://safetydata.fra.dot.gov/officeofsafety/publicsite/summary.aspx.

## II. In Order to Increase the Effectiveness of the Highway Safety Programs, Congress Enacted an Evidentiary Privilege to Protect the Information Gathered for the Purpose of Planning and Implementing Highway Safety Improvement Projects, Including Crossing Safety Projects

Section 409 of Title 23 plays an important complementary role in promoting the effectiveness of the Crossing Program and other highway safety programs. The highway safety programs, including the Crossing Program, depend on comprehensive and timely data-gathering and analysis to assure that scarce federal highway safety funds are most effectively expended. Section 409 implicitly recognizes that because resources are limited, projects must be prioritized, and not all sites in need of improvement can or will receive funding immediately. Inevitably, situations posing some inherent risk will be left unaddressed for a time while more urgent projects are funded.[4] This knowledge may inhibit parties from

[4] *See Duncan v. Union Pac. R.R.*, 790 P.2d 595, 601 (Utah App. 1990) ("Highway maintenance and improvement are predominantly fiscal matters. . . . it is not fiscally feasible to equip [all

compiling complete and accurate information, and candidly assessing that information, out of fear that identifying hazards that may then go unaddressed for a time could expose them to tort liability. As this Court explained, "States feared that diligent efforts to identify roads eligible for aid under the Program would increase the risk of liability for accidents that took place at a hazardous location before improvements could be made." *Pierce County, Washington v. Guillen*, 537 U.S. 129, 134 (2003). *See also Long v. State of Louisiana ex rel. Dep't of Transp. and Development*, 916 So.2d 87, 94 (2005).

Section 409 is designed directly to address that concern by specifying that certain types of information related to federal safety programs may not be discovered or admitted into evidence in civil litigation. By enacting §409, Congress intended to "[f]oster the free flow of safety-related information by precluding the possibility that such information later would become admissible in civil suits. The interest to be served . . . is to obtain information with regard to the safety of roadways free from fear of future tort actions." *Reichert v. Dep't of Transp. and Development*, 694 So.2d 193, 197 (La. 1997).[5] Section 409 ensures

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crossings] with the best possible means of assuring traffic safety. Rather, [the state DOT] prioritizes the crossings in allocating the limited funds available for crossing improvements.")

[5] Protecting certain sensitive information from discovery, admission into evidence, or other disclosure or use, is hardly novel or unprecedented. There are many federal statutes and programs that prohibit or restrict the disclosure of certain information as a means of advancing public policy and the public interest, including the interest of promoting safety. For a full catalogue of such programs see U.S. Dept. of Transp., Federal Railroad Administration, *Report on Federal Safety Programs and*

that the safety-related information collected and compiled by states and private entities is not used as a tool in private litigation against the very parties assisting the public safety effort. As a matter of public policy, "Congress has determined that the effect of the prohibition [set forth in §409] would be to enhance the safety of the nation's highways . . . and that this goal outweighs" the interests individual plaintiffs have in being able to use the protected information in litigation. *Coniker v. State*, 695 N.Y.S.2d 492, 495 (N.Y. Ct. Cl. 1999).[6]

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*Legal Protections for Safety-Related Information* (Apr. 2011) (available at FRA Docket No. 2011-0025, www.regulations.gov).

[6] This policy was recently reaffirmed in a rulemaking to implement the statutory requirement that railroads develop safety risk reduction programs that evaluate and manage safety risks. 49 U.S.C. §20156(a)(1)(A)-(C). As required by statute, FRA completed a study evaluating whether "it is in the public interest . . . to withhold from discovery and admission into evidence" in personal injury actions materials "compiled or collected for the purpose of evaluating, planning, or implementing a railroad safety risk reduction program," 49 U.S.C. §20119(a), concluding that

> It is likely that limiting the use of information collected as part of a railroad safety risk reduction program in discovery or litigation would serve the broad public interest by encouraging and facilitating the timely and complete disclosure of safety-related information to FRA. Such a rule is likely to remove a significant obstacle that would prevent the development of candid and effective railroad safety plans. FRA's statutory duty is ultimately to protect the broader public interest in improving and ensuring rail safety through effective railroad safety risk reduction program plans, and that broad public interest outweighs the individual interests of future litigants who may assert damage claims against railroads.

