No. 10-

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 CORPORATION AND VIAD CORPORATION

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

DID CONGRESS INTEND THE FEDERAL RAILROAD SAFETY ACTS TO PREEMPT STATE LAW-BASED TORT LAWSUITS?

PARTIES TO THE PROCEEDINGS AND RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Gloria Gail Kurns and Freida E. Jung Corson are individuals and plaintiffs-petitioners in this action. Ms. Kurns is the executrix of the estate of the late George M. Corson. Mrs. Corson is the widow of George M. Corson.

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Defendants-Respondents Railroad Friction Products, ("RFPC") and VIAD Corporation ("VIAD"), moved for summary judgment in the Court of Common Pleas of Philadelphia County, First Judicial District of Pennsylvania. RFPC and VIAD argued that there was insufficient evidence of Petitioners' Decedent, George M. Corson's exposure to asbestos from any of Respondents' products to find factual causation. *Kurns v. Airco Welders Supply, Inc.*, 2008 Phila. Ct. Com. Pl. LEXIS 241 (2008). VIAD argued that Petitioners' claims were barred by the doctrine of federal preemption. The Philadelphia Court of Common Pleas denied RFPC's and VIAD's motions for summary judgment, but granted the summary judgment motions filed by several other defendants.

On May 13, 2008, following the grants of summary judgment to some defendants and the voluntary dismissal of other defendants, including the first captioned defendant, A.W. Chesterton, Inc., RFPC removed the remainder of the case to the United States District Court for the Eastern District of Pennsylvania. Petitioners asked the District Court to reconsider the state court grants of summary judgment to Defendants Soo Line Railroad, Airco/BOC and Westinghouse Air Brake.[1] District Court Judge James T. Giles denied these

1. A.W. Chesterton was voluntarily dismissed by Petitioners in the state court action on April 25, 2008, prior to removal to the District Court. The only remaining defendants in the state court case before its removal were RFPC and VIAD. *Kurns v. Airco Welders Supply, Inc.*, 2008 Phila. Ct. Com. Pl. LEXIS 241 (2008) at *2-3.

(Cont'd)

motions, stating that he lacked jurisdiction over the defendants who had won summary judgment in the state court. (App. C at 40a).

RFPC and VIAD again moved for summary judgment in the District Court[2] claiming that federal law preempted Petitioners' claims. On February 5, 2009, District Court Judge Mitchell S. Goldberg granted these defendants summary judgment. *Kurns v. A. W. Chesterton, Inc.*, 2009 U.S. Dist. LEXIS 7757 (E.D. Pa. Feb. 3, 2009) (App. B at 22a). Petitioners appealed to the United States Court of Appeals for the Third Circuit on March 4, 2009. After briefing and oral argument, the Third Circuit panel affirmed the District Court's orders in an opinion filed on September 9, 2010. *Kurns v. A. W. Chesterton, Inc.*, 2010 U.S. App. LEXIS 18853 (3d Cir.

(Cont'd)

Linde, LLC f/k/a/The BOC Group f/k/a/ Airco Welders Supply, Inc., ("BOC/Airco") was granted summary judgment by the Philadelphia Court of Common Pleas on May 13, 2008. *See Kurns v. Airco Welders Supply, Inc., Id.* The United States District Court for the Eastern District of Pennsylvania denied Petitioners' motion to reconsider the state court grant of summary judgment to Linde/BOC/Airco, stating that it had no jurisdiction over a defendant that was dismissed in the state court action. (*See* Appendix C at 40a).

2. As noted earlier, only VIAD raised the issue of federal preemption in the state court. However, Pa.R.C.P. P. 1041 provides that when one defendant raises an issue that would defeat the claims as to all defendants, it is deemed filed on behalf of all defendants. The state court rejected VIAD's preemption argument based *upon Norfolk & W.R. Co. v. Pa. Pub. Util. Comm'n.*, 413 A.2d 1037 (Pa. 1980). RFPC raised the preemption issue before the District Court in the case herein.

2010). (App. A at 1a). On September 22, 2010, Petitioners moved for a rehearing *en banc*, which was denied on October 5, 2010. (App. D at 42a).

In addition to the opinions in the instant case, Petitioners' counsel have previously responded to two petitions for writs of certiorari in two Pennsylvania state cases in which the Pennsylvania Superior Court affirmed judgments. In both of those cases, the Pennsylvania Supreme Court rejected petitions for appeal. The sole issue on appeal in those cases is federal preemption. In the first of those cases, the Pennsylvania Superior Court published its opinion affirming judgment. *Atwell v. John Crane, Inc.*, 986 A.2d 888 (Pa.Super. 2010). The Petition for Writ of Certiorari is pending in this Court at No. 10-272.[3] In the second case, *Harris v. Griffin Wheel, Inc.*, the Pennsylvania Superior Court did not publish an opinion. The Petition for Writ of Certiorari is pending in this Court at No 10-520 in *Harris*.[4]

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3. At the conference regarding the Petition for Writ of Certiorari filed by Petitioner John Crane in *Atwell*, this Court asked for the Solicitor General to submit a brief regarding the U.S. Government's views.

4. Although undersigned counsel recognize the importance of the issues raised in the two Pennsylvania cases noted above, counsel's paramount duty to those clients in securing the judgments precludes counsel from acquiescing to the petitions for writs of certiorari there, especially where the issue is better presented in the instant case.

STATEMENT OF JURISDICTION

Petitioners seek review of the opinion of the Third Circuit Court of Appeals filed on September 9, 2010. *Kurns v. A. W. Chesterton, Inc.*, 2010 U.S. App. LEXIS 18853 (3d Cir. 2010). (App. A at 1a). Thereafter, Petitioners timely filed a Petition for Rehearing En Banc with the Third Circuit. The Third Circuit denied a rehearing on October 5, 2010. (App. D at 42a). This Court has jurisdiction under 28 U.S.C. § 1254 (2006).

