No. 10-879

In the Supreme Court of the United States

GLORIA GAIL KURNS, EXECUTRIX OF THE ESTATE OF GEORGE M. CORSON, DECEASED, AND FREIDA E. JUNG CORSON, WIDOW IN HER OWN RIGHT,
PETITIONERS

v.

RAILROAD FRICTION PRODUCTS CORP. AND VIAD CORP.,
RESPONDENTS

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

BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether the Locomotive Inspection Act, 49 U.S.C. § 20701 *et seq.* (2006), preempts state-law tort claims concerning the design, construction, or material of locomotives or their parts and appurtenances, as this Court held in *Napier* v. *Atlantic Coast Line Railroad Co.*, 272 U.S. 605 (1926).

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INTRODUCTION AND INTERESTS OF *AMICUS CURIAE*[*]

For 85 years since this Court's ruling in *Napier v. Atlantic Coast Line Railroad Co.*, 272 U.S. 605 (1926), it has been settled law that Congress preempted the field of locomotive equipment safety and that state tort lawsuits against equipment manufacturers are not exempted from an otherwise preempted field. Although Respondents have cogently explained why *Napier* squarely resolves this case, we explain here why the Court should neither overrule *Napier* nor weaken the Court's longstanding field preemption precedent through a special presumption against preemption of state tort suits.

Amicus, the Chamber of Commerce of the United States of America, is uniquely positioned to advise the Court on these important issues. The Chamber is the world's largest federation of business, trade, and professional organizations, representing 300,000 direct members and indirectly representing the interests of more than three million businesses and corporations of every size, from every sector, and in every geographic region of the country. Many of the Chamber's members conduct operations in multiple States and have experienced firsthand the burdens that a proliferation of inconsistent state regulations can impose on American businesses. Many of the Cham-

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[*] The parties have consented to the filing of this brief, and their letters of consent are on file with the Clerk. No counsel for any party has authored this brief in whole or in part, and no person or entity, other than the *amicus* and its counsel, has made a monetary contribution intended to fund the preparation or submission of this brief. See Rule 37.6.

ber's members have also suffered from the cost and uncertainty of out-of-control tort lawsuits that subject businesses to large and unpredictable liability.

The Chamber and its members strongly believe that this Court's longstanding field preemption jurisprudence should be left undisturbed. Although Petitioners and their *amici* suggest that *Napier* should be overruled as "an artifact of an outdated jurisprudential era," their account of *Napier*'s place in history misreads both the history and its supposed artifact. Contrary to Petitioners' suggestion, this Court's early decisions did *not* uniformly treat field preemption as an automatic consequence of federal action. And *Napier*—authored by the chief opponent of that automatic approach—certainly did not do so. To the contrary, *Napier* falls easily within an unbroken line of early decisions that were the very basis for the Court's modern preemption jurisprudence. *Napier* is no artifact, and its longstanding statutory interpretation merits the strongest *stare decisis* respect.

Nor should the Court avoid *Napier*'s consequences by fashioning a special presumption against preemption of state tort lawsuits. Although Petitioners and their *amici* ask the Court to carve out an exception to field preemption for tort lawsuits, there is no basis in law or logic for such an exception—no matter how convenient it may be to the plaintiffs' bar. Tort lawsuits are often the most unpredictable and disruptive form of interference with uniform federal regulation. Absent express statutory language to the contrary, courts should not presume that statutes intended to preempt an entire field were simultaneously intended to stop just short of preempting lawsuits that would subject defendants to divergent tort liability in each of the fifty States. Any such negative presumption is

difficult to reconcile with the text and structure of the Constitution itself. As the Supremacy Clause states, federal law "shall be the supreme law of the land; and the judges in every state shall be bound thereby, *anything in the constitution or laws of any state to the contrary notwithstanding*." U.S. Const. Art. VI, cl. 2 (emphasis added).

Moreover, recognizing an exception to longstanding principles of field preemption for tort lawsuits would contravene the very purpose of the Supremacy Clause, which was adopted (along with the federal commerce power) to enable the kind of uniform national regulation of interstate commerce embodied in the statute construed in *Napier*. Consistent with the Supremacy Clause, the Court's preemption jurisprudence has ensured that States cannot interfere with a field Congress has sought to regulate uniformly. Those longstanding principles should be reaffirmed here.

STATEMENT

This case arises out of a series of laws enacted in the late nineteenth century to regulate the Nation's interstate railroads. Specifically, Congress created the Interstate Commerce Commission (ICC) and passed various railroad safety measures, culminating in the 1924 amendments to the Boiler Inspection Act, which was later renamed as the Locomotive Inspection Act ("Act" or "LIA"). Unlike prior laws, the LIA gave the Commission broad authority over the safety of "the entire locomotive and tender and all parts and appurtenances thereof." Act of Mar. 4, ch. 169, § 1, 38 Stat. 1192 (1915).

1. The LIA aimed to "promote the safety of employees and travelers upon railroads." 36 Stat. 913

(1911). It sought to accomplish that objective by requiring that locomotives and their parts be "in proper condition and safe to operate," and by empowering the ICC to establish "rules and regulations" for the design and construction of locomotives and their parts. Act of June 7, ch. 355, § 2, 43 Stat. 659. The LIA provided for inspectors to investigate accidents, inspect locomotives, and order repairs. See LIA §§ 3, 6, 8. It also authorized the United States to bring enforcement actions against carriers for any violations of the LIA. See LIA § 9.