U.S. Dept. of Transp., Federal Railroad Administration, *Study of Existing Legal Protections for Safety-Related Information and Analysis of Considerations for and Against Protecting Railroad*

Congress clearly believes that §409 plays an important and effective role in fostering the gathering and analysis in a timely fashion of the information necessary to rationally improve highway safety. It has amended the statute twice to expand its scope; first by prohibiting discovery, in addition to admission into evidence, of protected material, and second by protecting not just information that is "compiled" for safety improvement purposes, but also any information that is "collected" from other sources for such purposes. *See Guillen*, 537 U.S. at 135-36.

### III. The Third Circuit's Rigid and Restrictive Reading of 23 U.S.C. §409 is Inconsistent with the Purpose and Goals of the Crossing Program

This case involves the question whether information contained in crossing reports submitted for inclusion in the National Inventory and in accident reports that railroads are obligated to file with FRA is covered by the §409 privilege. In an effort to advance his litigation strategy, the plaintiff sought to introduce into evidence information submitted in several inventory and accident reports. Relying on this Court's decision in *Guillen*, the district court held that the inventory reports were collected and compiled for the "purpose of pursuing the objectives of" the §130 Program, Pet. App. at 112a, and therefore excluded inventory reports the plaintiff planned to use in pursuing his claim against Norfolk Southern. The district court also held that under the terms of 49 U.S.C. §20903, accident reports that railroads must submit under 49 U.S.C. §20901 are privileged and may

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*Safety Risk Reduction Program Information* 64 (Oct. 2011) (available at FRA Docket No. 2011-0025, www.regulations.gov).

not by admitted into evidence. Pet. App. at 118a. The Court of Appeals reversed and held that all but one inventory report, and all but one of the accident reports, are admissible.

This decision is of great concern to railroads because it potentially renders admissible as evidence in civil litigation a great deal of information that is compiled and collected for the purpose of improving crossing safety, undermining the purpose of §409. Reading the statute very narrowly, the Third Circuit held that as a general rule the §409 privilege applies only to inventory reports created subsequent to 2008, and then, only to those submitted by states. This holding derived from the Court's conclusion that only information that §130 requires a party to collect or compile is covered by the privilege. Because submission of reports to the National Inventory has been expressly required by §130 only since 2008, the Court held that inventory reports created prior to 2008 are not covered by the privilege. Moreover, since §130 imposes an obligation only on states—though a similar obligation is imposed on railroads under a separate statutory provision, 49 U.S.C. §20160—reports submitted by railroads, even after 2008, are not protected.[7] Reasoning that prior to 2008, inventory reports were not submitted "pursuant to §130 or any other statute," the Court held that only one of nine inventory reports—the sole report submitted by Pennsylvania after 2008—was privileged.

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[7] Section 130(*l*) requires states to report current information (as specified by the Secretary) on previously unreported crossings and, periodically, on other crossings; 49 U.S.C. §20160 imposes a similar requirement on railroads.

Nonetheless, the Court then went on to consider whether pre-2008 reports were submitted "pursuant to §130," in as much as "§130(d) has long required states to maintain statewide" crossing inventories, which may, in turn, have been utilized when submitting reports to the National Inventory. The Court further pointed out that railroads often submitted crossing reports to the states, which were used to create state inventories that may have been passed along to the National Inventory. Thus, the Court acknowledged that the pre-2008 reports from the National Inventory may either have been "originally collected pursuant to §130 or rely on data originally collected pursuant to §130." Pet. App. at 20a.

