No. 10-879

IN THE

Supreme Court of the United States

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

v.

RAILROAD FRICTION PRODUCTS CORPORATION AND VIAD CORPORATION,
Respondents.

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

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

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

INTEREST OF *AMICUS CURIAE* [1]

Amicus curiae Association of American Railroads (AAR) is an incorporated, nonprofit trade association representing the nation's major freight railroads,

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[1] The parties have filed letters with the Court consenting to the filing of *amicus* briefs. Pursuant to Rule 37.6, AAR states that no person or entity other than AAR has made monetary contributions toward this brief, and no counsel for any party authored this brief in whole or in part.

many smaller railroads, Amtrak, and several commuter railroads. AAR's members operate approximately 76 percent of the rail industry's line haul mileage, produce 96 percent of its freight revenues, and employ 93 percent of rail employees. AAR frequently appears before Congress, administrative agencies and the courts on behalf of its members on matters of significant interest to the railroad industry. One such matter is the interplay between state law and the comprehensive federal regulatory scheme governing railroad safety, the subject of the decision below.

Although none of the parties in this case are railroads—the former railroad employer of petitioners' decedent was named as a defendant but subsequently granted summary judgment on grounds that are not before this Court—this case nonetheless presents an issue of vital importance to the nation's railroads.[2] In the decision below, the Third Circuit held that the Locomotive Inspection Act (LIA) preempted the plaintiff's state law product liability claims against respondents, companies that had manufactured locomotives and/or component parts of locomotives with which the plaintiff worked while employed at a railroad. AAR is filing this brief because the outcome of this case, and the manner in which this Court construes the preemptive effect of the LIA, will have

[2] This case arises out of a lawsuit brought by a former railroad employee (who has since passed away) against several parties, including respondent manufacturers, under state law, and against his former railroad employer under the Federal Employers' Liability Act (FELA), 45 U.S.C. §51 *et seq*. The FELA claim was dismissed because the court found there was no evidence of railroad negligence. *Kurns v. Airco Welders Supply, Inc., et al*., No. 1746 EDA 2008 (Pa. Super. Ct. 2008).

a substantial impact on railroads throughout the nation.

Application of the doctrine of federal preemption is of tremendous interest to AAR and its members because of the long history of comprehensive federal regulation of railroad safety. Beginning with the 1892 appearance of a representative of an AAR predecessor organization at congressional hearings on the original Safety Appliance Act (SAA) (the first federal railroad safety legislation),[3] AAR has had long-standing involvement with the subject of rail safety, frequently representing its members in proceedings before legislative and regulatory bodies. AAR continues to participate in all significant railroad safety rulemaking proceedings conducted by the Federal Railroad Administration (FRA), the agency now responsible for implementing and enforcing federal railroad safety laws. Those laws, which constitute a comprehensive scheme of railroad safety regulation, have the dual, and related, goals of advancing safety and ensuring nationally uniform regulation. Preemption of state laws related to rail safety is an essential component of the federal safety statutes because it removes potential impediments to the effective implementation of the federal scheme.

In addition to its involvement with rail safety in the legislative and regulatory arenas, AAR frequently participates as *amicus curiae*, on behalf of its members, in significant cases that implicate the interplay between the federal regulatory scheme and state law. *E.g., CSX Transp., Inc. v. Easterwood*, 507 U.S. 658

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[3] *Hearings on S.811 Before the Senate Committee on Interstate Commerce*, 52nd Cong., 1st Sess. (1892) (testimony of H.S. Haines, Vice President of the American Railway Association).

(1993) (preemption of state law with respect to duties to select and install grade crossing warning devices, and train speed); *Norfolk Southern Ry. v. Shanklin*, 529 U.S. 344 (2000) (crossing warning devices); *Burlington Northern Santa Fe Ry., et al. v. Doyle*, 186 F.3d 790 (7th Cir. 1999) (minimum train crew requirements); *CSX Transp., Inc. v. City of Plymouth, Michigan*, 92 F.Supp.2d 643 (E.D. Mich 2000), *aff'd*, 283 F.3d 812 (6th Cir. 2002) (train length and speed); *Carrillo v. ACF Industries, Inc.*, 980 P.2d 386 (1999) (safety appliances on covered hopper cars). Establishing preemption in those cases was essential because application of state law would have undermined the national uniformity of railroad safety regulation which Congress has determined is critical to effective railroad regulation.

National uniformity is implicated in this case too, specifically with regard to the twenty-four thousand locomotives currently in service on the rail network. Preemption of state law under the LIA, which is at issue here, assures that AAR members will be able to rely on a single source of regulation of their locomotives. As the parties that are most directly affected by rail safety regulation in general, and locomotive regulation in particular, AAR member railroads have a strong interest in the outcome of this case.

STATEMENT OF THE CASE

AAR adopts the Factual Background and Procedural History of the case set forth in respondents' brief.

SUMMARY OF THE ARGUMENT

This Court should affirm the Third Circuit's decision which held that petitioners' state law claims related to locomotive design is preempted by the LIA.

Congress has delegated authority to the Secretary of Transportation to regulate all aspects of locomotive design, construction and materials, occupying that field, and thereby preempting all state efforts to regulate in that area. LIA preemption of state law applies regardless of whether a locomotive is operating on a railroad's line or temporarily in a shop for repair. It would be untenable to hold that while states are preempted from regulating locomotives while in use, they are free to regulate the design of the very same locomotives when in a shop.

Congress expanded the Secretary's authority over rail safety under the Federal Railroad Safety Act (FRSA), but in doing so did not limit the broad LIA preemption recognized by this Court in *Napier v. Atlantic Coast Line R.R.,* 272 U.S. 605 (1926). Moreover, LIA preemption applies to state tort claims as well as state legislation and regulation. Both avenues of state regulation have the impact of establishing standards for the design of locomotives, and thus undermine the plenary authority of the Secretary to regulate locomotives.

Notwithstanding the Third Circuit's suggestion to the contrary, preemption of respondents' state law claims is not dependent on whether a plaintiff has a remedy under FELA. Both railroads and manufacturers are responsible for complying with federal standards for locomotives, and both must be insulated from state efforts to impose design and construction standards on locomotives. Additionally, contrary to the assertions made by petitioners and some of their *amici*, preemption of petitioners' claims would not serve to preclude state law contribution or indemnity claims that otherwise might be available to a railroad against a manufacturer of railroad

equipment. Unlike petitioners' claims, contribution or indemnity claims do not seek to impose a state law standard of conduct on manufacturers, but rather seek an allocation of liability between parties that may be liable for violation of a federal safety standard.