Subsequent amendments to the LIA did not materially alter it. See Resp'ts Br. 10-15. In 1965, President Johnson consolidated the functions of the inspectors within the ICC. The following year, Congress transferred the ICC's safety regulatory authority to the Secretary of Transportation. Department of Transportation Act of 1966, Pub. L. No. 89-670, § 6(e)(1)(E), (G), (f)(3)(A), 80 Stat. 931, 939, 940 (1966). In 1970, Congress enacted the Federal Railroad Safety Act (FRSA) to address railroad safety hazards in addition to those involving locomotives and their parts, which were already covered by the LIA. Pub. L. No. 91-458, 84 Stat. 971 (1970). These additional regulations supplemented, but did not repeal or replace, those previously established by the LIA. Finally, in 1994, Congress recodified the railroad safety statutes "without substantive change" to their provisions. Act of July 5, Pub. L. No. 103-272, § 1(a), 108 Stat. 745; 49 U.S.C. § 20701 *et seq.* (1994).

2. Soon after Congress enacted the LIA, this Court construed it and determined its preemptive scope in *Napier v. Atlantic Coast Line Railroad Co.*, 272 U.S. 605 (1926). The opinion was written for a unanimous Court by Justice Brandeis, an ardent *op-*

ponent of the more expansive approach to preemption used by some of his fellow Justices. He explained that the "main question" presented in that case was "one of statutory construction"—"whether the [LIA] has occupied the field of regulating locomotive equipment used on a highway of interstate commerce." *Id.* at 607. Answering that question in the affirmative, the Court found that the text, structure, and purpose of the LIA "clearly manifested" Congress's "intention to occupy the entire field of regulating locomotive equipment." *Id.* at 611.

Because the LIA preempted the entire field of locomotive equipment safety, the Court struck down two state statutes requiring that certain safety equipment be installed on locomotives. Although the state requirements did not directly conflict with ICC regulations, the Court held that the ICC had *exclusive* authority to "prescribe the rules and regulations by which fitness for service shall be determined." *Id.* at 612. As the Court observed, "the power delegated to the Commission * * * extends to the design, the construction, and the material of every part of the locomotive and tender and of all appurtenances." *Id.* at 611. Thus, "the Commission sets the standard," and "the standard set by the Commission must prevail." *Id.* at 612-613.

3. In 1996, the Department of Transportation completed a congressionally mandated investigation and rulemaking to determine whether asbestos in locomotives and their parts should be regulated. The Department concluded that no regulation was necessary, and that "further action with respect to the presence of asbestos in locomotive cabs" was not "warranted at this time." U.S. Dep't of Transp., Re-

port to Congress, Locomotive Crashworthiness and Cab Working Conditions (Sept. 1996), at 10-12.

4. In 2007, locomotive repairman George Corson filed a tort lawsuit against his railroad employer and two companies that allegedly manufactured or distributed the locomotives, boilers, and brake shoes Corson had repaired. Although those items were designed and manufactured in compliance with all federal regulatory standards, Corson alleged that they were defective in their design because they contained asbestos. JA20-27. With respect to the manufacturer and distributor, he alleged product defect and failure-to-warn claims under Pennsylvania law.

Finding those tort claims preempted by the LIA, the district court granted summary judgment to the manufacturer and distributor. Pet. App. 25a-34a. Relying on this Court's decision in *Napier* and joining numerous other courts that have addressed the matter, the Third Circuit unanimously affirmed. Pet. App. 10a.

SUMMARY OF ARGUMENT

As we explain below in Part I, the Court's decision in *Napier* remains good law and should not be overruled. Correctly understood, the historical context makes clear that *Napier* is fully consistent with the Court's modern preemption jurisprudence. Further, *stare decisis* strongly disfavors overturning *Napier's* longstanding statutory interpretation.

As we explain in Part II, moreover, *Napier* should not be limited, and the entire field preemption doctrine marginalized, by a novel presumption against preemption of state tort lawsuits. Tort lawsuits are at least as likely as legislation to interfere with a scheme of uniform federal regulation, if not more so.

And such interference would contravene the very purposes for which the Framers crafted the Supremacy and Commerce Clauses.

ARGUMENT

I. This Court's Decision In *Napier* Remains Good Law And Should Not Be Overruled.

In an attempt to diminish *Napier*, Petitioners and their *amici* mischaracterize that decision as "an artifact of an outdated jurisprudential era." Br. of Public Law Scholars as *Amici Curiae* in Support of Pet. ("Scholars Br.") 2. Petitioners coyly suggest that "*Napier* must be understood in its historical context" (Pet. Br. 40) and therefore given little weight, while their *amici* argue directly that "*Napier* [should] be overruled" (Scholars Br. 26).

In so doing, Petitioners and their *amici* attempt to suggest that "[p]reemption doctrine has changed fundamentally since *Napier* in 1926." Scholars Br. 3; see also Pet. Br. 40-41. They argue that the pre-New Deal Court applied a rule whereby *all* federal regulation was thought to "automatically preempt[] the relevant field," and that *Napier* merely "reflects the rule of automatic field preemption that characterized the pre-New Deal period." Scholars Br. 7. Yet after the New Deal, they say, there was a "fundamental change in the law of preemption"—a change that swapped the "automatic preemption" rule for a new focus on congressional intent. *Id.* at 6, 27. The "contemporary approach to preemption," we are told, renders *Napier* an "anachronism." *Id.* at 6, 7.