The Court determined that this "complication" would call for addressing the question whether "reports originally collected pursuant to §130(d)—and therefore privileged under §409—lose their privilege when voluntarily submitted by a state to the federal government?" *Id.*[8] However, the Court went on to conclude that it need not attempt to answer this question because Norfolk Southern had not produced evidence that the seven pre-2008 report in questions "were ever 'collected . . . pursuant to section [ ] 130.'" Pet. App. at 21a. Under this reasoning, in order to even reach the question of whether reports submitted to the National Inventory are privileged under §409,

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[8] The United States Government has addressed this question generally, opining that information collected for highway safety planning purposes, and therefore privileged under §409, would not lose its privilege if subsequently transferred to another agency that used the information for non-privileged purposes, and would retain the privilege even in the hands of the transferee agency. Brief for the United States at 32, n. 24, *Pierce County v. Guillen*, No. 01-1229 (2002).

the party invoking the privileged must proffer evidence that a report, previously submitted, possibly many years in the past, was originally submitted to a state inventory or relied on data submitted to the state by a railroad that was used to create the state's inventory, as opposed to having been submitted to the federal government without direct reliance on any such data. Only if the former were the case, might an inventory report be subject to the §409 privilege. As to accident reports, the Court held that the language of 49 U.S.C. §20903 only privileged accident reports on the accident giving rise to the current litigation, but not to reports about past accidents that occurred at the same crossing.

The manner in which the Third Circuit parsed the evidentiary privilege of §409 makes little sense when one considers the nature and purpose of the National Crossing Inventory. All crossing inventories, whether national or state, and regardless of which party (a state or railroad) submitted the information, serve the same purpose: to provide a database that can be utilized to make decisions about crossing safety improvements. The National Inventory contains the very type of information to be used to evaluate the relative hazardousness of grade crossings so they can be prioritized for improvements, for which federal funds may be requested. For example, average daily train volumes, traffic counts, maximum speeds, as well as accident reports on a crossing, are the kind of information that typically is used by traffic engineers to determine whether a crossing is in need of an upgrade to enhance safety, and fall within the ambit of §409. *Seaton v. Johnson*, 898 S.W.2d 232, 236 (Tenn. App. 1995) ("all records used or usable in identifying, evaluating or planning safety of highway or railroad-highway crossings pursuant to Sections

130, 144 and 152 of 23 U.S.C. are so immune to examination" *id*. at 237). Indeed, the National Inventory was created, through efforts of the state and federal governments, and railroads, expressly for the purpose of creating a database that could be used to improve safety at railroad crossings, and was considered an integral component of Congress' effort to improve crossing safety.

Distinguishing between the sources of the information or the submission dates—a State, as opposed to a railroad, before or after §130 (*l*) was enacted—or how the information made its way to the National Inventory, introduces a rigidity that does not advance the purpose of §409 or the goals of the Crossing Program. It also could lead to some curious results in which the same piece of information on a crossing is privileged in some instances but not others. Moreover, data that are out of date might be admissible, while more recent, accurate data, might not. The crossing database is dynamic by nature; some characteristics of a crossing change over time; others generally do not. For example, a roadway that was little traveled in the 1970s may, by 2010, as a result of development in the area, have become a busy thoroughfare with a high traffic count. Similarly, due to changing rail traffic patterns, a crossing that saw only a few trains a day at one point may now be traversed by many trains daily. Indeed, by enacting §130(*l*) and §20160(a) & (b) Congress recognized that crossing characteristics may change over the years in ways that could affect their level of hazard, and sought to ensure that the crossing database be kept current.[9] In addition, information

[9] It is not clear why timetable speeds from many years before the accident in this case occurred are even relevant to the preemption analysis since maximum allowable train speed can

submitted to the National Inventory about a crossing in one state may be inadmissible into evidence if the state met its §130(d) duty to create a state inventory by participating in the National Inventory, but information of the same kind about a crossing in another state would be admissible if the state maintained its own inventory.

