No. 10-879

IN THE
Supreme Court of the United States

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

RAILROAD FRICTION PRODUCTS CORPORATION AND VIAD CORP,
Respondents.

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

BRIEF FOR PETITIONERS

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QUESTION PRESENTED

Whether the Locomotive Inspection Act preempts the field of state common-law claims against manufacturers of locomotives and locomotive parts by workers injured in railroad maintenance facilities, even though the Act regulates only the "use" of a locomotive "on [a] railroad line," 49 U.S.C. § 20701, and even where, as here, the events giving rise to the claims occurred before those manufacturers were subject to regulation under the Act.

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INTRODUCTION

This case presents one of the most far-reaching assertions of implied field preemption ever rendered by a federal court of appeals. In the decision below, the Third Circuit held that an injured rail repair worker could not bring state-law claims against manufacturers of locomotives and locomotive parts even though the worker's claims did not actually conflict with any federal law or regulation. The Third Circuit's theory was that the Locomotive Inspection Act ("LIA"), enacted in 1911 to make locomotives safer while in "use" on the rails, impliedly preempted the field of state-law claims for failure to warn and design defects against manufacturers for parts that cause injury to workers repairing trains in maintenance shops. That breathtakingly broad judgment extends implied field preemption to claims *outside* the regulatory scope of the federal statute and invokes field preemption to deny claims based on events that occurred decades *before* the defendant-manufacturers even were subject to the federal Act. In addition, implied field preemption ordinarily is appropriate – even within the regulated field – only when Congress has legislated in an area so comprehensively that no other conclusion is warranted or the historical tradition of national control over a subject otherwise dictates federal supremacy. But, here, exactly the opposite is true. State law since the nineteenth century has afforded remedies to workers in railroad repair shops, and the most recent federal rail enactments have disclaimed intent for federal preemption absent explicit promulgation of a federal rule.

If upheld, the Third Circuit's approach would create a massive remedial gap for workers who fall outside the LIA's regulatory protections and who are

unable to invoke the Federal Employers' Liability Act ("FELA") to pursue claims against the railroad. It also creates the further anomaly that railroads held liable under FELA for injuries caused by defective locomotives or locomotive parts cannot turn to the actual wrongdoers – the manufacturers of those products – for contribution or indemnity.

OPINIONS BELOW

The opinion of the court of appeals (App.[1] 1a-21a) is reported at 620 F.3d 392. The opinion of the district court (App. 22a-39a) is not reported (but is available at 2009 WL 249769).

JURISDICTION

The judgment of the court of appeals was entered on September 9, 2010. A petition for rehearing was denied on October 5, 2010. App. 42a. The certiorari petition was filed on January 3, 2011, and granted on June 6, 2011 (JA123). The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant provisions of the Locomotive Inspection Act, the Federal Railroad Safety Act of 1970, and the Safety Appliance Act (codified as amended at title 49, subtitle V, part A) are reproduced in the Addendum, *infra*, at 1a-9a.

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[1] "App. _a" refers to the appendix filed with the certiorari petition, and "JA_" refers to the Joint Appendix filed with this brief.

STATEMENT

A. Legal Background

1. In the late nineteenth and early twentieth centuries, states regularly exercised their police powers to regulate the safety of the railroad industry. *See*, *e.g.*, *New York, N.H. & H.R.R. Co. v. New York*, 165 U.S. 628, 631 (1897). In particular, state law provided remedies for injured railroad workers and other persons, including those harmed by unsafe locomotives and locomotive parts, as well as those injured during repair work. *See*, *e.g.*, *Richmond & D.R.R. Co. v. Elliott*, 149 U.S. 266, 271-72 (1893); *Chicago, M. & St. P. Ry. Co. v. Artery*, 137 U.S. 507, 510-11 (1890); *Swoboda v. Union Pac. R.R. Co.*, 127 N.W. 215, 215-16 (Neb. 1910); *Texarkana & Ft. S. Ry. Co. v. O'Kelleher*, 51 S.W. 54, 54-55 (Tex. Civ. App. 1899); *see also Missouri, K. & T. Ry. Co. v. Orton*, 73 P. 63, 63 (Kan. 1903) (per curiam).