STATUTES INVOLVED

This Petition presents a question of implied field preemption arising from Congress' enactment of the original Boiler Inspection Act, (hereinafter "BIA"), currently codified at 49 U.S.C. §§ 20701-20703 (2007) as the Federal Railroad Safety Act ("FRSA"), and the Safety Appliance Act, (hereinafter "SAA"), 49 U.S.C. §§ 20301 *et seq.*,

The relevant provisions of the BIA are as follows:

49 U.S.C. § 20701 – "Requirements for Use":

> A railroad carrier may use or allow to be used a locomotive or tender on its railroad line only when the locomotive or tender and its parts and appurtenances –
>
> > (1) are in proper condition and safe to operate without unnecessary danger of personal injury;

> (2) have been inspected as required under this chapter and regulations prescribed by the Secretary of Transportation under this chapter; and
>
> (3) can withstand every test prescribed by the Secretary under this chapter.

The relevant portions of the FRSA, 49 U.S.C. § 20106 are as follows:

> (a) **National Uniformity of Regulation**
>
> (1) Laws, regulations, and orders related to railroad safety and laws, regulations, and orders related to railroad security shall be nationally uniform to the extent practicable.
>
> (2) A state may adopt or continue in force a law, regulation, or order related to railroad safety or security until the Secretary of Transportation (with respect to railroad safety matters), or the Secretary of Homeland Security (with respect to railroad security matters), prescribes a regulation or issues an order covering the subject matter of the State requirement. A State may adopt or continue in force an additional or more stringent law, regulation, or order related to railroad safety or security when the law, regulation, or order-
>
> (A) is necessary to eliminate or reduce an essentially local safety or security hazard;

(B) is not incompatible with a law, regulation, or order of the United States Government; and

(C) does not unreasonably burden interstate commerce.

(b) **Clarification Regarding State Law Causes of Action.**

(1) Nothing in this section shall be construed to pre-empt an action under State law seeking damages for personal injury, death, or property damage alleging that a party-

(A) has failed to comply with the Federal standard of care established by a regulation order issued by the Secretary of Transportation (with respect to railroad safety matters), or the Secretary of Homeland Security (with respect to railroad security matters), covering the subject matter as provided in subsection (a) of this section;

(B) had failed to comply with its own plan, rule, or standard that it created pursuant to a regulation or order issued by either of the Secretaries; or

(C) has failed to comply with a State law, regulation, or order that is not incompatible with subsection (a)(2).

(2) This subsection shall apply to all pending State law causes of action arising from events or activities occurring on or after January 18, 2002.

(c) **Jurisdiction.** Nothing in this section creates a Federal cause of action on behalf of an injured party or confers Federal question jurisdiction for such State law causes of action.

The relevant portions of the SAA are:

49 U.S. C. § 20302 - "General Requirements":

(a) General. **Except as provided in subsection (c) of this section and section 20303 of this title [49 USCS § 20303], a railroad carrier may use or allow to be used on any of its railroad lines—**

(1) a vehicle only if it is equipped with—

(A) couplers coupling automatically by impact, and capable of being uncoupled, without the necessity of individuals going between the ends of the vehicles;

(B) secure sill steps and efficient hand brakes; and

(C) secure ladders and running boards when required by the Secretary of Transportation, and, if ladders are required, secure handholds or grab irons on its roof at the top of each ladder;

(2) except as otherwise ordered by the Secretary, a vehicle only if it is equipped with secure grab irons or handholds on its ends and sides for greater security to individuals in coupling and uncoupling vehicles;

(3) a vehicle only if it complies with the standard height of drawbars required by regulations prescribed by the Secretary;

(4) a locomotive only if it is equipped with a power-driving wheel brake and appliances for operating the train-brake system; and

(5) a train only if—

(A) enough of the vehicles in the train are equipped with power or train brakes so that the engineer on the locomotive hauling the train can control the train's speed without the necessity of brake operators using the common hand brakes for that purpose; and

(B) at least 50 percent of the vehicles in the train are equipped with power

or train brakes and the engineer is using the power or train brakes on those vehicles and on all other vehicles equipped with them that are associated with those vehicles in the train.

(b) Refusal to Receive Vehicles Not Properly Equipped. **A railroad carrier complying with subsection (a)(5)(A) of this section may refuse to receive from a railroad line of a connecting railroad carrier or a shipper a vehicle that is not equipped with power or train brakes that will work and readily interchange with the power or train brakes in use on the vehicles of the complying railroad carrier.**

(c) Combined Vehicles Loading and Hauling Long Commodities. **Notwithstanding subsection (a)(1)(B) of this section, when vehicles are combined to load and haul long commodities, only one of the vehicles must have hand brakes during the loading and hauling.**

(d) Authority to Change Requirements. **The Secretary may—**

(1) change the number, dimensions, locations, and manner of application prescribed by the Secretary for safety appliances required by subsection (a)(1)(B) and (C) and (2) of this section only for good

cause and after providing an opportunity for a full hearing;

(2) amend regulations for installing, inspecting, maintaining, and repairing power and train brakes only for the purpose of achieving safety; and

(3) increase, after an opportunity for a full hearing, the minimum percentage of vehicles in a train that are required by subsection (a)(5)(B) of this section to be equipped and used with power or train brakes.

(e) Services of Association of American Railroads. **In carrying out subsection (d)(2) and (3) of this section, the Secretary may use the services of the Association of American Railroads.**

STATEMENT OF THE CASE

A. Form of Action and Procedural History

On June 13, 2007, George Corson ("Mr. Corson") and his wife, Freida E. Jung Corson ("Mrs. Corson"), filed a complaint in the Philadelphia County Court of Common Pleas because Mr. Corson contracted malignant mesothelioma, the only generally-accepted cause of which is asbestos exposure.[5] Mr. Corson died from this disease on November 17, 2007. His daughter, Gloria Gail Kurns ("Mrs. Kurns"), was thereafter appointed Executrix of his Estate and was substituted as a party-plaintiff. Mrs. Kurns and her mother, Mrs. Corson, are Petitioners herein.

Defendants including respondents RFPC and VIAD moved for summary judgment in state court. Generally, the defendants argued that there was insufficient evidence of Mr. Corson's exposure to asbestos from their respective products to merit trial. *See Kurns v. Airco Welders Supply, Inc.*, 2008 Phila. Ct. Com. Pl. LEXIS 241 (2008). The state court denied RFPC's and VIAD's motions for summary judgment, but granted the summary judgment motions filed by the other defendants, including Soo Lines Railroad, the successor to Milwaukee Road.