Under the Third Circuit's ruling, some data about a crossing would be privileged while other data would not, depending on the source of the data and the date it was supplied. Yet all the data about a crossing is relevant to the Inventory's purpose—to facilitate an assessment of the crossing's dangerousness, whether improvements are called for, and the priority to be given that crossing. Whether information submitted to the National Inventory comes within the scope of §409 should not turn on the source, timing, or pathway of the data. Interpreting §409 to apply only to information that §130 expressly mandates be compiled or collected, or only to data submitted by states that use the National Inventory to meet their §130(d) obligations, is not called for by the statutory text, nor does it serve the policy behind that statute. Indeed, in *Guillen*, this Court spoke of data collected for §152 "purposes," not information that §152 required to be submitted. Moreover, courts interpreting §409 have not conditioned the applicability of the privilege on the identity of the party submitting the information or the party seeking to invoke the privilege. The §409

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change if the railroad decides to change the level of track maintenance. 23 C.F.R. §213.9. Moreover, if anything, only track class, but not timetable speed, would be relevant to the preemption analysis since only the former determines the permissible maximum speed at which the train may be operated. *St. Louis Southwestern Ry. Co. v. Pierce*, 68 F.3d 276, 278 (8th Cir. 1995).

privilege routinely has been held to apply in cases where a railroad is the defendant. *Harrison v. Burlington N. R.R.*, 965 F.2d 155 (7th Cir. 1992); *Robertson v. Union Pac. R.R.*, 954 F.2d 1433 (8th Cir. 1992). "Congress recognized that the railroad industry needed encouragement and protection if the industry was going to make an honest survey which would point out the dangerous crossings in need of safety enhancement." *Rothermel v. Consolidated Rail Corp.*, 1998 WL 110010 at *4 (Del Super. 1998).

The Third Circuit's holding with respect to accident reports is similarly inconsistent with the purpose of §409.[10] These reports play an equally key role in the decision-making process under the Crossing Program. In planning their highway safety improvement programs carried out under §130, states collect and maintain records of crash data on all public roads including for railroad-highway crossings. 23 C.F.R. §924.9(a)(1). As FRA explained, the crossing inventory database can be "merged with highway-rail crossing collision files and used to analyze information for planning and implementation of crossing improvement programs." 77 Fed. Reg. at 64079. Accident reports, which contain information about the "cause" of the accident, are the type of documents that are particularly in need of protection from use in litigation. While candidly evaluating and articulating the cause of an accident at a crossing can be very helpful in assessing how the crossing's safety can be improved,

[10] The petition demonstrates that the language of §20903 is not as restrictive as the Third Circuit held and is properly read to extend to all the accident reports related to the crossing involved in this case. Pet. at 19-21. AAR agrees with this position, and, as explained below, also believes that accident reports fall squarely within the ambit of §409.

it also is the kind of information that the disclosing party would justifiably fear could expose it to liability in litigation. Therefore, permitting reports of past accidents to be admitted into evidence could make railroads more reticent about thoroughly disclosing all that they know when they fill out accident reports.

The decision below creates confusion about which crossing inventory data may be admitted into evidence in civil litigation and which may not. If allowed to stand, it can only have the consequence of causing parties to be more guarded in the information reported and the assessments made in complying with their reporting obligations. If the Third Circuit's interpretation of §409 were compelled by the statutory language, perhaps that extremely parsimonious reading of the statute, and the haphazard nature of the privilege that results from that reading, would be justified. But, as petitioner points out, the Third Circuit's reading of §409 is far from the most logical way to construe the statutory language. *See* Pet. at 15-16. The Crossing Program is an ongoing program whose continued success depends on constant evaluation and reevaluation of information on a great many crossings throughout the nation, much of which is contained in inventory and accident reports. The Third Circuit's decision, which erroneously conditions the application of the §409 privilege on the source of information, and when it was submitted, rather than the purpose for which it was compiled or collected, should be reviewed by this Court.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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