ARGUMENT

I. THE LOCOMOTIVE INSPECTION ACT PREEMPTS STATE LAWS THAT SEEK TO IMPOSE DESIGN REQUIREMENTS ON LOCOMOTIVES, INCLUDING STATE LAW-BASED TORT SUITS ALLEGING DESIGN DEFECTS

A. Congress Determined That Railroad Safety Should Be Regulated Comprehensively and Uniformly at the Federal Level and Preempted State Efforts to Regulate Rail Safety

The question in this case is whether the regulation of locomotive design is an exclusive federal matter or is instead subject to the *ad hoc* determinations of juries applying the varying laws of fifty states. Although this case involves a state law claim against manufacturers of locomotives and locomotive components, rather than a railroad, its resolution will directly affect the nation's railroads. National uniformity in the regulation of locomotive design is absolutely essential to the operation of the national rail network. It is therefore important that this Court reaffirm the well-established principle that the LIA occupies the field of locomotive design.

The railroad network, which dates to the first half of the nineteenth century, is an integral (perhaps the

archetypal) instrumentality of interstate commerce.[4] Rail operations are not a discrete activity which may be confined within the boundaries of a single state. Rather, the nation's rail transportation system is an integrated network in which over 560 railroad companies participate, operating over nearly 140,000 miles of track in 49 states.[5] Over 1.3 million freight cars, powered by more than 24,000 locomotives, operate on, and are interchanged throughout, this system.[6] Given these characteristics, "the Federal Government has determined that a uniform regulatory scheme is necessary to the operation of the national rail system." *United Transp. Union v. Long Island R.R.*, 455 U.S. 678, 688 (1982).

The fundamental importance of uniformity to the federal scheme of rail safety regulation was properly recognized by the Third Circuit in holding that the LIA preempts plaintiffs' state law claims. The Court reasoned that the "goal of the LIA is to 'prevent the paralyzing effect on railroads from prescription by each state of the safety devices obligatory on locomotives that would pass through many of them.'" *Kurns v. A.W. Chestertion, Inc.*, 620 F.3d 392, 398 (3d Cir. 2010). The Court further explained that "[i]f each state had its own standards for liability for railroad manufacturers, equipment would have to be designed so that it could be changed to fit these standards as the trains crossed state lines, or adhere to the standard of the most restrictive states." *Id*. This potential

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[4] In addition to covering all lower 48 states, the U.S. rail system links up with the major railroads of Canada and Mexico.

[5] Association of American Railroads, *Railroad Facts* 3 (2010 ed.).

[6] *Id.* at 49, 51. About one-third of rail traffic moves in interchange service, *i.e.*, on more than one line-haul railroad.

impediment to interstate commerce was recognized long ago by Congress when it began to put in place a regulatory structure aimed at effectively promoting railroad safety.

As the integrated and interdependent nature of the rail industry became apparent at the end of the nineteenth century, Congress initiated a policy that ultimately led to comprehensive regulation of the industry by the federal government. Initially, Congress targeted specific aspects of rail safety, leaving other aspects to the respective states. Eventually reaching the conclusion that continued partial reliance on state regulation in some areas was ineffective and counterproductive, Congress expanded the scope of federal regulation of railroad safety, opting for a regulatory regime premised on the legislative finding that a comprehensive, uniform, national approach to rail safety would be most effective. Today, "[r]ailroad law is unique in the breadth, degree, and comprehensiveness of federal oversight and involvement." *In re West Virginia Asbestos Litigation*, 592 S.E.2d 818, 820 (W. Va. 2003).

B. As a Component of the Comprehensive Scheme of Rail Safety Regulation the LIA Vests Authority to Regulate Locomotive Design Exclusively With the Federal Regulator Regardless of the Location of the Locomotive

This case involves the regulation of locomotives, an integral part of any railroad. Locomotives provide the power to operate trains and have served that function since the earliest days of the railroad industry (*See* 49 C.F.R. §229.5 for a definition of locomotive.) Although the source of the power has changed—between 1947 and 1955 the locomotive fleet went

from majority steam powered to majority diesel-electric powered—the basic concept of a power unit pulling freight cars has remained the same. *Railroad Facts* at 49; *see generally* JOHN H. ARMSTRONG, THE RAILROAD – WHAT IT IS, WHAT IT DOES 45-69 (1978). Every one of the hundreds of trains that move across the country each day is powered by one or more locomotives. This essential component of the railroad industry has been the subject of federal regulation for a century.

First enacted as the Boiler Inspection Act, c. 103, 36 Stat. 913 (1911) (and now codified at 49 U.S.C. §§20701-20703), the LIA initially was limited to locomotive boilers. Congress soon expanded the law's scope to cover all aspects of locomotive safety, delegating authority to the Interstate Commerce Commission (ICC) to prescribe regulations covering "every part of the locomotive and tender and of all appurtenances." *Napier*, 272 U.S. at 611.[7] The LIA imposes obligations on railroads, specifically prohibiting use of a locomotive unless the locomotive and its parts and appurtenances "are in proper condition and safe to operate without unnecessary danger of personal injury," 49 U.S.C. §20701(1), and gives rise to an absolute duty to maintain locomotives in a safe and proper condition. *Southern Ry. Co. v. Lunsford*, 297 U.S. 398, 401 (1936). Violation of the LIA may result from either a failure to comply with an FRA

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[7] Originally, the ICC, which is responsible for the economic regulation of the rail industry, also was granted authority for implementing the railroad safety laws enacted by Congress. When the Department of Transportation was established, authority over safety was transferred to the FRA, an agency within DOT. Department of Transportation Act, Pub. L. No. 89-670, §6(e), 80 Stat. 931 (1966).

regulation related to locomotives or failure to keep a locomotive's parts and appurtenances in proper condition and safe to operate. *McGinn v. Burlington Northern R.R.*, 102 F.3d 295, 299 (7th Cir. 1996); *Mosco v. Balt. & Ohio R.R.*, 817 F.2d 1088, 1091 (4th Cir. 1987). Though federal authority over locomotives is plenary, the absolute obligations imposed by the LIA apply only to locomotives that are "in use." *Brady v. Term. R.R. Ass'n*, 303 U.S. 10, 13 (1938); *Crockett v. Long Island R.R.*, 65 F.3d 274, 277 (2d Cir. 1995); *Angell v. Chesapeake & Ohio Ry. Co.*, 618 F.2d 260, 262 (4th Cir. 1980); *Lyle v. Atchison, Topeka & San Francisco Ry. Co.*, 177 F.2d 221, 222 (7th Cir. 1949).