On May 13, 2008, following the grants of summary judgment to some defendants and the voluntary

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5. Respondents did not contest the mesothelioma diagnosis nor did they contest that Mr. Corson's mesothelioma was caused by asbestos exposure.

dismissal of other defendants, including the first captioned defendant, A.W. Chesterton, Inc., RFPC removed the case to the United States District Court for the Eastern District of Pennsylvania. After the case was removed, Petitioners asked the District Court to reconsider the state court grants of summary judgment to Defendants Soo Line Railroad, Airco/BOC and Westinghouse Air Brake.[6] Chief District Court Judge James T. Giles denied Petitioners' reconsideration motions on the grounds that the district court lacked jurisdiction over the defendants who had won summary judgment in the state court. (App. C at 40a).

RFPC and VIAD moved for summary judgment in the District Court. This time, both defendants claimed that federal law preempted Petitioners' claims. On February 5, 2009, District Court Judge Mitchell S. Goldberg granted RFPC's and VIAD's summary judgment motions. (App. B at 22a).

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6. Airco Welders Supply, Inc./The BOC Group ("Airco/BOC"), now doing business as part of Linde, LLC, was a party to the Superior Court appeal. *See Kurns v. Airco Welders Supply, Inc.*, 2008 Phila. Ct. Com. Pl. LEXIS 241 (2008). The Pennsylvania Superior Court dismissed the appeal as interlocutory due to the existence of the removed claims in federal court that are the subject of this appeal. *Kurns v. Airco Welders Supply, Inc.*, 986 A.2d 1293 (Pa. Super. 2009).

A.W. Chesterton was voluntarily dismissed by Appellants in the state court action on April 25, 2008, prior to removal to the District Court. The only remaining non-dismissed defendants in the state court action prior to removal were RFPC and VIAD. *Kurns v. Airco Welders Supply, Inc.*, 2008 Phila. Ct. Com. Pl. LEXIS 241 (2008) at *2-3.

Petitioners appealed to the United States Court of Appeals for the Third Circuit on March 4, 2009. The Third Circuit affirmed the District Courts orders on September 9, 2010. (App. A at 1a). On September 22, 2010, Petitioners moved for a rehearing en banc, which the Third Circuit denied on October 5, 2010. (App. D at 42a). This petition for Writ of Certiorari followed.

B. Facts Necessary to the Disposition of the Case

From 1949-1974, Mr. Corson was exposed to asbestos from his work on the Chicago, Milwaukee, St. Paul & Pacific Railroad (the "Milwaukee Road"). He worked on locomotives manufactured by the Baldwin Locomotive Company, predecessor-in-interest to Respondent VIAD Corporation ("VIAD"). These locomotives were insulated with asbestos. The locomotives also had asbestos-containing brake shoes distributed by Respondent Railroad Friction Products Corporation ("RFPC"), which Mr. Corson had to change on a regular basis.

Mr. Corson testified during his deposition that he first worked for the Milwaukee Road in Mobridge, SD in 1949. He moved to Montana, and continued to work for the Milwaukee Road there. As a machinist's helper, he worked on Baldwin steam-powered locomotives.[7] Pipefitters, boilermakers, tinsmiths and painters worked near him. The pipefitters removed old insulation from the boilers and installed new insulation. The pipefitters also used asbestos cement and tape.

7. Mr. Corson knew that the locomotives were manufactured by Baldwin because the name was on the front of the engine, below the boiler.

Sometimes old insulation was ground up into a powder, mixed with water, and re-used as a paste. Mr. Corson handled what he called "rigid asbestos." This came in sheets and insulated the boiler. His work on boiler valves required him to handle the insulation around the boiler. Once a year, the machinists would remove all the asbestos from the boiler so they could test the strength of the metal by tapping all around the boiler with a hammer. The pipefitters replaced all the insulation except that around the valves, which the machinists replaced.

In the 1960s and into the early 1970s, Mr. Corson's son, Terry Corson ("Terry"), worked with him at Lewistown, MT. Terry testified that the Milwaukee Road had different varieties of brake shoes in stock at Lewistown, including grinding shoes, freight car shoes and locomotive shoes. There was usually a pallet of freight car shoes and a pallet of locomotive shoes on hand, and each pallet held hundreds of shoes. Terry estimated that he and his father changed about a dozen brake shoes a week. They used COBRA composition brake shoes[8] on both boxcars and locomotives. Terry did not recall using any other brand. Terry testified that his father was a "working foreman" who did brake changes himself. Mr. Corson worked on the Milwaukee Road until 1974.

Mr. Corson was diagnosed with asbestos-caused malignant mesothelioma in 2007, and he died from this disease.

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8. As stated in Petitioners' original Complaint and conceded in RFPC's motion, RFPC distributed COBRA asbestos-containing railroad brake shoes.

REASONS FOR GRANTING THE PETITION

CONGRESS DID NOT INTEND THE FEDERAL RAILROAD SAFETY ACTS[9] TO PREEMPT STATE LAW-BASED TORT LAWSUITS.

A. This Court has consistently allowed railroad workers and non-railroad workers alike to sue the entities subject to the railroad safety acts under state law.

In its decision in this case, the Third Circuit held that federal legislation preempted the field of railroad safety regulation so as to preclude state tort lawsuits against companies that supplied asbestos-containing equipment to the railroads. In so ruling, the Third Circuit relied upon this Court's decision in *Napier v. Atlantic C. Ry. Co.*, 272 U.S. 605 (1926). For the reasons that follow, this Court's review is necessary to correct the Third Circuit's and other lower courts' gross misinterpretations of this Court's decisions with respect to railroad safety regulations.