During that period, Congress enacted several statutes regulating particular aspects of railroad operations. In 1887, the Interstate Commerce Act, ch. 104, 24 Stat. 379, was passed to regulate the rates charged by railroad carriers. Beginning in 1893, Congress enacted a series of laws, known collectively as the Safety Appliance Act ("SAA"), requiring railroads to maintain certain safety equipment on train cars used on their lines. *See* Act of Mar. 2, 1893, ch. 196, 27 Stat. 531, as amended by Act of Mar. 2, 1903, ch. 976, 32 Stat. 943, as supplemented by Act of Apr. 14, 1910, ch. 160, 36 Stat. 298 (codified as amended at 49 U.S.C. §§ 20301-20306). In 1908, Congress created in FELA a federal cause of action for injured railroad employees against the railroads that employ them. *See* 45 U.S.C. § 51 *et seq.*

In 1911, Congress enacted the Boiler Inspection Act ("BIA"), making it unlawful for common carriers "to use any locomotive engine propelled by steam power in moving interstate or foreign traffic" unless the boiler and its appurtenances were "in proper condition and safe to operate" in "active service." Act of Feb. 17, 1911, ch. 103, § 2, 36 Stat. 913, 913-14 ("1911 Act"). In 1915, Congress amended the BIA to cover not only the boiler but also "the entire locomotive and tender and all parts and appurtenances thereof." Act of Mar. 4, 1915, ch. 169, § 1, 38 Stat. 1192, 1192. As amended, the Act became known as the Locomotive Inspection Act, 49 U.S.C. § 20701 *et seq*. The LIA currently provides that "[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 . . . are in proper condition and safe to operate without unnecessary danger of personal injury." *Id.* § 20701(1).[2]

After the LIA's enactment, state law continued to provide remedies for injured railroad workers (where FELA did not apply) and other persons, including those harmed by unsafe locomotives and locomotive parts, as well as those injured during repair work. *See*, *e.g.*, *Industrial Accident Comm'n v. Payne*, 259 U.S. 182 (1922); *New York Cent. R.R. Co. v. White*, 243 U.S. 188 (1917); *Shanks v. Delaware, L. & W.R.R. Co.*, 239 U.S. 556 (1916); *Alabama Great S. Ry. Co. v. Hamby*, 192 S.E. 467 (Ga. Ct. App. 1937); *Day v. Chicago & N.W. Ry. Co.*, 188 N.E. 540 (Ill. 1933); *New Orleans & N.E.R.R. Co. v. Beard*, 90 So. 727 (Miss. 1922); *Malone v. St. Louis-San Francisco Ry. Co.*, 213 S.W. 864 (Mo. Ct. App. 1919); *see also Gilvary v. Cuyahoga Valley Ry. Co.*, 292 U.S. 57 (1934). In

[2] Section 20701 is reproduced in its entirety at page 21, *infra*.

addition, injured persons who lacked claims under FELA were permitted to pursue state-created causes of action based on violations of the LIA or the SAA. *See*, *e.g.*, *Crane v. Cedar Rapids & I.C. Ry. Co.*, 395 U.S. 164, 166-67 (1969); *Tipton v. Atchison, T. & S.F. Ry. Co.*, 298 U.S. 141, 147-48, 151-52 (1936); *Fairport, P. & E.R.R. Co. v. Meredith*, 292 U.S. 589, 598 (1934); *see also infra* note 21.

2. Following a series of subsequent statutory developments, the LIA today plays a fundamentally different role in the federal regulation of railroad transportation than it did in the early twentieth century.

The original LIA, enacted in 1911, consisted of nine substantive provisions. *See* 1911 Act §§ 1-9, 36 Stat. 913-16. Section 1 contained a jurisdictional provision, and § 2 contained the precursor to what is now § 20701 (quoted at p. 21, *infra*). Sections 3 and 4 provided for the appointment of inspectors to enforce the Act. Section 5 required carriers to file rules and instructions for the inspection of locomotive boilers with the chief inspector and provided for review of those rules and instructions by the Interstate Commerce Commission ("ICC"). Section 6 prescribed procedures for inspections. Section 7 required the chief inspector to report annually to the ICC. Section 8 required carriers to report, and an inspector to investigate, any accident caused by failure of a boiler or appurtenance and resulting in serious injury or death. Section 9 provided for civil penalties for violations of the statute, a regulation, or an inspector's order.[3]

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[3] Initially, the LIA was codified in chapter 1 of Title 45. *See* 45 U.S.C. §§ 22-34 (1988).