But there is a problem with this historical account: It is not true. As we explain below, the pre-New Deal period was far from uniform in its approach to preemption. Although some decisions do

appear to have applied a rule of "automatic preemption," others followed what Petitioners now characterize as the "contemporary approach," eschewing such mechanical rules. And while both approaches persisted in separate lines of authority until the New Deal, they culminated *not* in an abrupt paradigm-shift, but rather in the ascendancy of the very "contemporary approach" that had existed all along—in a line of decisions that *included Napier*. Thus, far from being an anachronism, *Napier* was in fact an early example of the "contemporary approach," and it remains fully consistent with this Court's modern preemption jurisprudence.

Because *Napier* cannot fairly be overruled on the ground that it applied an "outdated" preemption analysis, Petitioners' attack on *Napier* amounts to no more than a claim that it misconstrued the LIA. But even if that were true—and it is not—a disputed statutory interpretation is no reason to overrule a nearly century-old decision of this Court. As we explain below, statutory *stare decisis* strongly favors adhering to *Napier*'s interpretation of the LIA. It should not be overruled.

A. Petitioners mischaracterize the historical context from which *Napier* emerged.

The roots of this Court's field preemption doctrine run deep. As early as *Gibbons v. Ogden*, Chief Justice Marshall indicated that state law must yield not only if it is "contrary to" federal law, but also if it would "interfere with" it. 22 U.S. 1, 82 (1824). The latter type of interference was at issue in, among other cases, *Sinnot v. Davenport*, 63 U.S. 227 (1859), where the Court struck down a state law requiring steamboat owners to file a statement of ownership.

The Court found the state law preempted by a federal steamboat licensing statute, even though a steamboat owner could have complied with both state and federal requirements. As the Court explained, the federal statute established "the guards and restraints, and the *only* guards and restraints, which Congress has seen fit to annex to the privileges of ships and vessels engaged in the coasting trade." *Id.* at 241 (emphasis added). Congress, in other words, intended to preempt the field.

Relying on the work of Professor Stephen Gardbaum, however, Petitioners and their *amici* characterize the Court's pre-New Deal preemption doctrine as uniformly applying a rule of "automatic field preemption." Pet. Br. 40; Scholars Br. 6-7. But Gardbaum's own account of the history shows this to be a mischaracterization. The pre-New Deal period in fact saw "two distinct conceptions of preemption." Stephen Gardbaum, *The Breadth vs. the Depth of Congress's Commerce Power: The Curious History of Preemption During the* Lochner *Era*, in RICHARD A. EPSTEIN & MICHAEL S. GREVE, FEDERAL PREEMPTION 48-78, at 56 (2007) ("*Curious History*"). Although one conception indeed "viewed preemption as an automatic, necessary, and inherent consequence of federal action," the other conception "understood preemption as a discretionary power of Congress" that "required a manifestation of congressional intent, express or implied, in the particular federal law." *Id.* at 56-57. Both of these conceptions, moreover, "*existed side by side*, with individual justices generally adhering to one or the other." *Id.* at 56 (emphasis added). Thus, contrary to Petitioners' suggestion, the "automatic conception

never had * * * a total monopoly" in the pre-New Deal period. *Id.* at 57.

The cases bear this out. Far from treating field preemption as an automatic consequence of federal action, multiple early decisions *declined* to find preemption when the Court saw no intent by Congress to occupy the field. *E.g.*, *Cooley v. Bd. of Wardens*, 53 U.S. 299, 321 (1851) ("[A]lthough Congress has legislated on this subject, its legislation manifests an intention, with a single exception, not to regulate this subject, but to leave its regulation to the several states."); *Waite v. Dowley*, 94 U.S. 527 (1876) (reasoning that state and federal laws could coexist where they had different purposes).

Two of those pre-New Deal decisions were particularly influential. The first—"routinely cited by proponents of the alternative conception" (Gardbaum, *Curious History*, at 62)—was *Reid v. Colorado*, 187 U.S. 137 (1902). There the Court declined to hold that federal law preempted the field of transporting livestock. Far from applying a rule of automatic preemption, the Court in fact strained to avoid preemption, observing: "It should never be held that Congress intends to supersede, or by its legislation suspend, the exercise of the police powers of the states, even when it may do so, unless its purpose to effect that result is clearly manifested." *Id.* at 148. And the Court found that "Congress did not inten[d] to override the power of the states" to regulate livestock, despite regulating some of the field. *Ibid.*

In a second case, the Court even more directly repudiated the rule of automatic preemption that Petitioners claim characterized the period: "[T]he

intent to supersede the exercise by the state of its police power as to matters not covered by the Federal legislation is not to be inferred from the mere fact the Congress has seen fit to circumscribe its regulation and to occupy a limited field." *Savage v. Jones*, 225 U.S. 501, 533 (1912).

Thus, when this Court ushered in the so-called "contemporary" era of preemption jurisprudence with its decision in *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947), it drew on a line of decisions that predated the era. As Professor Gardbaum explains, "*Reid v. Colorado* and *Savage v. Jones* * * * bec[a]me the foundation of the modern, more restrained preemption doctrine." Gardbaum, *Curious History*, at 66; see also Viet D. Dinh, *Federal Displacement of State Law: The Nineteenth-Century View*, in EPSTEIN & GREVE, FEDERAL PREEMPTION 27-40, at 39 (2007) (observing "emergence of modern preemption doctrine" by "the end of the [nineteenth] century"). Although *Rice* extinguished a competing line of decisions employing automatic preemption, *Rice*'s defining feature—a focus on congressional intent—was not new. It is therefore misleading to suggest that "preemption doctrine changed" (Scholars Br. 7) or "evolved" (Pet. Br. 40) after the New Deal in some dramatically new direction. See *Medtronic, Inc.* v. *Lohr*, 518 U.S. 470, 485 (1996) ("the purpose of Congress is the ultimate touchstone in every pre-emption case" (internal quotation marks omitted)). Rather, it is more accurate to say that the Court "decisively switched from one [already-existing] conception to the other"—both of which had previously "coexist[ed]" in separate decisions. Gardbaum, *Curious History*, at 63.