Recognizing Congress' intent to comprehensively regulate locomotives at the national level, this Court has long held that the LIA preempts state regulation of locomotives. Thus, in *Napier*, this Court struck down two states' laws which would have required the installation of certain equipment on locomotives. Acknowledging that the "intention of Congress to exclude states from exercising their police power must be clearly manifested," this Court held that the LIA occupies the field with regard to "the design, the construction, and the material of every part of the locomotive and tender and of all appurtenances." 272 U.S. at 611. (Congress has occupied a field when "the scheme of federal regulation [is] so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it." *Fidelity Fed. Sav. and Loan Ass'n v. de la Cuesta*. 458 U.S. 141, 153 (1982).) Because Congress had delegated to the ICC a "general" power to set "standards" for locomotives, the LIA preempts state efforts to regulate locomotives regardless of whether the state standard conflicts with the LIA or whether federal

regulators have addressed the specific area covered by the state standard. *Id.* at 613. Several years after *Napier*, this Court reaffirmed the ICC's broad authority over locomotives. *United States v. Baltimore & Ohio R.R.*, 293 U.S. 454 (1935).

Following *Napier*, lower courts consistently have held that attempts by states, through either common law or enactment of positive law, to impose requirements for equipping locomotives are preempted. *E.g., Ogelsby v. Delaware & Hudson Ry. Co.*, 180 F.3d 458, 461 (2nd Cir. 1999) (Allowing states to regulate instructional labels on locomotives would "undermine the goal of the BIA, which is to prevent 'the paralyzing effect on railroads from prescription by each state of the safety devices obligatory on locomotives that would pass through many of them.' [citation omitted]."); *Marshall v. Burlington Northern, Inc.*, 720 F.2d 1149 (9th Cir. 1983) (preempting negligence suit alleging that the locomotive should have been equipped with strobe and oscillating lights); *see also In re Amtrak "Sunset Limited" Train Crash in Bayou Canot*, 188 F.Supp.2d 1341, 1347 (S.D. Ala. 2000) ("The claims against Amtrak concerning the Sunset Limited locomotives are preempted by the" LIA.); *Springston v. Consolidated Rail Corp.*, 863 F.Supp. 535, 541 (N.D. Ohio 1994), *aff'd*, 130 F.3d 241 (6th Cir. 1997) ("It is clear that Congress intended to provide a nationally uniform standard of regulating locomotive equipment. If each state is permitted to make its own decisions with respect to such items as reflective materials, oscillating, strobe and ditch lights, such goal would be compromised."); *In Re Train Collision at Gary, Ind. on January 18, 1993*, 670 N.E.2d 902, 911 (Ind. App. 1996) ("claims regarding alleged defects in the design and structure of the train cars are preempted by the" LIA); *Consolidated*

Rail Corp. v. Penn. Pub. Util. Com'n, 536 F.Supp. 653 (E.D. Pa.), *aff'd*, 696 F.2d 981 (3rd Cir. 1982), *aff'd*, 461 U.S. 981 (1983) (preempting state statute requiring speed recorders and indicators on locomotives); *Gen. Motors Corp. v. Kilgore*, 853 So.2d 171, 178 (Ala. 2002) ("Because . . . the [LIA] occupies the entire field, there is no area within which the states may regulate."). These decisions are grounded in the principle that preemption of state regulation "is necessary to maintain uniformity of railroad operating standards across state lines." *Law v. General Motors Corp.*, 114 F.3d 908, 910 (9th Cir. 1997). In a succinct summary of the key issue presented when states attempt to regulate locomotives, the Court in *Law* explained that "[i]f each state were to adopt different liability-triggering standards . . . Congress's goal of uniform, federal railroad regulation would be undermined." *Id.* at 910-11.

Petitioners' attempt to distinguish *Napier* and the numerous other cases that hold the LIA preempts state law by arguing that the LIA's preemptive effect does not apply to the claims in this case because the ICC (and now FRA) did not have authority to regulate the locomotive "repair process." Pet. Br. 23, 35; *see also id.* 42 (ICC "not authorized . . . to issue any regulations governing the safety of railroad repair and maintenance."). But, fairly construed, petitioners' claims challenge the adequacy of the design and construction of locomotives, not the repair process. Were respondents held liable, it would effectively impose state-law requirements with respect to "the design, the construction, and the material" of locomotives (*Napier*, 272 U.S. at 611), and thereby invade the field occupied—and thus preempted by—the LIA.

Petitioners' attempt to limit the LIA's preemptive effect to circumstances in which a locomotive is "in use" creates an untenable situation. Locomotive design is indivisible; it does not vary depending on whether the locomotive is in use or temporarily in a repair shop. Locomotives are anything but stationary, and they spend most of their lives moving over rail lines throughout the nation. All large and moderate sized railroads operate across multiple state lines. Moreover, during those operations, locomotives are routinely interchanged among railroads; consequently, just like freight cars, locomotives used by a railroad may move off that railroad's line onto other railroads' systems. *See United States v. Allegheny Ludlam Steel Corp.*, 406 U.S. 742, 743 (1972). Under these circumstances, if individual states were permitted to impose requirements on locomotives (or rail cars, for that matter) when they happen to be in a shop, railroads that operate daily in interstate commerce would soon be subject to varying and potentially conflicting regulations, creating a huge burden on commerce, potentially even requiring changing equipment as trains cross state borders.[8] As the court pointed out in *Seaman v. A.P. Green Ind., Inc.*, 707 N.Y.S. 2d 299, 302 (N.Y. S. Ct. 2000), "[a] locomotive's design, construction, parts and materials,

[8] This Court recognized the danger of varying state standards, holding that an Arizona law regulating the length of trains violated the Commerce Clause because it would "inevitably result in an impairment of uniformity of efficient railroad operation because . . . [c]ompliance with a state statute limiting train lengths requires interstate trains of a length lawful in other states to be broken up and reconstituted as they enter each state . . .". *Southern Pac. Co. v. Arizona*, 325 U.S. 761, 773 (1945).

which are regulated by the BIA, are the same whether or not the locomotive is in use."