In 1965, President Johnson, acting under the authority granted by the Reorganization Act of 1949, ch. 226, 63 Stat. 203, abolished the position of locomotive inspector established under the LIA and transferred the locomotive inspection function to the ICC. *See* Reorganization Plan No. 3 of 1965, 30 Fed. Reg. 9351 (July 28, 1965). In a message to Congress accompanying that reorganization plan, President Johnson explained that the ICC's ability effectively to promote railroad safety was then "severely limited by certain anachronistic provisions of the locomotive inspection statutes." Special Message to the Congress Transmitting Reorganization Plan 3 of 1965: Locomotive Inspection (May 27, 1965), *reprinted in* 45 U.S.C. § 22 note (1988). The LIA, he wrote, "specifies in detail the method of appointing locomotive inspectors, the functions to be performed by them, and the organization structure for administering inspection activities." *Id.* Although those provisions "may have been suited to conditions 50 years ago," President Johnson concluded, "they are clearly inappropriate today." *Id.* In light of those changes, §§ 3 and 4 of the LIA were omitted from subsequent editions of the United States Code. *See* 45 U.S.C. §§ 24-27 (1988). In 1966, Congress transferred authority to implement and enforce the LIA from the ICC to the Federal Railroad Administration ("FRA"), part of the newly created Department of Transportation. *See* Department of Transportation Act, Pub. L. No. 89-670, § 6(e)(1)(E), (G), (f)(3)(A), 80 Stat. 931, 939, 940 (1966).

In 1970, Congress enacted the Federal Railroad Safety Act, Pub. L. No. 91-458, 84 Stat. 971 ("FRSA"), for the purpose of promoting railroad safety and reducing railroad-related accidents and injuries. *See*

id. § 101, 84 Stat. 971 (codified as amended at 49 U.S.C. § 20101). The FRSA established broad federal regulation of railroads, providing that the Secretary of Transportation "shall . . . prescribe, as necessary, appropriate rules, regulations, orders, and standards for all areas of railroad safety." *Id.* § 202(a), 84 Stat. 971 (codified as amended at 49 U.S.C. § 20103(a)). And it granted the Secretary broad new powers to implement and enforce that mandate.[4] Significantly, even as it transitioned from piecemeal prohibitions to comprehensive regulation, Congress included a section providing that "[a] State may adopt or continue in force any law, rule, regulation, order, or standard relating to railroad safety until such time as the Secretary has adopted a rule, regulation, order, or standard covering the subject matter of such State requirement." *Id.* § 205, 84 Stat. 972 (codified as amended at 49 U.S.C. § 20106(a)(2)).

The FRSA's legislative history reflects that, in enacting the statute, Congress recognized the limited nature of the existing federal statutes applicable to railroads. The Senate Report explained that "the railroad industry is the only mode of transportation in the United States which presently is not subject to

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[4] *See* FRSA § 208(a) ("the Secretary is authorized to perform such acts including, but not limited to, conducting investigations, making reports, issuing subpoenas, requiring production of documents, taking depositions, prescribing recordkeeping and reporting requirements, carrying out and contracting for research, development, testing, evaluation, and training"), (c) (authorizing Secretary's agents to enter and inspect facilities and equipment), 84 Stat. 974, 975 (codified as amended at 49 U.S.C. §§ 20107(a)-(b), 20108(a)-(b)); *id.* § 203 (authorizing emergency orders prohibiting use of unsafe facilities or equipment), 84 Stat. 972 (codified as amended at 49 U.S.C. § 20104); *id.* §§ 209-210 (penalties and injunctive relief), 84 Stat. 975-76 (codified as amended at 49 U.S.C. §§ 20111-20112).

comprehensive Federal safety regulations." S. Rep. No. 91-619, at 1 (1969). The report further found that "scant attention ha[d] been paid to railroad safety at . . . the . . . Federal level[]" and that the existing "rail safety statutes" – including the LIA and the SAA – applied only "to some very specific safety hazard[s]." *Id.* at 4; *accord* H.R. Rep. No. 91-1194, at 8 (1970) (the LIA and other existing railroad safety statutes "meet only certain and special types of railroad safety hazards").

In 1994, the statutes regulating railroad transportation were repealed and partially re-codified in Title 49. *See* Act of July 5, 1994, Pub. L. No. 103-272, 108 Stat. 745 ("1994 Act"). A few provisions from the original LIA were re-enacted: § 20701 contains the substantive safety standard and inspection requirements found in § 2 of the original Act; § 20702 contains some of the inspection procedures contained in §§ 5-6; and § 20703 contains the requirement for accident reports and investigations from § 8. Sections 1, 3-4, 7, and 9 of the original LIA – including the provisions governing the appointment of locomotive inspectors and the assessment of civil penalties – were not re-enacted as freestanding provisions.