In *Napier*, this Court held that federal safety legislation and regulations occupied the field of "legislation." *Napier* struck down state laws that required particular kinds of locomotive equipment, such as firebox doors or cab curtains, on locomotives traveling through a particular state. 272 U.S. at 609-610. Since

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9. This Court has repeatedly held that the FRSA, BIA, SAA and FELA are to be read as one. *Urie v. Thompson*, 337 U.S. 163 (1949). In this Petition for Certiorari, Petitioners sometimes refer to these acts as a group as "railroad safety acts."

locomotive components were potentially within the federal government's scope of authority, the states could not legislate even in the absence of federal government action: "We hold that state ***legislation*** is precluded, because the Boiler Inspection Act, as we construe it, was intended to occupy the field." *Id.* at 612. (emphasis added). The field was thus defined as "legislation."

For the first 70 years following *Napier*, this Court and other courts of last resort at the state level interpreted *Napier* as establishing the primacy of federal establishment of railroad safety standards. However, in giving precedence to the federal standards, this Court and other courts allowed injured parties to remediate violations of those standards through state tort law remedies.

Typical of the cases decided after *Napier* is *Tipton v. Atchison, T. & S. F. R. Co.*, 298 U.S. 141 (1936). In *Tipton*, a California railroad switchman, not engaged in interstate commerce, was injured as a result of a defective coupling mechanism. *Id.* at 145. This Court found that injury resulted from a violation of the federal standards. *Id.* at 146. In construing the Safety Appliance Act ("SAA"), this Court held:

> The Safety Appliance Acts impose an absolute duty upon an employer and prescribe penal sanctions for breach. The earliest, that of 1893, affected only cars which were being used in interstate commerce. By the Act of 1903 the duty was extended to all cars used upon any railroad which is a highway of interstate commerce. The absolute duty imposed

> necessarily supersedes the common law duty of the employer. But, unlike the Federal Employers' Liability Act, which gives a right of action for negligence, the Safety Appliance Acts leave the nature and the incidents of the remedy to the law of the states. The Safety Appliance Acts modify the enforcement, by civil action, of the employe's common law right in only one aspect, namely, by withdrawing the defense of assumption of risk. They do not touch the common or statute law of a state governing venue, limitations, contributory negligence, or recovery for death by wrongful act.
>
> *Id.* at 146

Thus, Tipton was left to state remedies, which in this case, were limited to workers compensation. *See also, Gilvary v. Cuyahoga V. R. Co.*, 292 U.S. 57 (1934).

In *Fairport, P. & E.R. Co. v. Meredith*, 292 U.S. 589 (1934), this Court upheld a personal injury verdict based upon a finding that the defendant railroad had violated the SAA's requirements as to brakes. Defendant's train hit plaintiff's automobile at a grade crossing. Plaintiff was not a railroad employee, and her claim was not governed by FELA. This Court ruled that she could sue for a violation of the SAA and that her right to bring her suit "derived from principles of common law." *Id.* at 598. The Supreme Court held that issues other than the railroad's duty to comply with the specific requirements of the SAA were governed by state law. *Id.* Had *Napier* been read as broadly as defendants

suggest, the *Meredith* lawsuit would have been preempted.

In *Atchison, T. & S.F. R. Co. v. Scarlett*, 300 U.S. 471 (1937), a railroad worker was injured when descending a ladder from a box car. The ladder itself was a required safety appliance. The worker's foot slipped on a slanting brace rod, which was immediately behind the ladder. The ladder itself conformed to the federal regulations promulgated under the SAA, and as a result, this Court held that there was no violation of the SAA. *Id.* at 472. This Court nevertheless found that the worker had a common law remedy sounding in negligence for the proximity of the slanting brace rod to the ladder:

> The right of recovery, if any, must therefore rest upon the effect of the near proximity of the ladder to the rod, neither being in itself defective. The law to be applied to that situation is the common-law rule of negligence, and not the inflexible rule of the Safety Appliance Act; and the questions to be answered are whether the two appliances were maintained in such relation to one another as to constitute negligence on the part of the company and, if so, whether Scarlett assumed the risk.
>
> *Id.* at 475

Contrary to Respondents' reading of the law following *Napier*, this Court allowed the lawsuit. The worker was prevented from arguing to the jury that there was strict

liability because the ladder complied with the Safety Appliance Act. *Id.* at 474. Given that this Court cited *Napier* in this decision, and that this Court remanded the case for a trial on the negligence claim, this Court clearly did not construe the railroad safety acts as precluding such lawsuits.

In *Breisch v. Central R. of N. J.*, 312 U.S. 484 (1941), this Court recognized the principle decided in *Tipton*: "It is clear that an employee injured in intrastate transportation by defective equipment of an interstate railroad comes under the Safety Appliance Acts. Nor is there any longer a question as to the power of the state to provide whatsoever remedy it may choose for breaches of the Safety Appliance Acts. The federal statutes create the right; the remedy is within the state's discretion. (Footnotes and citations omitted)." *Id.* at 486. In *Breisch*, this Court recognized that a railroad employee not engaged in interstate commerce could afford himself of a state court common law remedy against the railroad, despite the existence of the Workers Compensation Act.

Despite *dicta* in *Napier* that could have been interpreted so as to preclude all state regulation of railroad safety, many states enacted legislation or regulations that affected the railroads. For example, Iowa directed that all railroad operate cabooses with two platforms. The railroad complained that Iowa had no right to enforce such a regulation. In *Fleming v. Richardson*, 24 N.W. 2d 280 (Ia. 1946), the Iowa Supreme Court upheld the regulation against a preemption argument. In a later case, the Iowa Supreme Court explained its rationale:

> An exercise by a state of its police power, which would be valid if not superseded by federal action, is superseded only where the repugnance or conflict is so direct and positive the two acts cannot be reconciled or consistently stand together. *Fleming v. Richardson*, 237 Iowa 808, 830, 831, 24 N.W.2d 280; *Southern Pacific Co. v. Arizona ex rel. Sullivan*, 325 U.S. 761, 65 S.Ct. 1515, 89 L.Ed. 1915; *Terminal R. Assn. v. Brotherhood of Railroad Trainmen*, 318 U.S. 1, 63 S.Ct. 420, 87 L.Ed. 571; 15 Am. Jur.2d, Commerce, section 69, page 714; and 15 C. J. S., Commerce, section 11, page 266.
>
> *Powers v. McCullough*, 140 N.W. 2d 378, 382 (Ia. 1966)

Because the SAA said nothing about the number of platforms on cabooses, Iowa was free to regulate.

