No. 10-879

IN THE
Supreme Court of the United States

GLORIA GAIL-KURNS, EXECUTRIX OF THE ESTATE OF GEORGE M. CORSON, DECEASED, ET AL.,

Petitioners,

v.

RAILROAD FRICTION PRODUCTS CORPORATION, ET AL.,

Respondents.

On Writ Of Certiorari to the United States Court of Appeals For The Third Circuit

AMICUS CURIAE BRIEF OF THE AMERICAN ASSOCIATION FOR JUSTICE IN SUPPORT OF PETITIONERS

GARY M. PAUL
American Association for Justice
777 6th St. NW, Suite 200
Washington, DC 20001
(202) 965-3500

AAJ President

JEFFREY R. WHITE
Counsel of Record
Center for Constitutional Litigation, P.C.
777 6th St. NW, Suite 520
Washington, DC 20001
(202) 944-2839
jeffrey.white@cclfirm.com

Attorney for Amicus Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

IDENTITY AND INTEREST OF *AMICUS CURIAE*

The American Association for Justice (AAJ), respectfully submits this brief as *amicus curiae*. The parties have filed letters of consent to the filing of this amicus brief.[1]

AAJ is a voluntary national bar association whose trial lawyer members primarily represent individual plaintiffs in civil suits, including personal injury actions, consumer lawsuits, and employment-related cases. Throughout its 65-year history, the association has championed the fundamental right of every American to legal recourse for redress of wrongful injury.

AAJ views the lower court's decision in this case as one that deprives railroad workers of meaningful remedy against the manufacturers of unreasonably dangerous equipment used by those workers. In addition, the federal court's decision also intrudes on the authority of a State, which most often provides legal recourse to individuals, to administer its own laws.

SUMMARY OF THE ARGUMENT

A crucial issue in this case is whether federal preemption of the field of state legislative and administrative regulation necessarily or impliedly

---

[1] Pursuant to Rule 37.6, Amicus Curiae discloses that no counsel for a party authored any part of this brief, nor did any person or entity other than Amicus Curiae, its members, or counsel make a monetary contribution to its preparation.

extends to preemption of common-law tort remedies, despite the absence of evidence that Congress so intended. The lower court held that the Locomotive Inspection Act, which requires railroads to use locomotives or parts and appurtenances thereof that are "safe to operate without unnecessary danger of personal injury," preempts Petitioner's product liability action against the manufacturer of locomotive equipment that contained asbestos and caused the death of a railroad worker.

1. The intent of Congress is the touchstone of preemption, and there is a strong presumption against preemption in the absence of clear indicia of that intent. Because the right to legal remedy for wrongful injury is a fundamental right under the Constitution, courts may not preempt such a cause of action and leave injured persons without remedy unless Congress specifically intended that result. The mere silence of Congress in a statute not directed at railroads rather than manufacturers falls far short.

In addition, 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. It would have been impossible for Congress to have intended to preempt a cause of action that did not exist.

The lower court also erred in stating that tort awards would impede Congress' goal of uniformity of railroad equipment regulation. There is no evidence or authority that uniformity was in fact an objective of the LIA. If a state remedy somehow interfered with Congress' goals under the statute, that matter

could be addressed at the appropriate time through conflict preemption. The fact that the Federal Employers' Liability Act created a cause of action for railroad workers for violation of the LIA demonstrates that Congress did not view jury verdicts for injury caused by unsafe equipment as interfering with its regulatory goals.

In fact, the LIA is construed as a supplement to the FELA, which was enacted to expand the tort remedies available to railroad workers and make it easier for injured workers to prevail.

2. This Court's decision in *Napier v. Atlantic Coast Line Railroad Co.*, 272 U.S. 605 (1926), that the LIA occupied the field, precluding state legislation to regulate railroad equipment, cannot be construed as preempting state tort remedies as well. This Court clearly intended the preemptive field to be limited to positive state law. In other instances, Congress has occupied the field of safety regulation but allowed state tort remedies to continue, tolerating any tension that might arise. Indeed, Justice Brandeis, who authored *Napier*, argued strenuously in a previous dissenting opinion that Congress, in enacting the FELA, intended that state tort remedies be available to workers not covered by the act, even as against railroads.

The lower court equated state legislative regulation with tort remedies intended "to persuade defendants to comply with a standard of care." This Court in a line of preemption cases has underscored the crucial distinction between state legislative and administrative regulations, which are direct governmental commands, and tort awards, which do not require a defendant to alter its behavior or

products, but may offer a financial incentive to take reasonable steps voluntarily. The Supremacy Clause is concerned with the exercise of state power awards, not with the indirect influences that merely motivate private voluntary actions.

Nor does this Court's statement in *Garmon v. San Diego Building Trades Council*, 320 P.2d 473 (Cal. 1958) that "regulation can be as effectively exerted through an award of damages" support preemption of Petitioner's common-law remedies. *Garmon* was not concerned with preemption of state law, but with preserving the exclusive primary jurisdiction of the National Labor Relations Board by ousting all courts, state and federal, from cases deciding unfair labor practices. In that context, the quoted statement becomes a tautology. Any state court determination whether an activity is an unfair labor practice intrudes on the NLRB's exclusive jurisdiction over such questions.

Secondly, the picketing activity at issue in *Garmon* was an unfair labor practice under state statute, but a protected activity under federal law, presenting direct conflict. In cases involving labor violence, this Court allowed state tort recoveries because there was no federal interest in protecting the activity which could outweigh the state's interest in providing a damages remedy. Finally, the *Garmon* court placed great weight on the fact that federal remedies were available so that the plaintiff would not be left without recourse.

The intent of Congress is the touchstone of preemption. Precluding state remedies for wrongful injury without clear and manifest proof that Congress specifically so intended raises the danger of

an unelected judiciary substituting its policy preference for those of the representative lawmakers. This Court should reverse the judgment of the court below.