B. History Of Asbestos Use In Locomotives And Locomotive Parts

This case involves a railroad maintenance worker who became ill and eventually died from exposure to asbestos insulation surrounding locomotive boilers and contained in locomotive brake shoes. Manufacturers in the United States first began using asbestos in the latter half of the nineteenth century.[5] Because

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[5] *See* Global Env't & Tech. Found., *Asbestos Strategies: Lessons Learned About Management and Use of Asbestos: Report of*

asbestos was noncombustible and resistant to wear, its earliest uses included insulation in steam engines, locomotives, and pipes.[6]

During the period in which it was used in locomotives, asbestos was not a critical component of boiler insulation. Railroads generally used 85 percent magnesia insulation, a material in which asbestos merely acted as a reinforcing fiber and added little to the insulating value of the magnesia.[7] Nor was asbestos the only material suitable for the task: early twentieth century patents reveal numerous alternatives to asbestos such as aluminum, fiberglass, animal hair, and wool.[8]

Despite the available alternatives, locomotive and equipment manufacturers persisted in using asbestos, even after obtaining information about the harms it caused to humans. At least 30 case reports published between 1900 and 1930 indicated that asbestos dust exposure could lead to lung disease and that exposure to the fibrous form of asbestos could thus be an occupational hazard.[9] By 1935, large-scale epidemicological studies showed the link between asbestos exposure and asbestosis.[10] Railroads were familiar with that literature because, throughout the 1930s, reports of the health dangers of asbestos exposure

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Findings and Recommendations On the Use and Management of Asbestos 33 (May 16, 2003).

[6] *See id.*

[7] *See* Barry I. Castleman, *Asbestos: Medical and Legal Aspects* 372-73 (5th ed. 2005) ("Castleman, *Asbestos*").

[8] *See id.* at 373-74.

[9] *See* Irving J. Selikoff & Douglas H. K. Lee, *Asbestos and Disease* 23 (Academic Press 1978).

[10] *See id.* at 23-24.

were presented at meetings of the Association of American Railroads and were published in railroad claim agent journals.[11]

By the early 1980s, manufacturers had largely ceased using asbestos in locomotives.[12]

C. Factual Background And Procedural History[13]

1. From 1947 to 1974, George Corson worked as a machinist repairing and maintaining locomotives in railroad maintenance facilities. JA42 (¶ 6).[14] His tasks included working with asbestos insulation surrounding locomotive boilers. App. 3a. In particular, Mr. Corson's responsibilities included changing boiler valves, a task that required using a tool to strip the asbestos insulation from the valve, releasing asbestos dust. Mr. Corson also worked alongside pipe fitters and was exposed to asbestos dust created when they removed and replaced asbestos insulation surrounding the boilers themselves. JA56-59, 60-70. The Baldwin Locomotive Company, predecessor-in-interest of respondent Viad Corp ("Viad"), manufactured locomotives on which Mr. Corson worked.

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[11] *See* Castleman, *Asbestos* at 646-47, 650.

[12] *See* U.S. Dep't of Transp., Fed. Railroad Admin., *Locomotive Crashworthiness and Cab Working Conditions: Report to Congress* 10-11 to 10-12 (Sept. 1996) ("1996 FRA Report"), *available at* http://www.regulations.gov/#!documentDetail;D=FRA-2004-17645-0009.

[13] The Court views the facts in the light most favorable to petitioners, against whom summary judgment was granted below. *See*, *e.g.*, *Pennsylvania State Police v. Suders*, 542 U.S. 129, 134 (2004); *Howlett v. Birkdale Shipping Co.*, 512 U.S. 92, 94 (1994).

[14] The Third Circuit erroneously stated that Mr. Corson worked until 1994, rather than 1974. *See* App. 2a.

App. 3a; JA43, 51 (¶¶ 10, 10(at)); JA54-56, 59-60, 63, 72-74.

Another of Mr. Corson's duties was changing locomotive brake shoes. Those brake shoes contained asbestos, and removing them also released asbestos dust. Respondent Railroad Friction Products Corporation ("RFPC") distributed asbestos-containing Cobra brake shoes used by Mr. Corson. App. 3a; JA70-71, 79-82, 86-90, 119-21.

In 2005, Mr. Corson was diagnosed with malignant mesothelioma, the only known cause of which is exposure to asbestos. App. 3a; JA52 (¶ 13). He became severely ill and died from the disease in October 2007. JA72-78, 90-94.