The Secretary of Transportation's plenary authority to prescribe regulations for locomotives—the basis for preemption—applies to locomotives at all times. The *Napier* holding must be read this way to effectuate Congress' determination that the federal government alone has the authority to regulate locomotives. Clearly, uniformity in the regulation of railroad equipment, preserved by federal preemption, is critical to rail operations because it avoids the need to conform to potentially varying state requirements for locomotives and other railroad equipment, and instead, permits railroads to look to and rely upon federal standards. To grant the federal government exclusive authority over the design of locomotives while they are operated on a railroad's line, while permitting state design standards to apply while the same locomotives are being maintained in a shop, undermines the regulatory scheme Congress chose to implement for locomotives. With respect to locomotives, contrary to petitioners' assertions, that scheme is "so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it." Pet. Br. 32.

C. The LIA is Part of a Scheme of Federal Railroad Safety Laws That Are Premised On the Importance of Maintaining Uniformity of Rail Equipment and Safety Regulation

The LIA is but one prong of the comprehensive federal regulation of rail safety that began at the end of the nineteenth century with enactment of the SAA, c. 196, 27 Stat. 531 (1893) (codified today at 49 U.S.C. §§20301-20306). Initially limited to requiring that

rail cars be equipped with automatic couplers, Congress amended the SAA in 1910 to establish additional uniform national standards for "safety appliances" on railroad cars. Act of April 14, 1910, c. 160, 36 Stat. 298. The 1910 Act directed the ICC to issue safety appliance standards, a directive implemented by an ICC order of October 13, 1910. *See* 49 C.F.R. Part 231 (containing regulations implementing the SAA). The regulations promulgated under the SAA preempt state law requiring "greater or less or different equipment." *Southern R.R. v. Railroad Comm'n*, 236 U.S. 439, 446 (1915); *Carrillo*, 980 P.2d at 389-90 ("Since Congress 'has so far occupied the field the categories of safety appliances created by [the SAA] . . . should be broadly read to include every device falling within that category, even if the Secretary of Transportation has not seen fit to standardize a particular type or use of that device.") (citations omitted)

In 1970, Congress greatly expanded the already extensive and longstanding federal regulation of railroad safety. Despite finding that the existing federal laws, which focused on regulating discrete areas of rail safety, were "reasonably effective in their respective areas," H.R. Rep. No. 91-1194 (1970), *reprinted in* 1970 U.S.C.C.A.N. at 4106, Congress determined that there was nonetheless a pressing need for a more uniform and comprehensive approach to regulating rail safety. Therefore, Congress enacted FRSA, Pub. L. No. 91-458, 84 Stat. 971 (1970), with the purpose of "promot[ing] safety in every area of railroad operations and reduc[ing] railroad-related accidents and incidents." 45 U.S.C. §421 (now codified at 49 U.S.C. §20101). *See Doyle*, 186 F.3d at 794 (Congress passed FRSA "[i]n response to the perceived need for comprehensive rail safety regula-

tion."). Explaining its decision greatly to expand the federal role in rail safety, Congress noted that the railroad industry "has very few local characteristics," but rather

> has a truly interstate character calling for a uniform body of regulation and enforcement. * * * To subject a carrier to enforcement before a number of different State administrative and judicial systems in several areas of operation could well result in an undue burden on interstate commerce.

H.R. Report No. 91-1194, *reprinted in* 1970 U.S.C.C.A.N. at 4110-11. FRSA represents the culmination of Congress' approach to regulating rail safety, which is guided by the determination that in order to achieve a safe, efficient, and competitive national rail network, uniformity with regard to operations must be maintained. *Michigan Southern R.R. v. City of Kendallville, Ind.,* 251 F.3d 1152, 1155 (7th Cir. 2001) ("Congress' occupation of the field of railroad regulation is to ensure uniform national standards.").

FRSA expanded the role of the federal government in the regulation of rail safety; it did not contract the Secretary's long-recognized authority over locomotives. Thus, the Third Circuit correctly concluded that FRSA, which "supplemented" existing railroad safety laws, did not narrow the preemptive scope of the LIA, which continues to occupy the field with respect to the regulation of locomotives. 620 F.3d at 400-01.[9] FRSA granted authority to regulate all

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[9] In the petition for certiorari, petitioners asserted that FRSA had superseded any preemptive authority of the LIA. However, petitioners' merits brief does not seem to pursue that argument directly, though at least one of their *amici* does. Br. for *Amicus*

areas of rail safety, expanding the Secretary of Transportation's authority well beyond the specific areas already regulated by the federal government under previously enacted safety laws. To the extent states had regulated within the areas covered by the Secretary's expanded authority, those regulations were permitted to remain in effect until the Secretary had issued regulations covering those areas. At the same time, Congress made it clear that FRSA was not meant to "replace the existing rail safety statutes and implementing regulations," and that those laws were to "continue to be enforced and administered by the Department [of Transportation] in their respective areas . . . as if [FRSA] had not been enacted." H.R. Rep. 91-1194, at 16.

Thus, FRSA may not be read to permit states to expand their authority over rail safety into areas where they had previously been prohibited from regulating. As the court held in *Consolidated Rail Corp.*, 536 F.Supp. at 656-57, a decision affirmed by this Court, neither FRSA's purpose nor its legislative history suggests that Congress intended to overrule *Napier* and permit states to reoccupy the field of locomotive safety by regulating locomotive construction and design until FRA issues a regulation covering the same subject. Interpreting FRSA as having reduced the scope of LIA preemption "would undermine achievement of one of the explicit purposes of the Railroad Safety Act—national uniformity of railroad

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Curiae National Association of Retired and Veteran Railway Employees. There is no merit to that assertion. *See Springston*, 130 F.3d at 245 ("the preemptive effect of the BIA on state regulation of locomotive equipment was not affected or modified by the Federal Railroad Safety Act."). The United States agrees. Br. for the United States as *Amicus Curiae* 21, n.9.

regulation." *Marshall*, 720 F.2d at 1153. As the Third Circuit correctly held, locomotives, which continually cross state boundaries, remain subject to exclusive federal regulation in all respects.