ARGUMENT

I. IN ENACTING THE LOCOMOTIVE INSPECTION ACT FOR THE PROTECTION OF RAILROAD WORKERS, CONGRESS DID NOT INTEND TO PREEMPT INJURED WORKERS' STATE TORT REMEDIES AGAINST THE MANUFACTURERS OF UNREASONABLY DANGEROUS RAILROAD EQUIPMENT.

AAJ addresses this Court with respect to the crucial issue of when a court may hold that a federal safety statute preempts a state common law remedy for wrongful injury. In this case, the court below held Petitioner's state law cause of action preempted, not based on an express preemption provision in the statute nor on any clear indication of congressional intent, but rather because the court deemed it to lie within a field of safety regulation occupied by federal law. AAJ urges this Court to make clear that the intent of Congress remains the touchstone of preemption analysis and that courts may not set aside state remedies for wrongful injury in the absence of clear and unambiguous proof that Congress so intended.

Petitioner's decedent, a railroad employee, died of mesothelioma caused by exposure to asbestos in locomotive brake shoes and boilers. The lower court held that Petitioner's product liability cause of action against the manufacturers was preempted by

the Locomotive Inspection Act.[2] The court looked to this Court's holding in *Napier v. Atlantic Coast Line Railroad Co.*, 272 U.S. 605, 613 (1926), that "the Boiler Inspection Act, as we construe it, was intended to occupy the field." *Kurns v. A.W. Chesterton, Inc.*, 620 F.3d 392, 396-98 (3d Cir. 2010). AAJ does not dispute the validity of that decision. However, as Justice Stone accurately observed, "Every Act of Congress occupies some field, but we must know the boundaries of that field before we can say that it has precluded a state from the exercise of any power reserved to it by the Constitution." *Hines v. Davidowitz*, 312 U.S. 52, 78 (1941) (Stone, J., dissenting). In this case, the *Napier* court did not indicate any congressional intent to include state tort causes of action within the preempted field. In fact, Justice Brandeis, writing for the Court, explicitly held only "that state *legislation* is precluded" as a result of field preemption. 272 U.S. at 613 (emphasis added).

---

[2] The Locomotive Inspection Act, originally referred to as the Boiler Inspection Act, currently provides:

> 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;

49 U.S.C. § 20701. References in the text to either the Locomotive Inspection Act (LIA) or Boiler Inspection Act (BIA) refer to this statutory provision.

AAJ submits that, on several important grounds, the lower court's authority and reasoning for denying Petitioner's state law cause of action was woefully insufficient. In fact, Congress clearly did *not* intend to eliminate Petitioner's product liability cause of action.

A. The Strong Presumption Against Preemption of State Tort Remedies Prevails in the Absence of Clear and Unambiguous Proof That Congress Intended Not Only to Preempt the Field of Regulation But Also Specifically to Preclude State Remedies for Injury.

The court below acknowledged that the Locomotive Inspection Act "itself is silent as to any preemptive effect." 620 F.3d at 396. The court acknowledged this Court's fundamental principles that "[t]he purpose of Congress is the ultimate touchstone in every preemption case," *id.* (quoting *Altria Group, Inc. v. Good*, 555 U.S. 70, 76 (2008)), and that "there is a presumption against field preemption unless congressional intent to preempt is clear and manifest." *Id.* (citing *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992)). Nevertheless, the lower court gave those principles little effect, substituting instead its own view that the LIA should preempt state law. The court did not inquire whether Congress actually intended such a result, but instead ventured that preemption of state law would be a sensible way to avoid potential conflict with federal regulation:

> [O]ne can easily understand how a state law or action which regulates whether a

> locomotive or any of its parts and appurtenances "are in proper condition and safe to operate" could conflict with federal safety regulations.

Id.

AAJ argues in Part II below that there "is no general, inherent conflict" between federal safety regulations and damage awards against the makers of unreasonably dangerous products. *See Cipollone*, at 505. Even prior to that argument, however, there are powerful reasons why Congress generally does not intend to preempt state common law remedies and may "tolerate whatever tension" there may arise between such remedies and federal occupation of a field of safety regulation. *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 256 (1984).

Of vital importance, of course, is the states' strong interest in developing and preserving appropriate avenues for legal redress for victims of wrongful injury. *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 487-89 (1996). This Court emphasized:

> [Because] the States are independent sovereigns in our federal system, we have long presumed that Congress does not cavalierly preempt *state-law causes of action*.

Id. at 485 (emphasis added).

In *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947), this Court rejected a claim of field preemption where that was not the clear purpose of Congress:

> [Where] Congress legislated here in a field which the States have traditionally occupied . . . we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the *clear and manifest purpose* of Congress."

Id. at 230 (emphasis added).

Product liability is indisputably a field historically and traditionally occupied by the states.

It is not concern for federalism alone that forms the basis for the very strong presumption that Congress does not intend to preempt state tort remedies, even when it occupies a field of safety regulation. The right to a remedy for wrongful injury is a fundamental right of Americans, citizens both of state and national sovereigns, under the Constitution.

The Founders were certainly familiar with the bedrock common-law principle: "Every right, when withheld, must have a remedy, and every injury its proper redress" in "a legal remedy by suit or action at law." William Blackstone, *3 Commentaries on the Laws of England* *23 & *109 (1765). Justice Powell wrote for this Court in *Ingraham v. Wright*, 430 U.S. 651 (1977), that the Founders intended to incorporate into the Due Process Clause those "essential" rights which "Blackstone catalogued among the 'absolute rights of individuals.'" *Id.* at 661. They consist of the rights to personal liberty, personal property, and personal security, including the right against wrongful injury to the person.

William Blackstone, *1 Commentaries on the Laws of England* *120-34 (1765). Indeed, protection of those absolute rights is "the principal aim of society." *Id*. at *120.

Chief Justice John Marshall, echoing Blackstone, restated this principle for Americans:

> The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection.

Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803). Following the adoption of the Fourteenth Amendment, this Court pronounced it "the duty of every State to provide, in the administration of justice, for the redress of private wrongs" under the Due Process Clause of the Fourteenth Amendment. *Missouri Pac. Ry. Co. v. Humes*, 115 U.S. 512, 521 (1885). More recently, this Court recognized that "a separate and distinct right to seek judicial relief for some wrong" is a fundamental right grounded in multiple provisions of the Constitution of the United States. *Christopher v. Harbury*, 536 U.S. 403, 415 & n.12. (2002).

Even where Congress has intended to preempt state legislation or administrative regulation of an activity, it must not be assumed that Congress also intended to eliminate the common-law causes of action for compensation for wrongful injury caused by that activity. *Wyeth v. Levine*, 555 U.S. 555, ___, 129 S. Ct. 1187, 1194-95 & n.3 (2009). This principle

holds true when Congress has occupied an entire field of safety regulation.

For example, this Court in *Pacific Gas & Electric Company v. State Energy Resources Conservation & Development Commission*, 461 U.S. 190, 212 (1983), held that Congress intended to occupy the field of safety regulation of nuclear power facilities. Nevertheless, the following year this Court held that the occupied field did not extend to state tort actions for injury caused by negligence of those facilities. *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984). Taking note of "Congress' failure to provide any federal remedy for persons injured," Justice White, writing for the majority, concluded that Congress could not have intended to preempt state tort causes of action. "It is difficult to believe that Congress would, without comment, remove all means of judicial recourse for those injured by illegal conduct." *Id.* at 251. Justice Blackmun, in his dissent, agreed with the majority on this point: "The absence of federal regulation governing the compensation of victims . . . is strong evidence that Congress intended the matter to be left to the States." "[I]t is inconceivable that Congress intended to leave victims with no remedy at all. . . ." *Id.* at 264 & n.7 (Blackmun, J., dissenting).[3]

---

[3] It is no answer that "federal law offers recourse to workers exposed to asbestos under the Federal Employer's Liability Act." *Kurns*, 620 F.3d at 400. In both *Medtronic* and *Wyeth* this Court denied preemption of plaintiffs' product liability actions, emphasizing the strong presumption that Congress would not leave injured plaintiffs with no recourse against manufacturers of dangerous drugs or medical devices, even though negligence causes of action against physicians or other health care providers were also available to them. *See*

Even where Congress has expressly preempted state legislation and regulation, this Court has required a more specific showing of intent to preempt product liability tort remedies. In *Cipollone*, for example, the Court held that the Federal Cigarette Labeling and Advertising Act, enacted in 1965, expressly preempted only state legislation and administrative regulation, but not product liability actions. 505 U.S. at 519. The Court further determined that the statute as amended in 1969, based on the expressed intent of Congress, preempted some but not all causes of action. *Id*. at 530-31. *See also Wyeth*, 129 S. Ct. at 1199-1201 (despite FDA's established and broad authority over drug warning labels, plaintiff's product liability action was not preempted in the absence of specific indication that Congress so intended, particularly where Congress provided no federal damages remedy); *Sprietsma v. Mercury Marine, a Div. of Brunswick Corp*., 537 U.S. 51, 69 (2002) (The Federal Boat Safety Act "might be interpreted as expressly occupying the field with respect to state positive laws and regulations but its structure and framework do not convey a 'clear and manifest' intent to go even further and implicitly pre-empt all state common law relating to boat manufacture.").

Wyeth, at 1191. The crucial fact remains that this Court presumes that Congress does not preempt legal recourse against a wrongdoer regardless of whether the injured person might assert a separate cause of action against a separate wrongdoer. It is simply not credible that Congress, by its mere silence in legislation directed at the liability of railroads, intended so dramatic a result as to bestow immunity upon the manufacturers of railroad equipment.

B. Congress' Purpose in Enacting the Boiler Inspection Act Was Not to Insure Uniformity in Raiload Equipment.

The basis advanced by the lower court for preempting product liability lawsuits under the LIA was that, "Congress' goal of uniform railroad equipment regulation would clearly be impeded by state product liability suits against manufacturers." 620 F.3d at 398. The court below did not base its assessment of congressional purpose on any statutory text, legislative history or guidance from this Court that clearly indicated Congress' intent to preempt common law causes of action against the manufacturers of railroad equipment. Instead, the court looked to decisions by two other appellate courts who declared their discovery, more than 80 years after the fact, that Congress in 1911 preempted product liability lawsuits. 620 F.3d at 398 (citing *Law v. Gen. Motors Corp.*, 114 F.3d 908 (9th Cir. 1997), and *Oglesby v. Del. & Hudson Ry. Co.*, 180 F.3d 458 (2d Cir. 1999)). Nor did those courts rely on legislative text or legislative history. Instead, they found the "virtue of uniform national regulation" to be "self-evident," *Law*, at 910, and speculated that "the uniformity that is a goal of the BIA" would "be accomplished best by including the manufacturer within the statute's [preemptive] coverage." *Oglesby*, at 462.

Such an attempt to invent a legislative intent does violence to the principle that courts must be guided by Congress' actual intention as their touchstone in preemption analysis. This Court rejected a similar argument in *Medtronic* where the Court observed that Congress enacted the Medical

Device Amendments in "response to the mounting consumer and regulatory concern" over widespread injuries caused by unsafe devices such as the Dalkon Shield. 518 U.S. at 476. The Court stated that Medtronic's contention that Congress intended to preempt all common law actions by the victims of unsafe devices was "not only unpersuasive, it is implausible," and "spectacularly odd." *Id*. at 487 & 491. Moreover, it would "have the perverse effect of granting complete immunity from design defect liability to an entire industry that, in the judgment of Congress, needed more stringent regulation." *Id*.