2. In June 2007, Mr. Corson and his wife filed suit in Pennsylvania state court against multiple defendants, seeking damages for injuries caused by his exposure to asbestos. JA41-53. They sued the railroad that employed Mr. Corson under FELA. They also pleaded state-law tort claims against the manufacturers and distributors of the asbestos-containing products with which Mr. Corson worked, including respondents. The Corsons alleged multiple theories of liability, including that those products were defective, both because of their design and because they were not accompanied by adequate warnings regarding the dangers of asbestos or instructions regarding safe use. JA26-27 (¶ 12), 42 (¶ 8). The Corsons also alleged that the manufacturers and distributors were negligent, both in the design of the products and in the failure to furnish proper warnings and instructions. JA20-26 (¶¶ 7-10), 42 (¶ 8). After Mr. Corson's death, the executor of his estate (a petitioner here, along with his widow) was substituted as a plaintiff in the litigation. App. 3a.

In the state trial court, Viad moved for summary judgment on the ground that federal law preempted petitioners' claims. The trial court denied that motion. App. 3a. Subsequently, each of the respondents moved for summary judgment, asserting that insufficient evidence linked its products to Mr. Corson's exposure to asbestos. *Id.* The trial court denied those motions as well. JA100, 101. The court granted, however, motions for summary judgment filed by a number of other defendants, including the railroad for which Mr. Corson worked. With respect to Mr. Corson's FELA claim against the railroad that employed him, the trial court held that there was insufficient evidence of negligence to warrant a trial and that Mr. Corson could not rely on a violation of the LIA to establish negligence because "case law only permits these claims for injuries sustained while on the railroad, but not while in the [repair] shops." JA118.[15]

In May 2008, after the state trial court had granted summary judgment in favor of a defendant whose presence in the case had defeated diversity jurisdiction, respondents removed this case to the United States District Court for the Eastern District of Pennsylvania. App. 4a. In the district court, respondents again moved for summary judgment, each

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[15] After removal, the federal district court denied petitioners' motions to reconsider the state trial court's orders granting summary judgment to the railroad and other defendants, concluding that it lacked jurisdiction over defendants dismissed by the state court. *See* App. 40a-41a. Petitioners also appealed those orders through the state-court system, and a Pennsylvania intermediate appellate court dismissed the appeal for lack of jurisdiction, on the ground that the removal of the case to federal court divested the state courts of jurisdiction. *See Kurns v. Airco*, 986 A.2d 1293 (Pa. Super. Ct. 2009) (table).

asserting that the LIA preempted petitioners' state-law claims. *Id.* They alleged that petitioners' claims were barred by "field preemption under the Locomotive Inspection Act." JA102; *see* RFPC Br. in Support of Summ. J. at 3 (E.D. Pa. filed Dec. 16, 2008) (asserting "field preemption under the BIA"). Respondents did not argue that petitioners' state-law claims actually conflict with any requirement of federal law.

In February 2009, the district court granted respondents' motions for summary judgment. App. 22a-39a. The court held that the LIA preempts petitioners' claims, relying on *Napier v. Atlantic Coast Line Railroad Co.*, 272 U.S. 605 (1926). After quoting *Napier*'s conclusion that "'state legislation is precluded because the Boiler Inspection Act, as we construe it, was intended to occupy the field,'" the district court opined that, "because plaintiff alleges that Mr. Corson contracted mesothelioma through his contact with locomotive equipment, the reasoning and holding of *Napier* plainly applies." App. 27a-28a (quoting *Napier*, 272 U.S. at 613).

The district court rejected petitioners' contention that field preemption under the LIA did not bar petitioners' claims because the Act regulates only the conditions under which locomotives can be "used" on a "railroad line," 49 U.S.C. § 20701, and does not address safety hazards presented by the repair process. The court did not dispute the premise that the LIA's coverage is limited to locomotives that are in use on a railroad line, but it opined that "the issue of whether the locomotive was 'in use' or not is inapplicable" because "plaintiff is seeking relief pursuant to state law tort claims and not the BIA." App. 31a. The court further reasoned that, "because the BIA preempts the entire field of locomotive equipment, the

question of whether decedent was exposed to asbestos from locomotives in use or not in use is irrelevant." *Id.* (internal quotation marks omitted). The court's opinion relied entirely on implied field preemption and did not address conflict preemption.

3. The Third Circuit affirmed. App. 1a-21a. The court of appeals read *Napier* to stand for the proposition that "the LIA preempts a broad field relating to the health and safety of railroad workers, including requirements governing the design and construction of locomotives, as well as equipment selection and installation." App. 11a. It opined that "any state law in [the] area" regulated by the LIA is "preempted, regardless of whether the [federal] agency actually exercised [its] powers" under the Act. App. 10a. The court concluded that, because "the brake pads and engine valves that allegedly caused [Mr. Corson's] asbestos exposure . . . are clearly locomotive equipment," petitioners' claims "fall[] squarely within the field of employment hazards that the [LIA] was intended to cover." App. 12a (internal quotation marks omitted; brackets in original).