B. *Napier* is fully consistent with the Court's "contemporary" preemption jurisprudence.

When the historical context is properly understood, *Napier*'s true lineage becomes clear. Far from an "anachronism" (Scholars Br. 7), *Napier* fell squarely within the line of authority that became the Court's "contemporary" approach.

For one thing, *Napier*'s author was Justice Brandeis—a "main *opponent* of automatic preemption" and one of two "major proponents" of the modern approach that later prevailed.[1] Gardbaum, *Curious History*, at 62-63, 64 (emphasis added). Moreover, Justice Brandeis' opinion for the Court relied on *Reid* and *Savage*, the two most significant pre-New Deal decisions *rejecting* automatic preemption. *Napier*, 272 U.S. at 611. And nowhere in his *Napier* decision did Justice Brandeis even cite the competing line of decisions that had typified the automatic-preemption approach. See Gardbaum, *Curious History*, at 57-59.

Justice Brandeis' analysis in *Napier* also makes clear that he relied on no rule of automatic preemption. Instead, consistent with modern preemption jurisprudence, *Napier* asked whether "the legislation of Congress manifest the *intention* to occupy the entire field of regulating locomotive equipment." 272 U.S. at 611 (emphasis added). And upon examining the statute, *Napier* found that Congress did intend to occupy the field by delegating to a federal agency a broad authority to "prescribe the rules and regulations" for "the design, the construction, and the ma-

[1] The other was Justice Hughes. See Gardbaum, *Curious History*, at 67.

terial of every part of the locomotive and tender and of all appurtenances." *Id.* at 611, 612.

Further, in discerning an intent to preempt the field, *Napier* applied a more stringent "presumption against preemption" than even this Court's contemporary decisions have seen fit to apply. *Napier* declared without qualification that the "intention of Congress to exclude states from exerting their police power [over locomotive equipment] must be clearly manifested." *Id.* at 611. But when the Court adopted and restated this presumption against preemption in *Rice*—relying expressly upon *Napier*—it suggested that the presumption was warranted only where Congress legislates "in [a] field which the States have traditionally occupied."[2] *Rice*, 331 U.S. at 230; see also *United States v. Locke*, 529 U.S. 89, 108 (2000) (reaffirming that presumption is "not triggered when the State regulates in an area where there has been a history of significant federal presence").

Indeed, the Court's more recent decisions have not only reaffirmed that limitation, *Locke*, but have also called the entire presumption against preemption into serious doubt. See Br. of U.S. Chamber of Commerce as *Amicus Curiae* in Support of Pet'r, *Nat'l Meat Ass'n v. Harris* (No. 10-224). As recent decisions have made clear, preemption "fundamentally is a question of congressional intent" to be discerned from ordinary principles of statutory construction, not artificial presumptions. *English v. Gen. Elec. Co.*,

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[2] It is curious that Petitioners would quote *Rice*'s statement of the presumption against preemption without noting the very authority *Rice* relied upon to support its invocation of the presumption: *Napier*. Compare Pet. Br. 40-41 (quoting *Rice*) with *Rice*, 331 U.S. at 230 (citing *Napier*).

496 U.S. 72, 78-79 (1990). Thus, as a plurality of the Court has recently concluded, "courts should not strain to find ways to reconcile federal law with seemingly conflicting state law." *PLIVA, Inc. v. Mensing*, 131 S. Ct. 2567, 2580 (2011) (Thomas, J.).[3]

Nevertheless, the Court need not determine the scope or continuing viability of any presumption against preemption here. If *Napier* were decided to-

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[3] Relying on Professor Caleb Nelson's study of the Supremacy Clause's original meaning, Justice Thomas explained that the Clause is a *non obstante* provision that reverses the usual presumption against implied repeals and requires that "federal law should be understood to impliedly repeal conflicting state law." *Id.* at 2579-80 (citing Caleb Nelson, *Preemption*, 86 Va. L. Rev. 231 (2000)). Petitioners' *amici* suggest that the "flipside" of this argument is to eliminate implied field preemption and limit preemption doctrine to direct conflicts between federal and state law. Scholars Br. 30-31. But that conclusion does not follow. As Professor Nelson explains, the Supremacy Clause is "not confined to instances of what the Court calls 'conflict' preemption." Nelson, *Preemption*, at 261. Although "all preemption cases are about contradiction between state and federal law," a "'jurisdictional' rule of federal law—of the sort typically associated with 'field' preemption, whether express or implied—can also contradict a state-law rule." *Id.* at 261-62; see also *English*, 496 U.S. at 79 n.5 (1990) ("[F]ield pre-emption may be understood as a species of conflict pre-emption.").