If tort judgments in some fashion were to pose a threat to the effectiveness of federal safety regulation under the LIA, that threat can be removed as a matter of conflict preemption.[4] As this Court pointed out in *Rice*, a field preemption case,

> [P]ossibilities of conflict and repugnancy are conjured up. . . . But it will be time to consider such asserted conflicts between the State and Federal Acts

---

[4] It is also worth noting that the much-feared patchwork or "crazy-quilt" of fifty inconsistent state standards for defective products is vastly overstated. Although there is some variation among the states with respect to defenses or damages, there is general agreement on the standard for an unreasonably dangerous product. *See, e.g.*, James A. Henderson, Jr. & Aaron D. Twerski, *Achieving Consensus on Defective Product Design*, 83 Cornell L. Rev. 867, 887 (1998) (the "overwhelming majority" of courts apply the same "risk-utility approach in determining design defects.").

> when and if they arise. Any such objections are at this stage premature.

331 U.S. at 237.

Finally, the contention that Congress intended to eliminate tort remedies because jury verdicts would undermine the uniformity of federal regulations is blatantly contradicted by the FELA itself, which, as the court below indicated, authorizes a negligence cause of action for violation of the LIA. 620 F.3d at 400. The LIA "simply outline[s] a general standard which may be more specifically articulated in rules" and which may provide the basis for a jury verdict of negligence against the railroad. Thus, the FELA places in the hands of juries the question of whether locomotives and their appurtenances "are in proper condition and safe to operate without unnecessary danger of personal injury." *See Urie v. Thompson*, 337 U.S. 163, 190-91 (1949). Congress clearly was not concerned that jury verdicts might undermine the uniformity of railroad safety regulations.

In addition, FELA displaces state causes of action only for claims by railroad employees against their employers. *See Norfolk S. Ry. v. Sorrell*, 549 U.S. 158, 165 (2007). Outside of that exclusive statutory remedy, the states are "at liberty to afford any appropriate remedy." *Tipton v. Atchison, Topeka & Santa Fe Ry.*, 298 U.S. 141, 148 (1936). This Court has recognized that such remedies may include state-law causes of action by non-employees. *See, e.g., Crane v. Cedar Rapids & Iowa City Ry. Co.*, 395 U.S. 164 (1969); *Fairport, Painesville & E. R.R. Co. v. Meredith*, 292 U.S. 589 (1934). To hold that uniformity of regulation must be shielded from the

impact of differing tort outcomes would require this Court to overturn such longstanding precedents. Surely congressional intent to confer a broad immunity from liability on a manufacturing sector, must be based on more than congressional silence in a statute dealing solely with the liability of railroads.

C. The Purpose of Congress Was to Expand the Availability of Tort Remedies for Injured Railroad Workers.

The true intent of Congress in enacting the LIA and related statutes was to make it easier for workers and their families to recover for the wrongful injuries and deaths of railroad employees. Preempting their state law causes of action against the makers of unsafe equipment is inconsistent with this purpose.

This Court has made clear that the Boiler Inspection Act and the Safety Appliance Acts, are not to be viewed in isolation. They "are substantively if not in form amendments to the Federal Employers' Liability Act." *Urie v. Thompson*, 337 U.S. 163, 189 (1949). The LIA "does not purport to confer any right of action upon injured employees," but rather proof of violation of the LIA is sufficient to show negligence as a matter of law under the FELA. *Id*. at 188. As this Court concluded, Congress enacted the LIA with "the purpose and effect of facilitating employee recover, *not of restricting such recovery or making it impossible*." *Id*. at 189 (emphasis added).

The growth of the railroads brought progress and prosperity to Americans in all parts of the country, *see* Gary T. Schwartz, *Tort Law and the*

Economy in Nineteenth-Century America: A Reinterpretation, 90 Yale L.J. 1717, 1748 (1981). However, the "dark and bitter" price of progress was the ever-growing numbers of workers killed and injured by huge machines that lacked basic safety protections. Melvin L. Griffith, *The Vindication of a National Public Policy Under the Federal Employers' Liability Act*, 18 Law & Contemp. Probs. 160, 163 (1953). "In the second half of the nineteenth century, the United States experienced an accident crisis like none the world had ever seen and like none any Western nation has witnessed since." John Fabian Witt, *Toward a New History of American Accident Law: Classical Tort Law and the Cooperative Firstparty Insurance Movement*, 114 Harv. L. Rev. 690, 694 (2001).

The rates of death and serious injury to railroad workers were astronomical. *See generally* Walter Licht, *Working for the Railroad* 190-200 (1983). In 1890 one railroad worker in every three hundred was killed on the job. Among brakemen, one in every hundred died in work accidents *each year*. Michael L. Rustad & Thomas H. Koenig, *Taming the Tort Monster: the American Civil Justice System As a Battleground of Social Theory*, 68 Brook. L. Rev. 1, 27 & n.167 (2002). The Interstate Commerce Commission reported that in 1908, the year in which Congress enacted the FELA, injuries and deaths to trainmen totaled 281,645. 45 Cong. Rec. 4034 (1910).

American courts at that time offered little in the way of either justice or compensation for workers and their families who were ruined victims of careless railroad companies. The defenses of contributory negligence, assumption of the risk, and the fellow servant doctrine were devised and

promoted by the railroads' legal departments and adopted by courts who deemed it necessary to shield America's fledgling industries from the burdens of liability. *See*, Lawrence M. Friedman, *A History of American Law* 409-11 (1973); Morton J. Horwitz, *The Transformation of American Law*, *1870-1960* 85-89 (1977); Stuart Speiser, *Lawsuit* 120, 122, 124-26 (1980). AAJ's founder noted that, prior to workers's compensation laws, approximately 80 percent of workers and workers' families lost their tort actions against their employers. Samuel B. Horovitz, *Assaults and Horseplay Under Workmen's Compensation Laws*, 41 Ill. L. Rev. 311, 311 (1946), *cited in Simms v. Ruby Tuesday, Inc.*, 704 S.E.2d 359, 361 (Va. 2011).