The Third Circuit rejected petitioners' argument that, because Mr. Corson was exposed to asbestos while servicing locomotives that were not in use, field preemption did not bar petitioners' claims. App. 10a n.5. It acknowledged that the LIA does not apply in such circumstances: "The plaintiffs are correct that *liability* under the LIA only exists if the locomotive was in use at the time of the accident." *Id.* (citing *Crockett v. Long Island R.R.*, 65 F.3d 274, 277 (2d Cir. 1995)). But it reasoned that "[t]his has no impact on the scope of preemption" because "the plaintiffs are not asserting or contesting liability under the LIA." *Id.*

The court of appeals also distinguished *Wyeth v. Levine*, 129 S. Ct. 1187 (2009), on the ground that it involved "implied conflict preemption." App. 11a n.7. The court explained that, "[b]ecause we find that field preemption under the LIA bars the plaintiffs' claims, we need not analyze implied conflict preemption." *Id.* Neither respondent raised conflict preemption in its court of appeals brief; instead, both relied exclusively on the contention that the LIA preempts the relevant field.

4. On January 3, 2011, petitioners petitioned for a writ of certiorari. Approximately two months earlier, on November 1, 2010, this Court had issued an order inviting the Acting Solicitor General to file a brief expressing the views of the United States in another case presenting the question whether the LIA preempts the field of state-law claims involving injuries resulting from repair work on locomotives that were not in use on a railroad line. *See* Order, *John Crane Inc. v. Atwell*, No. 10-272 (Nov. 1, 2010). In May 2011, the United States filed an *amicus* brief in response to the Court's invitation, maintaining that "the field covered by the LIA does not include requirements concerning the repair of locomotives that are not in use." Br. for the United States as Amicus Curiae at 10, *John Crane Inc. v. Atwell*, No. 10-272 (U.S. filed May 6, 2011) ("U.S. *Atwell* Br."). On June 6, 2011, the Court granted the petition in this case.[16]

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[16] In this brief, petitioners have revised their question presented to track more closely the field-preemption issue that the United States recommended the Court grant review to resolve. *See* U.S. *Atwell* Br. (I).

SUMMARY OF ARGUMENT

I.A. The court of appeals' implied-field-preemption ruling is incorrect and should be reversed. The scope of field preemption is determined by the scope of the regulated field. Petitioners' claims are not within the field regulated by the LIA for two independent reasons.

First, the LIA's purpose is to ensure the safe operation of locomotives on railroad lines, and the Act does not cover locomotives under repair in railroad maintenance facilities. The Act's plain text makes clear that it regulates only the conditions under which a locomotive can be "used" on a "railroad line." 49 U.S.C. § 20701. That reading of the LIA comports with the interpretation of the agency charged with implementing the Act, this Court's precedent interpreting the companion SAA, and a unanimous body of federal court of appeals decisions. Accordingly, because Mr. Corson's injuries were incurred in the course of maintaining locomotives in repair facilities, petitioners' claims are not within any field preempted by the LIA.

Second, during the period in which Mr. Corson was exposed to asbestos by respondents' products, manufacturers of locomotives and locomotive parts were not subject to regulation under the LIA. The Act was first amended to apply to manufacturers such as respondents in 1988, years after Mr. Corson retired from railroad repair work. For that reason as well, petitioners' claims are not within the field regulated or preempted by the LIA.

B. Because states have traditionally provided remedies for injured railroad maintenance workers, respondents would in any event have to demonstrate a "clear and manifest" congressional intent to pre-

empt the field. *English v. General Elec. Co.*, 496 U.S. 72, 79 (1990) (internal quotation marks omitted). Nothing in the LIA reflects such a clear purpose to abolish state-law personal-injury claims absent an actual conflict with federal law. Subsequent statutory developments have made that conclusion even more apparent: the LIA currently represents only a small part of a larger regulatory regime established by the 1970 FRSA, and the FRSA expressly preserves a role for state safety regulation when there is no federal requirement on point.

C. The Third Circuit's rationale for finding field preemption is erroneous for three reasons. First, although the court acknowledged that the LIA applies only "if the locomotive was in use at the time of" the incident giving rise to the claim, the court incorrectly concluded that the "in use" limitation on the scope of the regulated field had "no impact on the scope of preemption." App. 10a n.5. In fact, the scope of field preemption is determined by the scope of the regulated field. Accordingly, the fact that the LIA does not apply to petitioners' claims means that those claims are not within any field that the Act preempts.