Moreover, nothing in the text or structure of the Supremacy Clause suggests that it is limited to cases of "direct" conflict. To the contrary, the Clause states that federal law "shall be the supreme law of the land; and the judges in every state shall be bound thereby, *anything in the constitution or laws of any state to the contrary notwithstanding*." U.S. Const. Art. VI, cl. 2 (emphasis added). This sweeping language does not suggest a reticence on the part of the Framers to preempt state law. Rather, as explained below (in Part II.C), the Framers viewed robust preemption as one of the chief purposes and virtues of the Supremacy Clause.

day, the fact that Congress has exclusively occupied the field of railroad equipment regulation would avoid any need for a presumption, whether or not it applies in other cases.

In short, the fact that the Court found preemption in *Napier* cannot be attributed to a doctrinal deck stacked in favor of preemption. To the contrary, given the opinion's author, the deck was stacked against preemption. But Congress's intent to preempt the field was so "clearly manifested" to the Court in *Napier* that a finding of preemption was compelled. *Napier*, 272 U.S. at 611.

C. *Stare decisis* strongly disfavors abandoning *Napier*'s statutory interpretation.

Because the preemption doctrine *Napier* applied cannot reasonably be dismissed as "an artifact of an outdated jurisprudential era" (Scholars Br. 2), what is really at issue here is not *Napier*'s constitutional methodology but rather the particular result of its statutory interpretation. As the Court put it in *Napier*, the "main question * * * is one of statutory construction"—and more precisely "whether the [LIA] has occupied the field of regulating locomotive equipment." 272 U.S. at 607. *Napier*'s conclusion that Congress intended the Act to occupy the field has been settled law for nearly a century. And there is no good reason for the Court to overrule its prior statutory interpretation.

For one thing, *Napier*'s interpretation of the LIA was correct. Although prior statutes had mandated particular requirements for locomotive equipment or had regulated only certain equipment, the LIA extended those piecemeal regulations in a manner that made clear Congress's intention to cover the entire

field. First, Congress expanded the covered equipment to "include the entire locomotive and tender and *all* parts and appurtenances thereof." *Napier*, 272 U.S. at 608 (quoting the Act) (emphasis added). Second, Congress "confer[ed] upon inspectors and the [ICC] power to prescribe requirements and establish rules to secure compliance" with the Act. *Id.* at 608-09. Third, instead of limiting the ICC's regulatory authority to certain concerns—*e.g.*, rider safety—the Act gave the ICC "broad" authority to prescribe all rules and regulations governing "the design, the construction, and the material of every part of the locomotive." *Id.* at 611. From all of this, the Court discerned Congress's intent that "the standard set by the Commission must prevail." *Id.* at 613. Any other requirements set by the States would necessarily conflict with Congress's intent that authority over all aspects of locomotive equipment be vested in the ICC. *Ibid.*

Even if one could reasonably disagree with *Napier*'s statutory interpretation, however, it should not be overruled. "Time and time again, this Court has recognized that the doctrine of *stare decisis* is of fundamental importance to the rule of law." *Hilton v. S. C. Pub. Rys. Comm'n*, 502 U.S. 197, 202 (1991) (quotation omitted). Further, *stare decisis* has "special force in the area of statutory interpretation," where, "unlike in the context of constitutional interpretation, the legislative power is implicated, and Congress remains free to alter what we have done." *Ibid.* (quotation omitted); see also, *e.g.*, *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 139 (2008); *Flood v. Kuhn*, 407 U.S. 258, 283-85 (1972).

Here, despite several opportunities, Congress has not seen fit to alter the preemptive force of the statu-

tory scheme. To the contrary, it has repeatedly revisited the regulation of locomotive equipment, passing laws in 1965, 1966, 1970, and 1994 without expressing an intent to alter *Napier*'s interpretation. Those laws have served only to expand the federal role; as Respondent's brief explains, they were not meant to repeal or replace the regulations previously established by the LIA. See Resp. Br. 45-48. And it is well settled that when Congress legislates against the backdrop of this Court's interpretations of prior versions of the law, it is presumed to adopt those interpretations. See, *e.g.*, *Merrill Lynch v. Dabit*, 547 U.S. 71, 85 (2006) ("[W]hen 'judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, the intent to incorporate its * * * judicial interpretations as well.") (quoting and applying *Cannon* v. *University of Chicago*, 441 U. S. 677, 696-699 (1979)); *accord Bragdon* v. *Abbott*, 524 U. S. 624, 645 (1998).

These principles apply with even greater force in preemption cases, which involve "interpreting statutes that underlie complex regulatory regimes" and "guid[ing] the allocation of state and federal regulatory authority." *Cal. v. Fed. Energy Regulatory Comm'n*, 495 U.S. 490, 498-499 (1990). Indeed, the Court has unanimously found that statutory *stare decisis* outweighs the force (if any) of a "presumption against preemption." *Id.* at 497 (rejecting a statutory interpretation inconsistent with a prior decision, even if the interpretation "would accord with the presumption against finding pre-emption") (quotation omitted). Any attempt to avoid preemption by overruling a prior statutory interpretation "misconceives the deference this Court must accord to longstanding and

well-entrenched decisions." *Id.* at 499; see also *Hilton*, 502 U.S. at 206-07 (holding that statutory *stare decisis* trumps canon requiring clear statement of congressional intent).