D. The LIA's Occupation of the Field of Locomotive Safety Preempts State Tort Actions

Petitioners suggest that *Napier* might be read as applying LIA field preemption of "the design, the construction, and the material of every part of the locomotive and tender and of all appurtenances" to state legislation but not to common law personal injury claims. Pet. Br. 32, 38.[10] This is incorrect. For the purpose of preemption under the federal railroad safety statutes there is no meaningful distinction, as either form of regulation can have a similarly disruptive effect on the federal regulatory scheme. *See Riegel v. Medtronic, Inc*. 552 U.S. 312, 323-24 (2008); *Geier v. American Honda Motor Co., Inc*., 529 U.S. 861, 881 (2000).[11]

Surely it would defeat the purpose of preemption to hold that a state legislature is prohibited from requiring a certain device on a locomotive but that a jury hearing a state law tort claim may find a defendant negligent for having failing to install the very same device. Inherent in the adjudication of a negligence action is a jury's determination of the proper standard of conduct to which the defendant should have

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[10] Some of petitioners' *amici* argue that LIA preemption does not apply to common law claims. *See Amicus Curiae* Br. of the American Association for Justice (AAJ); Br. of *Amicus Curiae* Public Justice, P.C.

[11] This Court held that preemption of state law under FRSA applies to "[l]egal duties imposed on railroads by the common law." *Easterwood*, 507 U.S. at 664.

adhered, *i.e.*, whether a duty was owed and, if so, whether due care was exercised in carrying it out. Damages assessed through findings of negligence under state tort law, no less than prescriptive regulations enacted by a state legislature, constitute the imposition of a state standard of conduct, a result inherently at odds with the federal regulatory scheme. As this Court explained in *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 247 (1959), "[t]he obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy. Even the States' salutary effort to redress private wrongs or grant compensation for past harm cannot be exerted to regulate activities that are potentially subject to the exclusively federal regulatory scheme."

This Court has consistently recognized the functional similarities of prescriptive legislative enactments and common law tort suits. Addressing the scope of preemption under the Federal Cigarette Labeling and Advertising Act in *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 521 (1992), this Court found "no distinction between positive enactments and common law," citing to *Garmon*'s characterization of the regulatory effects of common law claims as support for that conclusion.[12] Similarly, in *Geier*, 529 U.S. at 881, this Court characterized a tort action alleging a failure to install airbags in an automobile manufactured by the defendant as "a rule of state tort law imposing [ ] a duty" that "would have required manufacturers of all similar cars to install

[12] Contrary to the argument of *Amicus* AAJ, this Court's finding of the equivalence of tort suits and positive law for preemption purposes is not limited to the specific statute or facts at issue in *Garmon*.

airbags rather than other passive restraint systems." The Court explained that permitting such a claim "would have stood 'as an obstacle to the accomplishment and execution'" of important federal objectives. *Id.* (citations omitted)

Lower courts finding preemption under the LIA have utilized similar reasoning. *See Law*, 114 F.3d at 910-12. (The "purpose of tort liability is to induce defendants to conform their conduct to a standard of care established by the state. * * * Imposing tort liability . . . would transfer the regulatory locus from the Secretary of Transportation to the state courts" a result that is clearly contrary to federal law.); *Scheiding v. General Motors*, 993 P.2d 996, 1003 (Cal. 2000) ("plaintiffs' lawsuits would have a retroactive regulatory effect by now allowing design control the [LIA] denied the state at the time of manufacture"). "To permit a jury to impose upon a railroad the duty to equip its locomotives with purported safety features that the FRA has not seen fit to impose undermines the LIA's goal of national uniformity and the authority of the uniquely qualified FRA to assert its expertise regarding such features." *Dodge v. Union Pac. R.R.*, 2007 WL 1432033, at *3, n.2 (D. Ore. 2007).

Indeed, juries are particularly ill-suited to establish standards in areas where Congress has assigned that role to a federal agency with specific expertise in the subject matter. Unlike an expert agency, which takes into account all relevant information and factors when weighing whether to issue a regulation and the regulation's proper scope, a jury necessarily focuses on a single event, interpreted by expert witnesses paid by the litigants. In *Riegel*, this Court explained that where the federal government has implemented a regulatory regime, permitting juries

to establish a standard of care under state common law can be even more disruptive to the federal scheme than would actions of a state regulatory agency, because, while the regulatory agency presumably weighs the costs and benefits of a proposed regulation, "a jury, on the other hand, sees only the cost of a more dangerous design, and is not concerned with its benefits." 552 U.S. at 325. *See also Medtronic, Inc. v. Lohr*, 518 U.S. 470, 504 (1996) (Breyer, J., concurring) ("The effects of the state agency regulation and the state tort suit are identical. To distinguish between them for pre-emption purposes would grant greater power . . . to a single state jury than to state officials acting through state administrative or legislative lawmaking processes.") FRA takes the same position, explaining in a recent rulemaking that in the absence of preemption of tort actions, "the effective railroad safety standard would be set by the most recent jury verdict in each State and national uniformity of safety regulation would no longer exist." Federal Railroad Administration, Passenger Equipment Standards; Front End Strength of Cab Cars and Multiple-Unit Locomotives, 75 FED. REG. 1180, 1210 (Jan. 8, 2010). That is precisely why national policy on rail safety reflects the view that safety standards should be set by "experts in railroad safety to whom Congress has assigned the task" rather than "twelve jurors . . . most of whom probably do not know anything about railroad safety." *Id*.

II. LIA PREEMPTION IS NOT DEPENDENT ON THE AVAILBILITY OF A FELA REMEDY NOR DOES IT FORECLOSE ALL STATE LAW REMEDIES

The Third Circuit correctly held that petitioners' state law tort claims were preempted. But preemp-

tion of petitioners' claims here does not necessarily foreclose relief to plaintiffs who are injured in an accident or incident involving a locomotive. However, as the federal government establishes locomotive safety standards, any remedy must be derived from obligations placed on parties under federal law. On the other hand, notwithstanding the Third Circuit's suggestion in dicta "that federal law offers recourse to workers exposed to asbestos under the" FELA, 620 F.3d at 400, whether a FELA remedy would be available to a plaintiff notwithstanding the LIA is not relevant to the preemption analysis (and not before this Court). Indeed, in this case the plaintiff's FELA claim was dismissed because he could not make the showing of employer negligence that FELA requires.