A broad survey of reported tort decisions confirms that the common law courts of the late 19th Century were notably hostile to claims by injured employees, especially railroad workers. Gary T. Schwartz, *Tort Law and the Economy in Nineteenth-Century America: A Reinterpretation*, 90 Yale L.J. 1717, 1719-20 (1981). "Workers disabled in accidents and the widows and families of deceased railwaymen faced a grim and uncertain future." Walter Licht, *supra*, at 197.

Congress responded in 1908 by passing what has become the current Federal Employers Liability Act. Its purpose was most expansively stated by the Senate Committee on the Judiciary in a report accompanying an amendment to the Act in 1910:

> The tremendous loss of life and limb on the railroads of this country is appalling. . . .

> It was the intention of Congress . . . to shift the burden of the loss resulting from these casualties from "those least able to bear it" and place it upon those who can, as the Supreme Court said in [*St. Louis & Iron Mountain & Southern Railway Co.. v. Taylor*, 210 U. S. 281, 295-296 (1908)], "measurably control their causes." . . .
>
> This public policy which we now declare is based upon the *failure of the common-law rules* as to liability for accident, to meet the modern industrial conditions.

S. Rep. No. 432 (1910); 45 Cong. Rec. 4034, 4041 (1910) (emphasis added).

The House Committee on the Judiciary similarly stated:

> It is manifest . . . that the purpose of the statute was to *extend and enlarge the remedy* provided by law to employees engaged in interstate commerce in cases of death or injury to such employees while engaged in such service.

H.R. Rep. No. 513 (1910) (emphasis added). This Court upheld the statute's validity. *Second Employers' Liability Cases* [*Mondou v. New York, N.H. & H.R. Co.*], 223 U.S. 1 (1912).

Justice Louis Brandeis, a decade prior to authoring this Court's decision in *Napier*, argued strenuously that Congress passed the FELA with the intent of restoring the tort remedies of railroad

workers that the courts had seriously undermined. *N.Y. Cent. R. Co. v. Winfield*, 244 U.S. 147, 158-65 (1917) (Brandeis, J., dissenting).

The means Congress chose for accomplishing this purpose was to enable workers to present their cases to juries of their fellow Americans, overcoming judge-made common law barriers and judicial bias in favor of the railroads. *See Rogers v. Missouri Pac. R.R. Co.*, 352 U.S. 500, 508-09 (1957). For that reason, Congress made the right to trial by jury "part and parcel" of the remedy under FELA. *Dice v. Akron, Canton & Youngstown R.R. Co.*, 342 U.S. 359, 363 (1952). This Court found it "clear that the general congressional intent [behind FELA] was to provide liberal recovery for injured workers." *Kernan v. American Dredging Co.*, 355 U.S. 426, 432 (1958).

In sum, the purpose of Congress in enacting the FELA and the Locomotive Inspection Act, for which the FELA provides a federal cause of action was to make it easier for railroad workers to bring and prevail in tort lawsuits for employment-related injuries. FELA is the exclusive remedy for the injured railroad employee against the employer. *Norfolk S. Ry. v. Sorrell*, 549 U.S. 158, 165 (2007). But there is no indication that Congress intended to restrict or eliminate state causes of action by railroad workers against third parties who may be responsible for the worker's injury.

II. THIS COURT'S DECISION THAT THE LIA OCCUPIES THE FIELD OF RAILROAD EQUIPMENT REGULATION DOES NOT ENCOMPASS PREEMPTION OF STATE TORT REMEDIES.

A. The Occupied Field Recognized By This Court in *Napier* Does Not Extend to Tort Remedies for Death and Injury.

In *Napier*, this Court held that Congress in enacting the LIA "intended to occupy the field" of railroad equipment so as to preclude state legislation." 272 U.S. at 607. The lower court, however, expanded the scope of the preemptive field to encompass tort lawsuits. There is no basis in *Napier* to support such a drastic federal intrusion into a traditional area of state law. Indeed, a fair reading of this Court's decision argues against such preemption.

First, there is no indication that this Court employed the term "legislation" casually or in a manner that might impliedly include common law causes of action. A decade earlier, the Court similarly held that in enacting the Safety Appliance Acts, "Congress has so far *occupied the field of legislation* relating to the equipment of freight cars with safety appliances as to supersede existing and prevent further *legislation* on that subject." *S. Ry. Co. v. R.R. Comm'n of Ind.*, 236 U.S. 439, 447 (1915) (emphasis added). *See also Gilvary v. Cuyahoga Valley Ry. Co.*, 292 U.S. 57, 60 (1934) (noting that congressional power "excludes and supersedes state *legislation*," citing *Napier*). It was also well-established that where Congress has occupied a limited field of regulation, "the 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 implied." *Townsend v. Yeomans*, 301 U.S. 441, 454 (1937); *Savage v. Jones*, 225 U.S. 501, 533 (1912) (same).

More recently, this Court has indicated that deference to Congress' responsibility for balancing important but competing priorities requires that courts preserve state tort remedies, even where Congress has occupied the regulatory field. In *Silkwood*, for example, this Court found no inconsistency between "vest[ing] the NRC with exclusive regulatory authority over the safety aspects of nuclear development while at the same time allowing plaintiffs like Silkwood to recover for injuries caused by nuclear hazards." 464 U.S. at 258. Rather, "Congress intended to rely solely on federal expertise in setting safety standards, and to rely on . . . juries to remedy whatever injury takes place," *Id.* at 264. There is no basis for preemption where Congress has "decided to stand by both concepts and to tolerate whatever tension there [is] between them." *Wyeth*, 129 S. Ct. at 1200 (quoting *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 166-67 (1989)).