Nor is this one of those rare cases where reversal of a statutory precedent may be justified. See *California*, 495 U.S. at 499. *Napier's* holding that the LIA preempts the field of locomotive equipment regulation has been settled for nearly a century. It also has not proven unworkable.[4] Nor, as explained above, has there been any sufficient intervening change in the law. Meanwhile, this Court has repeatedly relied on *Napier* and its reading of the LIA in subsequent decisions. See, *e.g.*, *Rice*, 331 U.S. at 230; *Balt. & O. Ry. Co. v. Jackson*, 353 U.S. 325, 344 (1957); *Urie v. Thompson*, 337 U.S. 163, 192-93 (1949). And an "avalanche of . . . authority" in the lower courts has done the same, reaffirming *Napier*'s unambiguous ruling that the LIA preempts the field of locomotive equipment regulation. *In re W. Va. Asbestos Litig.*, 592 S.E. 2d 818, 822 (W. Va. 2003); accord *Law v. Gen. Motors Corp.*, 114 F.3d 908, 910 (9th Cir. 1997); *Forrester v. Am. Dieselelectric, Inc.*, 255 F.3d 1205 (9th Cir. 2001); *United Transp. Union v. Foster*, 205

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[4] Petitioners' *amici* assert that *Napier* has proven unworkable because "lower courts have" found preemption "whenever state law might apply divergent burdens on railroads and railroad equipment manufacturers." Scholars Br. 27. But this is no more than a complaint that *Napier*'s preemptive scope is broad—not that it is unworkable. Indeed, overruling *Napier* would be far more unworkable, as it would shatter the present unanimity and allow fifty States to "apply divergent burdens" (*ibid*) in a field previously regulated by a single sovereign. As explained in greater detail below (in Part II.B), this would subvert Congress's purpose of ensuring uniformity in railroad equipment regulation.

F.3d 851 (5th Cir. 2000); *Oglesby v. Del. & Hudson Ry. Co.*, 180 F.3d 458 (2d Cir. 1999); *Springston v. Consol. Rail Corp.*, 130 F.3d 241 (6th Cir. 1997); *Darby v. A-Best Prods. Co.*, 811 N.E. 2d 1117, 1125-26 (Ohio 2004); *Gen. Motors Corp. v. Kilgore*, 853 So. 2d 171 (Ala. 2002); *Mickelson v. Mont. Rail Link, Inc.*, 999 P.2d 985 (Cal. 2000).

In short, *Napier* amply merits *stare decisis*. Rather than being overruled, it should be reaffirmed.

II. *Amici's* Attempt To Create A Special Presumption Against Preemption Of Tort Lawsuits Should Be Rejected.

In addition to arguing that *Napier* should be overruled, Petitioners attempt to distinguish it on the ground that it involved "state *legislation*, not common-law claims." Pet. Br. 38. *Amici* representing the plaintiffs' bar likewise urge the Court to create a "strong presumption against preemption of state tort remedies," a presumption that would afford tort lawsuits special immunity from preemption. Brief of Amer. Ass'n for Justice ("AAJ Br.") at 7. But there is no reason, in general or in this case, to treat tort lawsuits any differently than state legislative or administrative enactments. And such a presumption would contravene both the plain language and evident purposes of the Supremacy and Commerce Clauses.

A. By its terms, this Court's preemption doctrine applies with equal force to common-law tort claims.

The Supremacy Clause itself is framed in terms that do not support any distinction between state positive regulation and state tort law or other common-law claims: It emphatically states that federal law "shall be the supreme law of the land; and the judges

in every state shall be bound thereby, *anything in the constitution or laws of any state to the contrary notwithstanding*." U.S. Const. Art. VI, cl. 2 (emphasis added). By its terms, that injunction applies with equal force whether the "laws of [the] state" at issue are positive regulations or common-law rules, and it binds "the judges in every state" regardless of what law they are applying.

The notion that special rules apply to common-law tort claims likewise finds no support in this Court's decisions. In assessing preemption, the Court has long observed that its "concern is with delimiting areas of conduct which must be free from state regulation if national policy is to be left unhampered," and that "[s]uch regulation can be as effectively exerted through an award of damages as through some form of preventive relief." *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 247-48 (1959). The reason is obvious:

> The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy. Even the States' salutary effort to redress private wrongs or grant compensation for past harm cannot be exerted to regulate activities that are potentially subject to the exclusive federal regulatory scheme.

Id. at 247.

More recently, in *Geier v. American Honda Motor Co.*, the Court reaffirmed that there is no special exception for state tort law. 529 U.S. 861 (2000). There the Court did not hesitate to find that a state tort suit alleging a duty to install an airbag was preempted by the Department of Transportation's decision not to require airbags for all automobiles. Although *amici*

now claim that preemption is chiefly "concerned with setting aside positive state commands," as opposed to "damage awards that merely 'persuade' manufacturers to act" (AAJ Br. 24), the Court in *Geier* observed that its "pre-emption cases ordinarily *assume* compliance with the state-law duty in question." 529 U.S. at 882. Thus, as the Court recognized earlier in *Garmon*, the distinction between a legislative command and a tort duty makes little difference in the context of preemption: both impose a state-law duty that may differ from federal law, and both make it costly to breach the duty. The rationale for preemption is therefore the same in both situations.

To be sure, this Court has sometimes held that particular federal statutes do not preempt state tort law. But those decisions adopt no special presumption favoring tort suits. In *Silkwood v. Kerr-McGee Corp.*, for example, the Court exempted tort lawsuits from preemption by one statute, but only because the Court found "ample evidence that Congress had no intention of forbidding the states from providing [tort] remedies." 464 U.S. 238, 251 (1984). Although Congress had generally preempted the field of nuclear power plant safety, it expressly indemnified power plant operators from tort liability and waived defenses in certain situations. Because those express provisions necessarily "assumed that persons injured by nuclear accidents were free to utilize existing tort law remedies," it was unlikely that Congress had any intent to preempt those remedies. *Id.* at 252.