Second, the court's reliance on *Napier* was misplaced. *Napier* involved state legislation requiring railroads to equip their locomotives with particular safety devices before using them on a railroad line. Unlike petitioners' claims – which arise from activities that the LIA does not regulate – the state statutes in *Napier* struck at the heart of the responsible federal agency's regulatory authority under the Act.

Third, the court's implied-field-preemption holding would leave many injured persons without a remedy. For example, under the court's decision, a railroad

repair worker injured by a defective locomotive part would have no claim under state law (which would be preempted) or under the LIA (because the locomotive was not in use at the time of the injury). Although a repair worker employed directly by the railroad would have a cause of action under FELA, that would provide no remedy unless the railroad was negligent as well. Moreover, if the worker did recover damages from the railroad, under the decision below, the railroad would be unable to seek contribution or indemnity from the manufacturer of the injurious product. The Third Circuit made no effort to explain how Congress could have intended such anomalous and harsh results.

II. Because the Third Circuit's implied-field-preemption ruling is incorrect, the judgment should be reversed and the case remanded for further proceedings. Conflict preemption provides no basis for affirming the judgment because it was neither pressed nor passed upon below and is therefore not properly presented here. In any event, to the extent the Court determines that it is appropriate to provide guidance to the lower courts on how to apply conflict preemption under the LIA, claims such as petitioners' do not conflict with the Act or federal regulations.

ARGUMENT

I. IMPLIED FIELD PREEMPTION DOES NOT BAR PETITIONERS' CLAIMS

This Court has held that, even when Congress has not expressly stated its intent to preempt state law, preemption can nonetheless be implied. Federal law impliedly preempts state law, even without an actual conflict between the two, when state law "regulates conduct in a field that Congress intended the Federal Government to occupy exclusively." *English*, 496 U.S. at 79. The doctrine of implied field preemption recognizes two circumstances in which state law is preempted even without a conflict with federal law: (i) when there is a "'scheme of federal regulation . . . so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it'" or (ii) when "an Act of Congress 'touch[es] a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject.'" *Id.* (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)) (alterations in original). Here, the Third Circuit relied on the first type of implied field preemption recognized in *English*. *See* App. 16a.[17]

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[17] The Third Circuit made no finding that the LIA "'touch[es] a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject.'" *English*, 496 U.S. at 79 (quoting *Rice*, 331 U.S. at 230) (alteration in original). Nor could it have done so, considering the history of state regulation and remedies in this area and the current conflict-preemption regime established by the FRSA. *See supra* pp. 3-5, 6-7; *Hillsborough County v. Automated Med. Labs., Inc.*, 471 U.S. 707, 719-20 (1985). This case involves none of the "uniquely federal areas of regulation" – such as foreign affairs and international vessel standards – recognized in this Court's preemption jurispru-

The court of appeals' rationale for finding field preemption, however, is erroneous. Field preemption does not bar petitioners' claims because they are not within the scope of the field regulated by the LIA. Moreover, the Act does not reflect the necessary clear congressional intent to preclude state-law claims absent an actual conflict with federal law.

A. Any Implied Field Preemption Under The LIA Does Not Extend To Petitioners' Claims Because Those Claims Are Not Within The Field Regulated By The Act

This Court's cases make clear that any implied field preemption resulting from a federal statute does not extend beyond the scope of the field the statute regulates. The Court has explained that, in "defining the[] scope" of the federal statute at issue, it would likewise be "defining . . . the scope of the resulting field pre-emption." *United States v. Locke*, 529 U.S. 89, 112 (2000). Similarly, in *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293 (1988), the Court stated that the doctrine of field preemption does not preclude the enforcement of state law unless that law "regulates *within* [the] exclusively federal domain." *Id.* at 305; *see Rice*, 331 U.S. at 237. Viad thus correctly concedes that "the scope of field preemption is determined by the scope of the regulated field." Viad Supp. Cert. Br. 4; *see* U.S. *Atwell* Br. 11, 13.

Petitioners' state-law claims fall outside the field regulated by the LIA in two respects. First, Mr. Corson's illness resulted from his work in rail repair and maintenance facilities, which are not, and never have been, regulated under the LIA. Second, during

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dence. *Chamber of Commerce v. Whiting*, 131 S. Ct. 1968, 1983 (2011) (plurality) (collecting cases).

the period that Mr. Corson was exposed to asbestos, the LIA did not apply to manufacturers of locomotives or locomotive parts, such as respondents.

1. The LIA regulates only locomotives in use on a railroad line

a. The LIA provides in pertinent part as follows:

> A railroad carrier may use or allow to be used a locomotive or tender on its railroad line only when the locomotive or tender and its parts and appurtenances—
>
> (1) are in proper condition and safe to operate without unnecessary danger of personal injury;
>
> (2) have been inspected as required under this chapter and regulations prescribed by the Secretary of Transportation under this chapter; and
>
> (3) can withstand every test prescribed by the Secretary under this chapter.