In 1908, in response to a high casualty rate among rail workers and the perceived inadequacy of the remedies available under the common law of that era, Congress enacted FELA to provide a fault-based remedy to rail employees injured on the job against their employer. FELA plaintiffs must prove all of the elements of a negligence claim, though if violation of a safety statute, like the LIA, causes an injury, the employer is considered negligent as a matter of law. *Urie v. Thompson*, 337 U.S. 163, 189 (1949). And, in such cases the employer loses the defense of comparative negligence which would otherwise be available. 45 U.S.C. §53. Though FELA now provides the exclusive remedy of all railroad employees against their employer for workplace injuries,[13] it does not bar rail

[13] Initially, many rail employees did not come within the scope of FELA's coverage because in order to recover, "the employee, at the time of the injury," had to be "engaged in interstate transportation, or in work so closely related to it as to be practically a part of it." *Shanks v. Delaware, Lackwanna &*

employees from suing other parties who may be liable for the injury. Injured non-rail employees may not bring claims under FELA, however, under appropriate circumstances they may have a cause of action against railroads and non-railroads that are responsible for their injuries.

A. The Sole Obligation of Both Railroads and Manufacturers With Respect to Locomotives is to Comply With the Standards Set Forth in and Promulgated Under The LIA and Any Liability Must Be Premised on Those Obligations

As the Court below correctly held, since the federal regulatory authority is the sole source of regulation of locomotives, the LIA forecloses certain causes of action (as do other federal rail safety statutes). Because Congress has occupied the field of "the design, the construction, and the material of every part of the locomotive," *Napier*, 272 U.S. at 611, neither the railroads that operate locomotives, nor companies that manufacture those locomotives, can be liable for failing to equip locomotives with parts or components that have not been prescribed by the FRA, even if those parts or components might be said to enhance safety. *Id*. at 610-11; *Forrester v. Amer. Dieselelectric, Inc.*, 255 F.3d 1205 (9th Cir. 2001) (dismissing allegation that failure to install an automatic warning

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Western R.R., 239 U.S. 556, 559 (1916). In 1939, FELA was amended to expand the scope of its coverage so that workers no longer would have to prove they were engaged directly in interstate commerce at the time they were injured. Act of Aug 11, 1939, c. 685, §1, 53 Stat. 1404; *see* S. Rep. No. 661, at 2-3 (1939); *see also Southern Pac. Co. v. Gileo*, 351 U.S. 493 (1956).

system on a locomotive crane constituted a defective design); *Marshall*; *Springston*. Nor, in the absence of a violation of the LIA or an FRA regulation, may they be liable for allegedly having designed a locomotive defectively.

Such claims are precluded because federal law establishes the standard of care. While there is no private right of action under the LIA (or the SAA or FRSA), these safety acts are considered an adjunct to FELA, *Urie*, 337 U.S. at 189, and railroads may be held liable for violations of those statutes in an action brought by a rail employee under FELA.[14] Additionally, it is well established that parties that are not proper plaintiffs under FELA may nonetheless seek

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[14] On the other hand, in addition to creating obligations with respect to locomotives, the LIA also bounds them. Adopting the reasoning supporting LIA preemption in design defect cases, courts have declined to hold railroads liable under FELA for failing to install components on locomotives that are not required by FRA. In *Norfolk Southern Ry. Co. v. Denson*, 774 So.2d 549 (Ala. 2000), the plaintiffs alleged the railroad was negligent in failing to equip its locomotives with air conditioning. "[O]n the authority of *Napier*," the Alabama Supreme Court held that the railroad had no such duty, reasoning that such a ruling would undermine the "jealously guarded" uniformity "on which various federal policies are grounded." *Id*. at 556. The Court noted that permitting such a claim could result in locomotives operating in Alabama "hav[ing] to be air conditioned, while those operating in neighboring states would not." *Id*. *See also Monheim v. Union R.R.*, ___ F.Supp.2d ___, 2011 WL 1527798 (W.D. Pa. 2011) (rejecting FELA claims that locomotive should have been equipped with an alterter or deadman's switch, and an ejection-proof seat, as precluded by the LIA); *Munns v. CSX Transp. Inc.*, 2009 WL 805133, at *5, n.5 (N.D. Ohio 2009) (rejecting FELA claim, as precluded by the LIA, that seats in locomotive were defective because they were not designed in an ergonomically sound way).

redress for violation of federal rail safety standards through state law remedies. *Fairport, P. & E. R.R v. Meredith*, 292 U.S. 589, 598 (1934) ("The Federal Safety Appliance Act . . . imposes absolute duties upon interstate railway carriers and thereby creates correlative rights in favor of such injured persons as come within its purview; but the right [of a non-railroad employee] to enforce the liability which arises from the breach of duty is derived from principles of the common law."); *Crane v. Cedar Rapids & Iowa City Ry.*, 395 U.S. 164 (1969); *Jacobson v. N.Y., N.H. & H. R.R.*, 206 F.2d 153, 156 (1st Cir. 1953) ("[T]hough Congress has not created a statutory right of action in favor of passengers injured as a result of violation of the Safety Appliance Acts, it is still possible for the courts to do so on principles of the common law."); *Scott v. Chicago, R.I. & Pac. R.R.*, 197 F.2d 259 (8th Cir. 1952) (suit by automobile passenger under Iowa law arising from a grade crossing accident alleging violation of LIA); *Steffey v. Soo Line R.R.*, 498 N.W.2d 304, 308 (Minn. App. 1993) (nonemployee must look to state law for remedy for LIA violation).