Finally, to the extent that any ambiguity exists regarding the boundaries of the federally occupied field described by Justice Brandeis for this Court in *Napier*, it is clear from Justice Brandeis' strong dissent in *New York Central Railroad Co. v. Winfield*, 244 U.S. 147 (1917), that he did not intend to include common law remedies within that field.

This Court held in *Winfield* that an injured railroad worker, who could not recover under FELA

because his employer was not negligent, was barred from seeking recovery under the state workers compensation statute. *Id*. at 150-51.

Justice Brandeis, in dissent, wrote that the FELA was enacted in reaction to the development of such judicial doctrines as contributory negligence, assumption of the risk, and the fellow servant's doctrine, which "practically abolished the liability of employers to employees; and in so doing they worked great hardship and apparent injustice. The wrongs suffered were flagrant; the demand for redress insistent; and the efforts to secure remedial legislation widespread." *Id.* at 160. However, the FELA at that time excluded many workers, leading Justice Brandeis to declare:

> The scope of the act is so narrow as to preclude the belief that thereby Congress intended to deny to the states the power to provide compensation or relief for injuries not covered by it.

Id at 163-64. He added:

> It was not the purpose of the act to deny to the states the power to grant the *wholly new right* to protection or relief in the case of injuries suffered otherwise than through fault of the railroads.

Id. at 164 (emphasis in original).

The only proper reading of *Napier's* holding is that the LIA preempts the limited field of state legislation requiring certain safety standards for locomotives and their appurtenances. This Court's

opinion cannot reasonably be construed as preempting state tort remedies against third parties and the author of that opinion clearly did not intend such an interpretation.

B. State Tort Remedies That Afford Compensation for Tortious Injury Are Not Equivalent to State Legislation or Administrative Regulation.

The court below nevertheless held that occupation of the field of railroad equipment regulation necessarily preempts not only state legislative and administrative regulation, but also product liability lawsuits, "the purpose of which is, in part, to persuade defendants to comply with a standard of care established by the state." 620 F.3d. at 398. This Court has made clear that federal preemption is indeed concerned with setting aside positive state commands, but does not set aside damage awards that merely "persuade" manufacturers to make reasonably safe products.

This Court has stated that the "common-sense view of the word 'regulates' would lead to the conclusion that in order to regulate insurance, a law must not just have an impact on the insurance industry, but must be specifically directed toward that industry." *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 50 (1987). Tort law lays down broadly applicable general principles, not specific standards. This Court in *Pilot Life* concluded that tort law is not a state law which "regulates insurance." *Id*. Product liability, for example, is premised on the obligation of all product suppliers to refrain from marketing

products that are unreasonably dangerous. *See* Restatement (Second) of Torts § 402A (1965).

The crucial distinction for purposes of preemption analysis is that regulation is a direct command by the government to an individual or company to conform its conduct (or its product) to certain requirements. A tort judgment, by contrast, does no more than require that the individual or company pay for harm caused by its failure to act reasonably (or market its product in reasonably safe condition). It does not actually require the defendant to alter its conduct or its product. *See* Philip H. Corboy & Todd A. Smith, *Federal Preemption of Product Liability Law: Federalism and the Theory of Implied Preemption*, 15 Am. J. Trial Adv. 435, 455-57 (1992); Ralph Nader & Joseph A. Page, *Automobile-Design Liability and Compliance With Federal Standards*, 64 Geo. Wash. L. Rev. 415, 437-39 (1996).

A compensatory award is not equivalent to an administrative penalty merely because it may "persuade" the defendant to alter its conduct. By holding otherwise, 620 F.3d at 398, the lower court lost sight of the central concern of the law of preemption: the division of power between the state and national government.

A manufacturer may well be influenced by liability to change its product, but it is not required to do so. The product may already have been taken off the market or replaced by a newer, safer model. The manufacturer may decide to address the hazard by a warning or by a design change not considered by the jury. It could also rationally decide, balancing the probability of future serious harm against the cost of

eliminating the risk, simply to compensate any future victims. Stephen Breyer, *Regulation and Its Reform* 175 (1982). In fact, many manufacturers sued for injury caused by their products do *not* change the product's design. A survey of risk managers of Fortune 1000 corporations with actual product liability experience reported that as a result over 35 percent had improved their product warnings and/or instructions and over 30 percent had improved the safety of their designs. E. Patrick McGuire, *The Impact of Product Liability* 18 (Conference Bd. 1988), summarized in W. Page Keeton, *et al.*, *Products Liability and Safety—Cases and Materials* 1033-34 (2d ed. 1989).

This is precisely how tort law is designed to operate. The law requires socially useful activities to pay their own way by internalizing the costs of the harms they cause. It falls to private individuals to make the decisions required to minimize those costs, and market forces cause these decisions to result in the most efficient level of operations. William M. Landes & Richard A. Posner, *The Positive Economic Theory of Tort Law*, 15 Ga. L. Rev. 851, 871-77 (1980-1981).

Federal law does not preempt private decisions. As Justice Blackmun explained:

> [The manufacturer] may decide to accept damages awards as a cost of doing business and not alter its behavior in any way. Or, by contrast, it may choose to avoid future awards . . . through a variety of alternative mechanisms, . . . The level of choice that a defendant retains in shaping its own

> behavior distinguishes the indirect regulatory effect of the common law from positive enactments such as statutes and administrative regulations.

Cipollone, 505 U.S. at 536-37 (Blackmun, J., concurring in part, dissenting in part).

Achieving safety by government regulation is a much different regime, premised on the belief that the marketplace cannot achieve the level of safety society demands. Steven P. Croley & Jon D. Hanson, *Rescuing the Revolution: The Revived Case for Enterprise Liability*, 91 Mich. L. Rev. 683, 736 (1993). Regulators therefore command manufacturers to do that which they would not do voluntarily.