In *Shields v. Atlantic C. L. R. Co.*, 350 U.S. 318 (1955), this Court held that an independent contractor had a right of action against the railroad under state law in strict liability for violating the Safety Appliance Act. There was no suggestion whatsoever that the Safety Appliance Act precluded a lawsuit against the railroad. This Court found that the independent contractor was owed a duty:

> There is no merit in respondent's contention that, since petitioner is not one of its employees, no duty is owed him under § 2 of the Act. Having been upon the dome running

> board for the purpose of unloading the car, he was a member of one class for whose benefit that device is a safety appliance under the statute. As to him, the violation of the statute must therefore result in absolute liability. *Coray v. Southern Pacific Co.*, 335 U.S. 520; *Brady v. Terminal Railroad Assn.*, 303 U.S. 10; *Fairport, P. & E.R. Co. v. Meredith*, 292 U.S. 589; *Louisville & N.R. Co. v. Layton*, 243 U.S. 617.
>
> *Id.* at 325

Not a single member of the Court, either in the majority or the dissent, suggested that plaintiff did not have a remedy under state tort law for the alleged Safety Act violation.

Another typical case is *Boyer v. Atchison T. & S. F. R. Co.*, 38 Ill. 2d 31 (1967), *cert. denied*, 390 U.S. 949 (1968). There the railroad passenger, traveling on a free pass issued by the railroad, sued to recover for violation of the SAA because he was thrown to the floor when a defective coupler broke. The passenger was allowed to press a claim in state court under strict liability. Again, the passenger's right to assert the state court action was unquestioned.

By the time that the Pennsylvania Supreme Court decided *Norfolk & W. R. Co. v. Pa. Public Util. Com.*, 489 Pa. 109 (1980), the parameters of *Napier*, *Tipton* and *Shields* were generally understood to restrict states from legislating or regulating in conflict with the Interstate Commerce Commission ("ICC") or Federal Railroad Administration ("FRA"). The Pennsylvania

Supreme Court also took guidance from the 1970 legislative history of the FRSA:

> Appellees urge that *Napier* and *Bessemer* are controlling on the issue of preemption by the Boiler Inspection Act. We disagree. While the broad language of the Act at one time could have been interpreted as reflecting Congressional intent to preempt the entire field of railroad safety, the enactment of section 205 of the Federal Railroad Safety Act in 1970 no longer permits that reading. Section 205 provides:
>
> > A State may adopt or continue in force any law, rule, regulation, order, or standard relating to railroad safety until such time as the Secretary [of Transportation] has adopted a rule, regulation, order, or standard covering the subject matter of such State requirement. A State may adopt or continue in force an additional or more stringent law, rule, regulation, order, or standard relating to railroad safety when necessary to eliminate or reduce an essentially local safety hazard, and when not incompatible with any Federal law, rule, regulation, order, or standard, and when not creating an undue burden on interstate commerce. [footnote omitted].
>
> *Id.* at 120-121.

It is noteworthy that the Pennsylvania Supreme Court's interpretation of the FRSA and the harmonization of *Napier* with some of the cases cited above continued for sixteen (16) years without change.

Manufacturers and suppliers of railroad products became regulated entities under the FRSA, along with the railroads in 1992. 45 U.S.C. § 34. The stampede to deprive railroad workers injured by defective products from pressing claims against those manufacturers and suppliers began in earnest thereafter. Ignoring the more than 70 years of precedent noted above, the 9th Circuit ruled that *Napier* prevented railroad workers alleging hearing losses from pressing state law tort claims against the manufacturers and suppliers of devices that caused the hearing losses. *Law v. GMC*, 114 F.3d 908 (9th Cir. 1997). Relying upon *Marshall v. Burlington Northern, Inc.*, 720 F.2d 1149 (9th Cir. 1983), the court in *Law* held that the Boiler Inspection Act preempted the products liability case against the locomotive manufacturers. Since *Marshall* is the underpinning of *Law*, it is important to analyze.

In *Marshall*, the widow of a motorist killed at a grade crossing by a Burlington Northern train sued the railroad. The theory of recovery was that the train should have been equipped with oscillating lights and/or strobe lights. The *Marshall* court did give the FRSA broad preemptive effect. 720 F.2d at 1153. However, the *Marshall* court also pointed out that the FRA had considered requiring trains to be equipped with the equipment that the plaintiff argued was necessary to prevent the accident in question, but that the agency had rejected that requirement. 720 F.2d. at 1153-1154.

Thus, the theory of recovery was in direct conflict with the federal regulatory requirement because it took on the character that the federal agency should have mandated a particular requirement that it rejected.

Law expanded the *Marshall* view of preemption by reading *Napier* literally and broadly without any of the limitations imposed by such decisions as *Tipton* or *Shields*, supra. The *Law* court failed to mention that in 1992, Congress amended the safety acts to subject manufacturers and suppliers of railroad equipment to federal regulation and potential fines for non-compliance. 45 U.S.C. § 34 (Pub. Law 102-365, § 9(a)(8)). The railroads had been subject to safety acts since 1893 and understood that they were subject to state tort lawsuits for violations of federal safety standards. However, the manufacturers of railroad products ignored the decades of court decisions that allowed state tort lawsuits against the regulated entity, viz. the railroads. The manufacturers took a more aggressive stance: since they were subject to federal regulation, they reasoned, there could only be a federal remedy for violations of those regulations, and state remedies were preempted. The *Law* court accepted this argument in order to effectuate "national uniformity of regulations." 114 F.3d at 110-111.

The *Law* court noted that injured railroad workers could make a claim under FELA for their injuries, and that "[p]roof of a BIA violation is enough to establish negligence as a matter of law and neither contributory negligence nor assumption of risk can be raised as a defense." Railroad workers who are injured by trains which are "in use" can make a strict liability claim under

the BIA or SAA. However, railroad workers who are injured as a result of working on trains in the repair shops, such as Mr. Corson in this case, cannot make strict liability claims under the BIA or SAA.