The Court did not suggest, however, that field preemption should *ordinarily* stop short of state tort law—indeed, quite the opposite. The Court recognized a "tension between the conclusion that safety regulation is the exclusive concern of the federal law

and the conclusion that a state may nevertheless award damages based on its own law of liability." *Id.* at 256. That tension would be "tolerated" in *Silkwood* only because Congress had clearly intended it. *Ibid.* The Court thus made clear that it was dealing with an unusual case, not announcing a general exception to the field preemption doctrine.

Other decisions finding no preemption of state tort claims are similarly narrow. In *Sprietsma v. Mercury Marine*, the Court limited preemption to state positive enactments because the statute contained an express preemption clause that was "most naturally read as not encompassing common-law claims." 537 U.S. 51, 63 (2002). So too in *Bates v. Dow Agrosciences, LLC*, 544 U.S. 431 (2005), where the express preemption clause prohibited States from imposing "requirements * * * in addition to or different from" federal law. *Id.* at 443. Construing this particular language, the Court held that the statute *would* preempt state tort claims seeking to impose "different or additional *requirements*," such as a different duty of care. *Id.* at 448 (quotation omitted). But the language of the statute "does not preclude States from imposing different or additional *remedies*" to enforce the federal requirements. *Ibid.* (quotation omitted). Neither *Sprietsma* nor *Bates* involved field preemption, and both turned on the particular language of an express preemption clause.

In sum, consistent with the text of the Supremacy Clause, this Court has never adopted a general presumption against preemption of state tort law. And it should not do so here.

B. Tort lawsuits are even more likely than state legislation to interfere with the LIA's goal of uniform railroad equipment regulation.

Because such a special presumption would have no sound basis, the question posed by a claim of field preemption is simply what Congress intended in enacting a particular statute. And *Napier* has already held that the LIA "was intended to occupy the field." 272 U.S. at 613. Nothing indicates that Congress intended to exempt state tort remedies from its otherwise exclusive decision to vest all regulatory authority in the ICC and its successor, the Secretary of Transportation.

1. Unlike *Silkwood*, *Sprietsma*, or *Bates*, the LIA contains no specific language indicating an intent to allow state tort lawsuits. Instead, as in *Geier*, the statute delegates authority to an agency to regulate the safety of locomotive equipment. And as in *Geier*, the agency made a deliberate decision, based on its knowledge and expertise, not to impose the very duty the plaintiff seeks to establish through state tort law—here, a requirement that manufacturers rid locomotive parts of asbestos. See U.S. Dep't of Transp., Report to Congress, Locomotive Crashworthiness and Cab Working Conditions (Sept. 1996), at 10-12 (finding that "further action with respect to the presence of asbestos in locomotive cabs" is not "warranted at this time"). Thus, although *amici* proclaim that every wrong must have a remedy (AAJ Br. 9), the agency that Congress has empowered to regulate locomotive equipment has determined that the presence of asbestos in locomotive parts is not a wrong in the first place. This is thus not a situation where a state tort lawsuit would provide compensation for a defendant's violation of federal law. Cf. *Bates*, 544 U.S. at 448;

Pet. Br. 39 n.31. Instead, the plaintiff here seeks to impose a new and different state-law duty.

Such a proliferation of differing state duties—whether imposed by tort law or statute—was plainly what Congress sought to avoid by delegating rule-making authority over "the design, the construction and the material of every part of the locomotive" to a federal agency. *Napier*, 272 U.S. at 611. Because locomotives move constantly from State to State, uniform national regulation is imperative, lest manufacturers be subject to a new set of equipment regulations each time a locomotive rolls into another State. Judge Kozinski has explained the consequences: "If each state were to adopt different liability-triggering standards, manufacturers would have to sell locomotives and cars whose equipment could be changed as they crossed state lines, or adhere to the standard set by the most stringent state." *Law*, 114 F.3d at 910-11 (holding that LIA preempts state tort claims). Not only would this undermine Congress's goal of uniform, federal standards, it would also "transfer the regulatory locus from the Secretary of Transportation to the state courts—a result the BIA was clearly intended to foreclose." *Id.* at 911-12.

Indeed, subjecting manufacturers to tort lawsuits in fifty different States would be an even greater threat to uniformity than subjecting them to state administrative or legislative regulation. Unlike positive enactments mandating particular equipment safety requirements, tort standards are highly malleable and juries are unpredictable. And even if "there is general agreement on the standard for an unreasonably dangerous product," the standard itself is inherently amorphous. AAJ Br. 14 n.4. Who is to say, applying the typical "risk-utility" standard, whether

the risks of a particular locomotive design choice outweigh its utility? To have juries in fifty different States answer that question would plainly undermine Congress's determination to have it answered by a single federal agency.

2. Nor is this a case where a "long history of litigation against manufacturers" pre-dated Congress's entry into the regulated field, making it unreasonable to presume that Congress "intended to deprive injured parties of a long available form of compensation." *Bates*, 544 U.S. at 449.

Instead, as Petitioners' *amici* acknowledge, "at the time Congress enacted the LIA, the common law did not permit workers who were not in privity of contract with equipment manufacturers to recover from manufacturers for injury caused by unsafe products." AAJ Br. 2. Thus, employees have *never* been able to bring tort lawsuits against locomotive equipment manufacturers—not before Congress enacted the LIA, and not after the Court held that it preempted the field.