In his classic exposition, Judge Calabresi contrasts the indirect influence exerted on the market by tort law ("general deterrence") with governmental regulatory mandates ("specific deterrence"). *See* Guido Calabresi, *The Costs of Accidents* 68-129 (1970). As one scholar summarized:

> [U]nder a general deterrence regime, manufacturers, not government officials, make decisions about product safety. . . . In contrast, specific deterrence mandates a particular choice determined by the legislature or an administrative agency. *It is a raw exercise of state power*.

Richard C. Ausness, *Cigarette Company Liability: Preemption, Public Policy, and Alternative Compensation Systems*, 39 Syracuse L. Rev. 897, 927

(1988) (emphasis added). *See also* Steven Shavell, *Liability for Harm Versus Regulation of Safety*, 13 J. Legal Studies 357, 359 (1984) (explaining that administrative regulation is a centralized system of government control, while tort law is essentially a market-based system). The Supremacy Clause is concerned with the exercise of government power, not with the private decisions of individuals.

This Court has closely adhered to this distinction. In *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984), the plaintiff sought personal injury damages for plutonium contamination of a worker allegedly due to the defendant's negligent operation of a federally licensed nuclear facility. Justice White, writing for the majority, reaffirmed the Court's position that the Atomic Energy Act preempted the field of safety regulation of nuclear power facilities. *Id.* at 249. Nevertheless, congressional silence with respect to common law actions indicated to the Court that "Congress assumed that traditional principles of state tort law would apply with full force." *Id.* at 255. Justice Blackmun, dissenting, nevertheless agreed on this point:

> Whatever compensation standard a State imposes, whether it be negligence or strict liability, a licensee remains free to continue operating under federal standards and to pay for the injury that results. . . . Compensatory damages therefore complement the federal regulatory standards, and are an implicit part of the federal regulatory scheme.

Silkwood, 464 U.S. at 264 (Blackmun, J., dissenting).

This Court subsequently explained:

> The effects of *direct* regulation on the operation of federal projects are significantly more intrusive than the *incidental* regulatory effects of such an additional award provision. Appellant may choose to disregard Ohio safety regulations and simply pay an additional workers' compensation award if an employee's injury is caused by a safety violation. We believe Congress may reasonably determine that *incidental regulatory pressure is acceptable, whereas direct regulatory authority is not*.

Goodyear Atomic Corp. v. Miller, 486 U.S. 174, 185-86 (1988) (emphasis added). Similarly, in *English v. General Electric Co.*, 496 U.S. 72, 85 (1990), the Court stated:

> We recognize that the claim for intentional infliction of emotional distress at issue here may have some effect on these decisions, because liability for claims like petitioner's will attach additional consequences to retaliatory conduct by employers. . . . Nevertheless, we believe that this effect is neither direct nor substantial enough to place petitioner's claim in the preempted field.

More recently, this Court stated:

> An occurrence that merely motivates an optional decision does not qualify as a requirement. The Court of Appeals was therefore quite wrong when it assumed that any event, such as a jury verdict, that might "induce" a pesticide manufacturer to change its label should be viewed as a requirement. . . .
>
> A requirement is a rule of law that must be obeyed; an event, such as a jury verdict, that merely motivates an optional decision is not a requirement.

Bates v. Dow Agrosciences, LLC, 544 U.S. 431, 443-45 (2005).

Product liability is a particularly clear example of the indirect impact of remedies on market forces. Because real-world markets do not provide perfect consumer information, manufacturers are able to "externalize" the injury costs of their products, forcing consumers, workers, taxpayers, and society generally to subsidize unsafe products by bearing part of the cost of the injuries they cause. This places the manufacturer who invests in safety at a competitive disadvantage. Product liability rules, by assessing risk retrospectively, compensate for imperfect consumer information. Steven P. Croley & Jon D. Hanson, *Rescuing the Revolution: The Revived Case for Enterprise Liability*, 91 Mich. L. Rev. 683, 707-08 (1993). *See also* W. Kip Viscusi, *Reforming Products Liability* 66 (1991) ("The purpose of products liability is to fill the gaps left by market imperfections and to replicate the incentives that would have been generated had markets been functioning perfectly.").

Product liability remedies therefore reflect a policy of making dangerous products pay their own way, that is, internalizing costs to achieve an efficient level of manufacturing operations. William M. Landes & Richard A. Posner, *The Positive Economic Theory of Tort Law*, 15 Ga. L. Rev. 851, 871-77 (1980-1981). Viewed another way, the law requires the product's purchase price to reflect the costs of injuries so the "cheapest cost avoider" makes the most efficient allocation of resources. *See* Stephen G. Breyer, *Administration and Its Reform* 175 (1982) (favoring the rule that is "likely to place costs on the party best able to avoid them").

Highly persuasive is this Court's decision in *New York Conference of Blue Cross v. Travelers Insurance*, 514 U.S. 645 (1995). The Court held that a state surcharge on hospital bills covered by commercial insurers are not preempted by 29 U.S.C. §144(a), which preempts state law that "relate to any employee benefit plan." The charges made nonprofit insurance "more attractive (or less unattractive) as insurance alternatives and thus have an indirect economic effect on choices made by insurance buyers, including ERISA plans." *Id.* at 659. Nevertheless, "laws with only an indirect economic effect on the relative costs of various health insurance packages" are not preempted. *Id*. at 662.

C. This Court's *Garmon* Decision Does Not Support the Preemption of Tort Damage Awards As Necessarily Equivalent to Preempted State Regulation.

The court below held that preemption of the field of railroad equipment regulation by legislation,

as announced in *Napier*, necessarily preempts plaintiff's product liability lawsuit as well. The court looked to *Law* and *Oglesby*, both of which cited *San Diego Building Trades Council, Millmen's Union, Local 2020 v. Garmon*, 359 U.S. 236 (1959), for the proposition that "regulation can be as effectively exerted through an award of damages as through some form of preventive relief." *Id*. at 247. AAJ submits that the *Garmon* dictum was uttered in a different context and is simply irrelevant to the preemption question presented in this case.