This Court has rarely ruled upon what constitutes "in use." *See*, *Brady v. Terminal R Ass'n*, 303 U.S. 10, 13 (1938). On those rare occasions when the issue has arisen, the lower appellate courts have uniformly held that the BIA and SAA "exclude those injuries directly resulting from the inspection, repair, or servicing of railroad equipment located at a maintenance facility." *Steel v. Burlington Northern, Inc.*, 720 F.2d 975 (8th Cir. 1983); *Angell v. Chesapeake & O.R Co.*, 618 F.2d 260, 262 (4th Cir. 1980); *Tisneros v. Chicago & N.W. Ry. Co.*, 197 F.2d 466 (7th Cir. 1952), *cert. denied*, 344 US 885 (1952). Put somewhat differently, neither the BIA nor the SAA applied to Mr. Corson since he was injured as a result of exposure to asbestos that occurred in the railroad repair shops. It stands to reason that if the statute does not give Petitioners a claim, it cannot preclude Petitioners from other remedies.

Without question, *Law* began the "reign of error." However, just because a number of lower courts have followed *Law* does not make it correct. As noted above, this Court has never endorsed the broad reading of implied federal field preemption that the literal language of *Napier* suggested. Rather, this Court in later decisions interpreted *Napier* as applying to the field of federal legislation (and regulation), and where there were conflicts, this Court upheld the supremacy of federal law. By granting certiorari in this case, this Court can reestablish the harmony in this Court's

decisions interpreting *Napier*, harmony that existed before the decision in *Law* and the misguided decisions following *Law*.

B. Neither the Safety Appliance Act nor the Boiler Inspection Act contained preemptive language, and subsequent reenactments have evidenced congressional intent not to preempt state regulation.

The legislative history of the railroad safety acts documents congressional intent to allow state tort lawsuits. Beginning in 1893 with the adoption of the first Safety Appliance Act, the railroads were subject to state court lawsuits. This Court held that Congress had the power to require safety devices on every railroad engaged in interstate commerce, even if the particular cars were only engaged in intrastate commerce. *Southern R. Co. v. United States*, 222 U.S. 20 (1911). The primary purpose of the railroad safety acts was to protect trainmen and the riding public. *Urie v. Thompson*, 337 U.S. 163 (1949).

The original SAA and BIA contained no statement of congressional intent to preempt state regulation or state tort lawsuits. In 1970, though, in enacting the FRSA, Congress declared that it did not want to preempt state regulations, and therefore, state-based remedies. *See* H.R. REP. 91-1194 (1970), reprinted in 1970 U.S.C.C.A.N. 4104, 1970 WL 5692 (Leg. Hist.).

> At the present time where the federal government has authority, with respect to rail safety, it preempts the field. With respect to

> the reported bill, the task force recommended that existing state requirements remain in effect **until** preempted by federal action.
>
> H.R. REP. 91-1194, at 4108 (emphasis added).

Prior to 1970, the FRA had allowed the states to regulate unless and until the FRA chose to regulate in the same area. The purpose of the 1970 amendments was to confer congressional approval on this practice. The legislative history of the FRSA demonstrates that Congress believed that its goal of protecting railroad workers' safety could best be accomplished by recognizing state authority over some rail safety matters. The FRSA authorized state regulation in "any area of rail safety" until preempted by an action of the Secretary (i.e. a regulation or order, not a statute) "with respect to the **particular** matter." It did so for the stated purpose of "promot[ing] safety in all areas of railroad operations":

> Summary of the Reported Bill
>
> **The Purpose of this bill is to promote safety in all areas of railroad operations,** to reduce railroad related accidents, and to reduce deaths and injuries to persons and damage to property caused by accidents involving any carrier of hazardous materials.
>
> To provide the legislative framework to achieve this purpose, the reported bill includes,
>
> * * *

4. State Regulation

> Section 205 **authorizes states to regulate** in **any area of railroad safety** until the Secretary acts with respect to the **particular** subject matter.
>
> *Id.*, at 4112 (emphasis added).

The final recommendations in the legislative history contain the same federal and state relationship, namely that the power to regulate matters of rail safety be continued in the states, and even expanded, unless and until a federal regulation specifically preempted the state regulation:

> The specific recommendations of this task force are:
>
> * * *
>
> 3. Existing state rail safety statutes and regulations remain in force until and unless preempted by federal regulation. Administration of the program should be through a federal-state partnership, including state certification similar to the certification principles set forth in the federal natural gas pipeline safety act of 1968.
>
> *Id.*, at 4129.

Congress decided to retain the provisions of the BIA and SAA intact, but at the same time precluded any

preemptive effect previously attributed to them, except when federal law or regulations conflicted with state law or regulations. That is the meaning of the legislative history. While the legislative history documents that the BIA and SAA would "continue without change," the same paragraph of the legislative history also documents that the BIA and SAA would continue to be supplemented by state law. Had Congress intended that the BIA and SAA preempt state law, Congress would not have set forth the following language:

> These particular laws have served well. In fact the committee chose to continue them without change. It is recognized, however, that they meet only certain and special types of railroad safety hazards. ... Consequently, there is a strong consensus which makes it appear clearly that the time is now here for broadscale federal legislation with **provisions for state participation to assure a much higher degree of railroad safety in the years ahead.**
>
> *Id.* at 4105 (emphasis added)

As can be seen above, in its 1970 reenactment of the BIA and SAA, Congress adopted a specific lack of preemption clause, now codified at 49 U.S.C. § 20106(a). The lack of preemption clause broadly applies to "railroad safety matters."

In cases decided after the passage of this reenactment, this Court has validated congressional intent in specifying the degree to which federal

legislation should have or not have a preemptive effect. Where a statute contains an express preemption clause, as the FRSA does here, the task of statutory construction must in the first instance focus on the plain wording of the clause, which necessarily contains the best evidence of Congress' preemptive intent. *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993). Under *Easterwood*, the clause cited above in the 1970 reenactment should be given such effect. Congress did not intend to preempt state law tort claims.