Nothing in the federal scheme of rail safety regulation suggests that in providing rail workers a federal remedy against their employer for workplace injuries Congress intended that *only* railroads may be liable in tort for violating federal safety laws. Like railroads, manufacturers may be held responsible for violations of the LIA or other federal rail safety standards. *See* 49 U.S.C. §21302(a)(1); 49 C.F.R. §229.7(b) (Any "person" may be liable for a violation of the LIA, including a locomotive manufacturer.); *Scheiding*, 993 P.2d at 1003. While "[s]tates are precluded from imposing additional duties in the field of locomotive equipment and design" a manufacturer

has a "duty [ ] to comply with federal regulations and standards concerning design, material and construction of locomotive equipment." *Carter v. Consolidated Rail Corp.*, 709 N.E.2d 1235, 1239 (Ohio App. 1998). "Any state law that undermines the national regime is preempted by the LIA," because only federal standards regulate a manufacturer's "conduct in the design and manufacture of its locomotives." *Bell v. Illinois Cent. R.R.*, 236 F.Supp.2d 882, 890-91 (N.D. Ill. 2001). Indeed, respondents acknowledge that the "DOT is [ ] charged with ensuring that manufacturers do not even *build* . . . unsafe locomotives." Br for Resp. 32.

Thus, notwithstanding the ruling below, LIA preemption does not necessarily preclude a remedy against a manufacturer of railroad equipment who may be responsible for an injury. In the context of regulation of locomotives, the purpose of preemption is not to insulate a particular class of defendants from liability for the consequences of their wrongful conduct. Rather, it is premised on ensuring that there will be a single source of regulatory authority with respect to locomotive safety, and requires that a regulated party's conduct be judged under federal substantive law alone. As in this case, preemption under the LIA protects manufacturers from legal liability for failing to adhere to state requirements. However, since manufacturers have an obligation to comply with the LIA (and other federal rail safety laws), 49 U.S.C. §21302(a)(1), they too may be liable for breaching that obligation through a common law action utilizing federal substantive law as the standard of liability. There is an important distinction between a state law claim which seeks to vindicate a party's rights when a federal statute, like the LIA, has been violated, and a state law claim which seeks

to vindicate a right under a state law theory of liability independent of the federal statute. Only the latter is preempted.[15]

Preemption can effectively achieve its goal—assuring uniformity in the regulation of rail safety—only if it avoids distinctions between railroad and non-railroad defendants; as a corollary, the liability of railroads and non-railroads for failing to adhere to applicable federal standards also must be coextensive. Indeed, any other outcome would undermine the principles on which preemption is grounded. Holding railroads responsible for injuries to their employees caused by a violation of a federal safety standard, while applying preemption to insulate from liability equipment manufacturers who may be equally culpable for the violation, does nothing to advance the policy of avoiding non-uniform requirements. "The logic behind field preemption does not support the premise that one defendant would be excused from suit and a different defendant would be open to suit on the same legal theory." *Oglesby v. Del. & Hudson Ry. Co.*, 964 F.Supp. 57, 62, n.3 (N.D. N.Y. 1997), *rev'd on other grounds*, 180 F.3d 458 (2nd Cir. 1999); *See also In re Amtrak "Sunset Limited" Train Crash*, 188 F.Supp.2d at 1349, n.11 (calling it an "oddity" and an "incongruous result" to hold that one group of claims arising under state law related to rail

[15] The right to pursue state tort remedies, not confined to railroad defendants, for violations of federal safety standards was confirmed by a 2007 amendment to FRSA which clarified that state law claims "alleging that a party has failed to comply with the Federal standard of care established by a regulation or order issued by the Secretary of Transportation" are not preempted. 49 U.S.C. §20106(b)(1)(A).

car design is preempted while federal claims arising from the same occurrences may go forward).[16]

There can be but one set of requirements with regard to locomotives: those established by the LIA and the regulations promulgated thereunder by the Secretary of Transportation. The Third Circuit correctly held that petitioners' state laws design defect claims are preempted because states may not impose locomotive design standards on manufacturers or railroads, not, as the Court suggested in dicta, because FELA "may be the appropriate avenue of relief" 620 F.3d at 400, even when an analogous state-law claim against a manufacturer is preempted. That point is irrelevant, and not necessarily correct. The only issue presented by this case is whether the LIA preempts a design claim against a locomotive manufacturer; the question of whether and to what extent an analogous design claim against a railroad under FELA is permitted or precluded is not before the Court, and AAR respectfully urges the Court to not repeat the Third Circuit's erroneous dicta.

[16] Of course, because the roles and responsibilities of railroads and manufacturers are different—manufacturers construct locomotives, while railroads operate them and are responsible for the workplace environment in which they are used—some legal theories may be available against railroads that would not be viable against manufacturers. For example, most likely only a railroad would be susceptible to an LIA claim alleging failure to maintain a locomotive so as to render it unsafe for use.

B. Preemption of Petitioners' State Law Design Defect Claims Should Not Impact Contribution or Indemnity Claims That Might Otherwise Be Available to Railroads Against Manufacturers

Petitioners assert, though do not explain why, that holding their state law claims to be preempted also would deprive railroads of their right to seek contribution or indemnity from manufacturers that might otherwise be available under state law. Pet. Br. 2, 18, 43. The impact of LIA preemption on state contribution and indemnity claims is not before the Court. However, there is no reason the field preemption under the LIA recognized in *Napier*, and applied by the Third Circuit in this case, would preclude such claims. Unlike state law claims alleging a design defect in a locomotive, a railroad's state law claims for contribution or indemnity against a manufacturer would not impose state law standards of care on a manufacturer, but simply would serve to allocate liability among parties responsible for violation of a federal standard.[17]

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[17] The doctrine of contribution is based on the principles of equity, and is aimed at arriving at a fair and just division of losses. 18 Am. Jur.2d *Contribution* §1 (1985). It is the right of one who has discharged a common liability to recover from another who also is liable for some portion of the liability borne by the first party. *Id.* Though a claim for indemnity arises from an express or implied contractual relationship, it also is an equitable doctrine which shifts the entire burden of loss from one tortfeasor who has been compelled to pay to another whose act of negligence is the primary cause of the injured party's harm. 41 Am. Jur. *Indemnity* §3 (1985). Like contribution, indemnity is designed to avoid the unfairness of one party bearing a loss where another party is at fault.