1. Garmon's concern was not federal preemption of state substantive law, but the exclusive jurisdiction of the NLRB over unfair labor practices.

In *Garmon*, an employer filed suit in California state court against labor unions that had picketed plaintiff's lumber business. The court awarded damages under a state statute authorizing damages for unfair labor practices. The Supreme Court reversed, holding that the claim should have been filed first with the National Labor Relations Board. Justice Frankfurter, writing for the majority, announced what has become known as the *Garmon* rule: "When an activity is arguably subject to section 7 [concerted activities] or section 8 [unfair labor practices] of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board." *Id*. at 245.

Congress did not preempt state regulation of certain labor activities, but rather completely deprived the courts—state and federal—of jurisdiction in favor of the NLRB, the "special tribunal" that Congress set up for this purpose. *Id*. at 242.

As this Court later explained, *Garmon* was chiefly concerned with establishing the remedial scheme provided by the National Labor Relations Board "by ensuring that the primary responsibility for interpreting and applying this body of law remain[ed] with the NLRB. . . . based on the primary jurisdiction rationale." *Brown v. Hotel & Rest. Emps. & Bartenders Int'l Union Local 54*, 468 U.S. 491, 502 (1984). *See also Retail Clerks Int'l Ass'n, Local 1625, AFL-CIO v. Schermerhorn*, 375 U.S. 96 (1963) ("*Garmon*, however, does not state a constitutional principle; it merely rationalizes the problems of coexistence between federal and state regulatory schemes in the field of labor relations; and it did not present the problems . . . whether the Congress had precluded state enforcement of select state laws.").

Thus *Garmon* involved the ouster of both federal and state courts from *any* regulation of certain labor activities. When considered in the context of preemption of state law, the quoted statement becomes a tautology. Clearly a state remedy may exert some influence on private conduct, albeit indirect. *Garmon*, however, does not address the distinction between direct state mandates, which this Court has stated may be preempted, and indirect financial incentives, which may not.

For that reason, this Court has stated, preemption of the field under the National Labor Relations Act does not extend to tort causes of action that have only a "peripheral" effect on the federal regulatory scheme and which further state interests in protecting their citizens. *Farmer v. Carpenters*, 430 U.S. 290, 296-97 (1977). In such cases, this Court indicated, state tort remedies are not deemed to fall within the preempted field, due to the State's

interest in protecting the health and well-being of its citizens. *Id.* at 302-03. *See also English v. Gen. Elec. Co.*, 496 U.S. 72, 86 n.8 (1990) (Reliance on *Garmon* "to argue that petitioner's [tort] claim falls within the preempted field" was "misplaced.")

2. Garmon addressed the special problem of state potential conflict between federal and state statutory law, not field preemption of common law remedies.

The award of damages against the unions in *Garmon* was based on the California court's determination that the union's peaceful picketing was an unfair labor practice in violation of California statute, not the common law. *See Garmon v. San Diego Bldg. Trades Council*, 320 P.2d 473, 481 (Cal. 1958). This Court reversed, holding that the union activity was arguably protected by federal labor law and that, under the comprehensive regime Congress established to govern labor relations, courts must yield to the "exclusive primary competence" of the NLRB to make that determination. 359 U.S. at 245.

Justice Frankfurter, writing for the majority in *Garmon*, made this clear, distinguishing a line of cases which upheld state damage awards in cases involving labor violence, which is clearly not a protected labor activity and where the states had a strong interest in making the tort remedy available.

> It is true that we have allowed the States to grant compensation for the consequences, as defined by the traditional law of torts, of conduct marked by violence and imminent threats to the public order. . . . State

> jurisdiction has prevailed in these situations because the compelling state interest, in the scheme of our federalism, in the maintenance of domestic peace is not overridden in the absence of clearly expressed congressional direction.

Id. at 247-48 (citations omitted).

In this case, the manufacture and sale of unreasonably dangerous railroad equipment containing asbestos is not a federally protected activity, while the states have a clear interest in providing legal redress and compensation for their citizens. *Garmon* thus does not support preemption of Petitioner's cause of action.

3. Plaintiff in Garmon was not wholly deprived of a remedy for injury.

The *Garmon* Court carefully conditioned its ouster of state court jurisdiction to award compensation on the availability of alternative federal remedies. 359 U.S. at 243. Justice Harlan, concurring, cautioned that, where Congress has not provided such a remedy, "there is no ground for concluding that . . . [state] liabilities for tortious conduct have been eliminated." *Id*. at 252 (Harlan, J., concurring) (quoting *United Const. Workers, Affiliated With United Mine Workers of Am. et al. v. Laburnum Const. Corp.*, 347 U.S. 656, 665 (1954)).

* * *

In this case, despite the fact that Congress occupied the field with respect to safety regulation of railroad equipment, there is no indication that

Congress also intended to eliminate the state tort remedies of workers against the manufacturers of unsafe equipment. The lower court's preemption of those remedies rests on little more than the court's own belief that it would have been wise and sensible for Congress to do so.

This Court has cautioned that in addressing preemption issues, "courts should not assume the role which our system assigns to Congress." *Pacific Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n.*, 461 U.S. 190, 223 (1983). Careful attention to the *actual* intent of Congress is the essential touchstone of preemption. The lower court erred in denying Petitioner her state remedy in the absence of clear and unambiguous proof that Congress intended that result. To hold otherwise, "inevitably invites an unelected federal judiciary to make decisions about which state policies it favors and which it dislikes." *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 546 (1985).

CONCLUSION

For the above reasons, the decision of the court below should be reversed.

Respectfully submitted,

Jeffrey R. White
Counsel of Record
Center for Constitutional Litigation, P.C.
777 6th St. NW, Suite 520
Washington, DC 20001
(202) 944-2839
jeffrey.white@cclfirm.com
Attorney for Amicus Curiae

August 19, 2011