Congress not only recognized state regulatory authority in the preemption clause cited above, but also expressly recognized that the states' authority over rail safety extends to "railroad equipment" and "rolling stock." Congress provided that a "State may participate in [investigations and surveillance] activities when the safety practices for **railroad equipment**, facilities, **rolling stock**, and operations in the State are **regulated by a State authority**..." 49 U.S.C. § 20105 (emphasis added).[10] Had Congress wished to occupy the field, Congress would not have included this express recognition of already-existing state authority, which the 1970 amendments expanded.

In 2007, Congress amended the FRSA, adding Section (b) to the prior enactment.[11] The statute now reads:

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10. Rolling stock refers to rail cars and locomotives, which are also the subject of the BIA and SAA. 49 C.F.R. § 224.5.

11. Section (a) has been the law since 1970, except for a homeland security reference.

(a) National uniformity of regulation

(1) Laws, regulations, and orders related to railroad safety and laws, regulations, and orders related to railroad security shall be nationally uniform to the extent practicable.

(2) A state may adopt or continue in force a law, regulation, or order related to railroad safety or security until the Secretary of Transportation (with respect to railroad safety matters), or the Secretary of Homeland Security (with respect to railroad security matters), prescribes a regulation or issues an order covering the subject matter of the State requirement. A State may adopt or continue in force an additional or more stringent law, regulation, or order related to railroad safety or security when the law, regulation, or order-

(A) is necessary to eliminate or reduce an essentially local safety or security hazard;

(B) is not incompatible with a law, regulation, or order of the United States Government; and

(C) does not unreasonably burden interstate commerce.

(b) Clarification regarding State law causes of action.

(1) Nothing in this section shall be construed to pre-empt an action under State law seeking damages for personal injury, death, or property damage alleging that a party-

(A) has failed to comply with the Federal standard of care established by a regulation order issued by the Secretary of Transportation (with respect to railroad safety matters), or the Secretary of Homeland Security (with respect to railroad security matters), covering the subject matter as provided in subsection (a) of this section;

(B) had failed to comply with its own plan, rule, or standard that it created pursuant to a regulation or order issued by either of the Secretaries; or

(C) has failed to comply with a State law, regulation, or order that is not incompatible with subsection (a)(2).

(2) This subsection shall apply to all pending State law causes of action arising from events or activities occurring on or after January 18, 2002.

(c) Jurisdiction. Nothing in this section creates a Federal cause of action on behalf of an injured party or confers Federal question jurisdiction for such State law causes of action.

49 U.S.C. § 20106 (b) (2007).

Under this revised statute, Congress showed its continued intent to reject the expansive and outdated preemptive effect that this Court gave the BIA and SAA in *Napier*. Since the Third Circuit mistakenly based its opinion on that reading, this Court should entertain review.

This Court has stated that it regards § 20106(a)(2) as "a provision that displays considerable solicitude for state law in that its express pre-emption clause is both prefaced and succeeded by express saving clauses." *Easterwood*, 507 U.S. at 665 (citation omitted).

The Secretary of Transportation through the FRA has never issued a regulation or an order "covering the subject matter" of asbestos in railroad equipment, the asbestos content of brake shoes, or warning of the risk of asbestos exposure at railroad worksites. 49 U.S.C. § 20106(a)(2). There is no express regulation or order with which a state tort lawsuit based upon could conflict. This Court found that Congress' use of the word "covering" within the first savings clause in § 20106(a)(2) has the effect of narrowing the scope of preemption. *Easterwood*, 507 U.S. at 664. The party claiming that railroad regulations preempt state law for a subject matter "must establish more than that they 'touch upon' or 'relate to' that subject matter, for 'covering' is a more restrictive term which indicates that pre-emption will lie only if the federal regulations substantially subsume the subject matter of the relevant state law." *Id.* (internal citation omitted). Since there are no federal regulations that "substantially subsume" the subject matter of Petitioners' tort claims against Respondents, the Third Circuit was wrong in holding that Petitioners' claims were preempted.

The FRA has never addressed asbestos, nor has it ever issued regulations on asbestos or in-shop safety. The word "asbestos" does not even appear in the FRA regulations, 49 C.F.R. §§ 200 through 268.[12] Prior to the adoption of the Occupational Safety and Health Act, the FRA left shop safety to the states to regulate. In 1978, after the creation of Occupational Safety and Health Administration ("OSHA"), the FRA stated that it would henceforth rely on OSHA to regulate workshop safety, and it so stated in 49 C.F.R.§ 221 (1978):

> We, therefore, believe that the FRA must exercise a continuing role in the area of railroad occupational safety and health. However, given the present staffing level for field investigation and inspection, the FRA has determined that, at this time, it would not be in the best interests of the public and of railroad safety for this agency to become involved extensively in the promulgation and enforcement of a complex regulatory scheme covering in minute detail, as do the OSHA standards, working conditions which, although located within the railroad industry, are in fact similar to those of any industrial workplace. Rather, we believe that the proper role for FRA in the area of occupational safety in the immediate future is one that will concentrate

12. The Fourth Circuit also noted this lack of regulation in 1976 in *Southern R.R. v. OSHRC*, 539 F.2d 335 (4th Cir. 1976), *cert. denied* 419 U.S. 999 (1976): "The Department of Transportation and FRA do not purport to regulate the occupational health and safety aspects of railroad offices or shop and repair facilities." 539 F.2d at 338.

> our limited resources in addressing hazardous working conditions in those traditional areas of railroad operations in which we have special competence.
>
> 49 C.F.R.§ 221 (1978).

The OSHA standards expressly do not preempt state law claims. The OSHA savings clause, 29 U.S.C. § 653(b)(4) (1970), states that nothing "...shall be construed to supersede or in any manner affect any workmen's compensation law or to enlarge or diminish or affect in any other manner the common law or statutory rights, duties, or liabilities of employers and employees under any law with respect to injuries, diseases, or death of employees arising out of, or in the course of, employment."

Assuming *arguendo* that the Third Circuit's view of implied federal field preemption over railroad safety was correct, the railroad safety regulations could not preclude Petitioners' lawsuits. The FRA narrowed the field of federal regulation by excluding railroad shops from the ambit of its regulations. The federal railroad safety regulations can only preempt lawsuits regarding situations and parties to which the regulations apply. The regulations do not apply to repair shops. OSHA's regulations, which do not preempt state tort lawsuits, do apply. Consequently, the Third Circuit should not have affirmed summary judgment.