It is not uncommon for third parties potentially to bear responsibility for an injury to a rail employee. Railroads frequently use equipment that is owned and/or manufactured by other parties. Similarly, some railroad operations may take place in facilities which the railroad does not own. Thus, rail employees may be exposed to hazards resulting from a third party's conduct over which the railroad has little control. Nonetheless, federal law imposes on railroads a duty to exercise ordinary care to provide a reasonably safe workplace. *Bailey v. Cent. Vermont Ry.*, 319 U.S. 350, 352-53 (1943).

However, "[a]n employer's non-delegable duties under FELA should not deprive the employee of recovery from other parties, or the employer of the ability to seek indemnification from third parties." *Stephens v. Southern Pac. Transp.Co.*, 991 F.Supp. 618, 620 (S.D. Tex. 1998). This Court has recognized that railroads have a right to seek contribution or indemnity on an underlying FELA claim under otherwise applicable state or federal law. *Norfolk & Western Ry. Co. v. Ayers*, 538 U.S. 135, 162 (2003). Indeed, *Ayers* suggests that the right to bring such actions serves to mitigate the unfairness of its holding that denied railroads the ability to seek apportionment of damages under FELA.

Many other courts have recognized railroad's state law contribution and indemnity rights. *Ayers*, 538 U.S. at 162, n.21. In *Ellison v. Shell Oil Co.*, 882 F.2d 349 (9th Cir. 1989), a railroad employee who was injured on the job filed a FELA action alleging the injury was caused by a violation of the SAA. The railroad defendant brought a state indemnity action against Shell, which owned the car and facility on which the injury occurred. The Ninth Circuit re-

versed a directed verdict for Shell stating that "FELA does not bar railroads from seeking indemnity where state law permits and where another party bears some legal responsibility." 882 F.2d at 353. *See also Burlington Northern R.R. v. Farmers Union Oil Co. of Rolla*, 207 F.3d 526 (8th Cir. 2000) (a railroad's obligations under FELA does not preclude a third party from being held financially responsible to a railroad for the railroad employee's work-related injuries, even where arising from the violation of a federal safety statute); *Poleto v. Consolidated Rail Corp.*, 826 F.2d 1270 (3rd Cir. 1987); *Waylander-Peterson Co. v. Great Northern Ry. Co.*, 201 F.2d 408 (8th Cir. 1953). There is no inconsistency between preempting state law design defect claims and permitting a railroad's state contribution or indemnity claims to go forward where the requisites for such claims have been met.[18]

Claims alleging locomotive design defects, as in this case, are preempted against manufacturers, and typically are foreclosed under FELA to the extent they seek to impose design requirements that are not called for by federal regulations.[19] However, where

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[18] Depending on the facts, differing standards of liability under FELA and state law may result in the railroad bearing liability where the third party does not, *e.g., Cazad v. Cheasapeake & Ohio Ry. Co.*, 622 F.2d 72 (4th Cir. 1980), but that is independent of whether preemption should bar an indemnity or contribution claim where it would otherwise be available.

[19] *King v. Southern Pac. Transp. Co.*, 855 F.2d 1485, 1489 (10th Cir. 1988). *See also Monheim*; *Munns*; *Denson*, note 14 *supra*. Analogously, where a FELA claim would be preempted under FRSA if brought under state law, courts have held the claim is precluded under the same rationale that supports preemption of related state law claims. *E.g., Waymire v. Norfolk and Western Ry. Co.*, 218 F.3d 773 (7th Cir. 2000); *Lane v. R.J.*

an LIA violation is alleged, or a manufacturer's wrongful conduct gives rise to liability under FELA, contribution or indemnity (if available under applicable state law) are appropriate and should not be foreclosed under any theory of preemption. In *Engval v. Soo Line R.R.*, 632 N.W.2d 560 (Minn. 2001), a rail employee injured by a defective part in a locomotive brought a FELA action against his employer alleging a violation of the LIA. The railroad argued that the defect was the result of a design flaw in a locomotive component and brought third party state law contribution and indemnity actions against the locomotive manufacturer, alleging the manufacturer was responsible for the LIA violation. Rejecting the manufacturer's argument that the railroad's contribution and indemnity actions were preempted, the Minnesota Supreme Court held that the contribution and indemnity claims "do not rely on any substantive state law standard, but instead rely on the standard imposed by the LIA." 632 N.W.2d at 570. Claims for contribution and indemnity do not implicate uniformity of federal regulation of locomotives because a finding in favor of a railroad would have no impact whatsoever on the federal scheme of regulating the equipping of locomotives, since "the applicable standard, as always, is the standard imposed by the LIA." *Id*. at 567. Rather than an attempt to impose state regulation on the design of locomotives, contribution and

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Simms, 241 F.3d 439 (5th Cir. 2001); *Nickels v. Grand Trunk Western R.R.*, 560 F.3d 426 (6th Cir. 2009); *Norris v. Cent. of Georgia R.R.*, 635 S.E.2d 179 (Ga. App. 2006). As the Court in *Lane* explained, the uniformity of rail safety regulation Congress intended "can be achieved only if [federal railroad safety] regulations . . . are applied similarly to a FELA plaintiff's negligence claim and a non-railroad employee plaintiff's state law negligence claim." 241 F.3d at 443.

indemnity claims simply seek an equitable result as between two putative tortfeasors. Thus, the *Engval* court properly recognized that, consistent with the policy underlying federal preemption, the liability of railroads and manufacturers is coextensive: neither may be liable for failing to comply with state law standards regarding the design, construction or material of locomotives, but both may be liable for violations of the LIA.[20]

Contrary to petitioners' assertion, railroad contribution and indemnity claims under applicable state law are not incompatible with the Third Circuit's holding.

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[20] *But see Union Pac. R.R. v. Motive Equip., Inc.*, 714 N.W.2d 232 (Wisc. App. 2006), in which a railroad that had been sued under FELA by an employee injured when a refrigerator in one of its locomotives caught fire brought an indemnity claim against the manufacturer that improperly installed the refrigerator. The court held that the railroad's indemnity claim was preempted by the LIA. The court's rigid, and erroneous, application of preemption failed to appreciate that the indemnity claim would not upset uniformity because it would require nothing of the manufacturer that was not required of the railroad itself, and would not hold the manufacturer to any standard in manufacturing its locomotives to which the railroad which operated the locomotive also is not held.

CONCLUSION

For the reasons set forth above, the holding of the Court of Appeals should be affirmed.

Respectfully submitted,

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