It is hard to imagine that Congress could have intended for its goal of uniform regulation to be sacrificed to state-law relief that did not even exist at the time.

3. This does not mean that Congress left employees entirely without recourse for locomotive-related injuries. Congress passed the Federal Employers' Liability Act (FELA) to provide a remedy for injured railroad employees, and FELA permits employees to sue their railroad employers for negligence. 45 U.S.C. § 51 *et seq.* This remedy is in some respects more favorable to employee plaintiffs than state tort law, because it subjects railroads to liability

if they "played any part in bringing about the injury." *CSX Transp., Inc. v. McBride*, 131 S. Ct. 2630, 2634 (2011). Yet, despite this generous remedy, the fact that FELA is limited to suits against employers, and does not allow employees to sue manufacturers, only underscores that Congress did not intend to subject equipment manufacturers to tort liability. See *id.* at 2644 (observing that "FELA's limitations on who may sue, and for what, reduce the risk of exorbitant liability").

In short, although FELA regulates the employer-employee relationship, the LIA regulates "the design, the construction and the material" of locomotive parts. *Napier*, 272 U.S. at 611. And Congress chose to have manufacturers regulated, not through a tort remedy, but through uniform standards set by an expert federal agency.

C. A special presumption against preemption would contravene the language and purpose of the Supremacy and Commerce Clauses.

A special presumption against preemption of state tort suits would also contravene not only the language of the Supremacy Clause, but also the purposes of that Clause and the Commerce Clause. Indeed, by opting to have railroad equipment regulation determined exclusively as a matter of national policy, Congress sought to accomplish the very purposes for which the Supremacy Clause was originally intended—and which this Court's longstanding field preemption doctrine protects, to-wit: removing obstacles to a national market and facilitating a national government with the power to regulate interstate commerce in a uniform and coordinated manner.

As James Madison explained in advocating for the newly proposed Constitution, "[t]he defect of power" in the government established under the Articles of Confederation "to regulate the commerce between its several members * * * [has] been clearly pointed out by experience." The Federalist No. 42, at 235 (James Madison) (Clinton Rossiter ed., 1961). Indeed, under the Articles of Confederation, the "multiplicity of laws in [the] several states" was one of the chief "evils * * * of our situation." James Madison, Vices of the Political System of the United States (1787). The problem, Madison added, was that States were acting as "little republics," encroaching on the rights of outsiders. *Ibid.* But according to Madison, the creation of an authoritative government with power to regulate commerce nationwide would dampen this impulse, as "an extensive Republic [a]meliorates the administration of a small Republic." *Ibid.*

Alexander Hamilton likewise explained the need for a national government with authority to prescribe uniform commercial regulations, lest "[e]ach State, or separate confederacy, would pursue a system [of] commercial polity peculiar to itself [that would create] distinctions, preferences and exclusions, which would beget discontent." The Federalist No. 7, at 30-31 (Alexander Hamilton) (Clinton Rossiter ed., 1961). Thus, "[t]he importance of the Union, in a commercial light, is one of those points, about which there is least room to entertain a difference of opinion, and which has, in fact commanded the most general assent of men, who have any acquaintance with the subject." The Federalist No. 11, at 52 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

Such a union required not only that the national government have authority to pass uniform laws go-

verning interstate commerce, but also that those laws supersede state laws that might interfere with federal authority. For this reason, the Framers thought that "[t]he character of such a [federal] governme[nt] ought * * * to be paramount to the state constitutions." James Madison, Notes of the Constitutional Convention (May 29, 1787), in 1 The Records of the Federal Convention of 1787, at 17-23 (Max Farrand ed., 1911). And the Commerce and Supremacy Clauses were enacted to ensure that this would be so.

In fact, this was one of the core purposes of the Constitutional Convention of 1787. That is why, when George Washington transmitted the new Constitution to the Continental Congress, he touted as one of the three critical reasons for its adoption the fact that it vested the power of "regulating Commerce" in "the general Government of the Union." Letter from Federal Convention President George Washington to the President of Congress, Transmitting the Constitution (Sept. 17, 1787). And in so doing, he expressly recognized that, given the Supremacy Clause, the price of that arrangement would be States' ceding a portion of their sovereignty to the national government. Analogizing the rights of the States to the rights of individuals, and invoking the "social compact" idea popularized by such philosophers as Rousseau and Locke, he said: "It is obviously impracticable in the federal Government Of these States to secure *all* Rights of independent Sovereignty to each and yet provide for the Interest and Safety of all—Individuals entering into Society must give up a Share of Liberty to preserve the Rest." *Ibid* (emphasis added).

Thus, although federalism and the States' "independent sovereignty" were undoubtedly part of the

Framers' constitutional vision, the Framers also saw uniform national regulation as essential in the realm of interstate commerce. The *amici's* proposed presumption against preemption of state tort suits would seriously threaten that system of uniform national regulation in this and other areas, thereby contravening the Framers' vision for the government created by the Constitution.

CONCLUSION

In short, when railroads became the Nation's chief engine of interstate commerce, Congress, in enacting the LIA, exercised exactly the sort of federal authority the Framers sought to enable through the Commerce and Supremacy Clauses. By safeguarding that authority against encroachment from the States, this Court's longstanding field preemption doctrine accomplishes the Framers' vision in a manner fully consistent with the text of those clauses. Any weakening of that doctrine—by overruling *Napier* or by creating a special presumption against the preemption of tort suits—would contravene both the language and the purposes of those critical provisions.

The decision below should be affirmed.

Respectfully submitted.

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