C. This Court should abandon implied federal field preemption.

To the extent that lower courts have erred by interpreting *Napier* in its broadest sense, that error can be corrected by this Court's abandonment of the doctrine of implied federal field preemption. *Napier* expressed the prevailing view of this Court in the late 19th century and early 20th century that when Congress acted within its powers in enacting a statute, the states could no longer regulate within the field of that statute. This Court held that any remedy for inadequate regulation must be addressed to the ICC, the federal agency that regulated the railroads in 1926. *Napier*, 272 U.S. at 613.

Despite the broad language of *Napier*, until recently the case was regarded by this Court as a conflict preemption case. In the years following *Napier*, the states began to share responsibility for railroad regulation, with the acquiescence, if not the support, of the ICC. Although the repair and maintenance facilities of the railroads were instrumental in the safety of locomotives and rolling stock, the ICC never regulated them. The various states did, however, exercise authority over those facilities. By the time that the FRSA was enacted in 1970, many state regulations regarding railroad safety were on the books. [13]

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13. The view of this Court regarding federal preemption had changed dramatically by the time the FRSA was adopted. *Compare Napier v. Atlantic C. Ry. Co.*, 272 U.S. 605 (1926), with *Terminal R. Ass'n v. Brotherhood of R. Trainmen*, 318 U.S. 1 (1943).

Petitioners attempted to persuade the Third Circuit that it should analyze the statutes and regulations involved in this case using the two-fold analysis this Court adopted in *Wyeth v. Levine*, — U.S. —, 129 S. Ct. 1187, 173 L. Ed. 2d 51 (2009), but the Third Circuit rejected Petitioners' suggestion in a footnote. This case presents this Court with the opportunity to prevent such error going forward by replacing implied federal field preemption with the express preemption and conflict preemption analysis this Court adopted in *Wyeth*.

In *Wyeth*, this Court held that federal courts should not presume that preemption was intended unless Congress clearly showed its desire to preempt:

> Our answer to that question must be guided by two cornerstones of our preemption jurisprudence. First, "the purpose of Congress is the ultimate touchstone in every preemption case." *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485, 116 S. Ct. 2240, 135 L. Ed. 2d 700 (1996); *see Retail Clerks v. Schermerhorn*, 375 U.S. 96, 103, 84 S. Ct. 219, 11 L. Ed. 2d 179 (1963). Second, "[i]n **all** preemption cases, and particularly in those in which Congress has 'legislated . . . in a field which the States have traditionally occupied,' . . . we 'start with the assumption that the historic police powers to the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'" *Lohr*, 518 U.S., at 485, 116 S. Ct. 2240, 135 L. Ed. 2d 700 (*quoting Rice v. Santa Fe Elevator Corp.*,

331 U.S. 218, 230, 67 S. Ct. 1146, 91 L. Ed. 1447 (1947)).

129 U.S. at 1194-1195, 173 L.Ed. at 60. (emphasis added).[14]

Applying the *Wyeth* two-fold analysis to the instant case, the first question is whether Congress demonstrated an intent to preempt state product warning requirements in railroad shops. Such intent must be viewed against the absence of regulations on the subject issues by the FRA, and the FRA's specific intent not to issue regulations. There is no express statement of preemption in the statute. The second question is whether state law either conflicts with or thwarts congressional purpose, or whether state law makes it impossible for the Respondents to comply with both federal railroad regulations and state failure-to-warn products liability law. *Id.* at 1196-1200, 173 L.Ed. at 62-66.

In *Wyeth*, this Court noted that Congress stated a clear intent to preempt state court law on product

14. The Third Circuit stated that *Wyeth* was a conflict preemption case, and therefore not controlling in a field preemption case. This Court has observed more than once that field preemption is but a species of conflict preemption. *See Gade v. National Solid Waste Management Ass'n*, 505 U.S. 88, 102 n.2 (1992); *English v. General Elec. Co.*, 496 U.S. 72, 75 n.5 (1990). *Wyeth* itself relied on several field preemption cases, including *Medtronic, Inc. v. Lohr*, 518 U.S. 470 (1996); *California v. ARC Am. Corp.*, 490 U.S. 93 (1989); and *Retail Clerks Int'l Ass'n v. Schermerhorn*, 375 U.S. 96 (1963).

warnings on vaccines [16] and tobacco.[17] Here, neither Congress nor the FRA has ever expressed such an intent regarding warnings about the hazards of asbestos products in railroad repair shops.[18] The Third Circuit failed to specify any federal regulation that conflicted with the state law on which Petitioners' *failure-to-warn* claim is based. There is simply nothing in the United States Code or the Code of Federal Regulations remotely incompatible with a state requiring a warning label of the danger of asbestos on a product package. Under *Wyeth*, Respondents had the burden to demonstrate that compliance with state tort law on warnings on the use of hazardous products actually conflicted with federal purposes, or would make it impossible for them to comply with federal regulations. *Wyeth*, 129 S. Ct. at 1203-1204, 173 L.Ed. 69-70. The Third Circuit failed to perform this required analysis.

It is respectfully suggested that the instant case offers this Court the opportunity to provide clarity by

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16. 42 U.S.C. § 300aa-22(b)(1) (1987).

17. 15 U.S.C. § 1334(b) (2009).

18. In *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984), this Court found that even in areas of obvious field preemption, such as nuclear energy, state tort claims were not barred. Congress had to enact a specific statute in response to this Court's holding in *Silkwood* to preempt. Thus, in *Silkwood*, *Easterwood*, as well as in *Sprietsma v. Mercury Marine*, 537 U.S. 51 (2002), this Court has consistently applied the presumption against preemption, and held that in the absence of federal statutory or regulatory issuances covering the area, there was no preemption, particularly of state tort claims for injury.

dispensing with the outmoded notion of implied federal field preemption in favor of express preemption and conflict preemption.

CONCLUSION

For the reasons set forth above, Petitioners respectfully request that this Court grant their Petition for a Writ of Certiorari.

Respectfully submitted,

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