49 U.S.C. § 20701.

The text and structure of that provision make plain that it applies only to the "use" of a locomotive "on [a] railroad line." *Id.*[18] Those textual limitations on the provision's scope are found in the initial portion of the section, which precedes and qualifies each of the three subsections that follow. *See id.* As a matter of grammar and statutory structure, the section consists of three independent requirements, each addressing the circumstances in which a railroad carrier is permitted to "use or allow to be used a locomotive or tender on its railroad line." *Id.* The LIA thus un-

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[18] That limitation has existed since the statute's enactment in 1911. *See* 1911 Act § 2, 36 Stat. 913-14.

ambiguously regulates locomotives, tenders, and their parts only when they are in "use" on a "railroad line."

The LIA's principal substantive standard, contained in subsection (1), reinforces the "use" limitation, providing that locomotives must be "in proper condition and safe *to operate*." *Id.* § 20701(1) (emphasis added). The other two subsections of § 20701 likewise address preconditions for the safe *operation* of locomotives – namely, that they "have been inspected as required under" the Act and implementing regulations (subsection (2)) and that they "can withstand every test prescribed by the Secretary" of Transportation under the Act (subsection (3)). By their terms, those provisions do not impose requirements that locomotives must satisfy while in repair facilities. *Cf. Locke*, 529 U.S. at 101, 111 (giving field-preemptive effect to a statute requiring the Coast Guard to issue regulations addressing the "design, construction, alteration, *repair, maintenance*, operation, equipping, personnel qualification, and manning of vessels") (emphasis added).

The remaining provisions of the LIA similarly contain no language authorizing (let alone requiring) the Secretary to regulate hazards posed by the process of repairing and maintaining locomotives. Rather, those provisions direct the Secretary both to inspect locomotives "as necessary" and to "ensure" that carriers also inspect their locomotives and repair any defects "before" a locomotive "is *used* again," 49 U.S.C. § 20702(a)(2)-(3) (emphasis added); provide that a locomotive found by the Secretary to be out of compliance with the Act or implementing regulations "may be *used* only after" it has been repaired and reinspected, *id.* § 20702(b)(3) (emphasis added); require

carriers to maintain reports of their inspections, *see id.* § 20702(c); and require carriers to report, and the Secretary to investigate, locomotive failures causing serious injury or death, *see id.* § 20703. Each of those provisions concerns the safe use of locomotives on railroad lines. None governs the repair process.

The FRA, the agency within the Department of Transportation that currently has authority to implement the LIA, also does not interpret the Act as granting authority to regulate work in repair and maintenance facilities. *See* U.S. *Atwell* Br. 15 ("the LIA does not authorize the FRA to regulate hazards posed by the repair process").[19] And that interpretation of the LIA comports with the longstanding view of the federal agency charged with implementing the Act. Little more than a decade after the LIA's passage, the ICC, which then had authority to administer the Act, determined that "it is the '*use*' of a locomotive not found to be in proper condition and safe to operate, and *not the condition itself*, which is a violation of the law." Inspection of Locomotive Boilers: Report of the Commission to the Senate, 73 I.C.C. 761, 763 (Aug. 29, 1922) (emphases added).

b. This Court has adopted a similar interpretation of parallel language in the SAA, which this Court has construed as a companion to the LIA. *See Brady v. Terminal R.R. Ass'n of St. Louis*, 303 U.S. 10 (1938).[20] In *Brady*, a railroad worker was injured

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[19] An *amicus* brief filed by the United States represents the views of the relevant agencies. *See*, *e.g.*, *PLIVA, Inc. v. Mensing*, 131 S. Ct. 2567, 2575 n.3 (2011).

[20] The SAA regulates the conditions under which a railroad carrier "may use or allow to be used on any of its railroad lines" a train car or locomotive. 49 U.S.C. § 20302(a). When *Brady* was decided, the SAA made it unlawful "'to haul[] or permit to

while inspecting one of a series of train cars that another carrier had delivered to his employer. After a suit against his employer under the SAA was dismissed, the worker brought a claim against the delivering carrier under the SAA. *See id.* at 12.[21] This Court explained that "[t]he first question is whether the car can be said to have been in use by the [delivering carrier] at the time in question." *Id.* at 13. It stated that the "'use, movement or hauling of the defective car,' within the meaning of the statute, had not ended when [the worker] sustained his injuries." *Id.* (quoting *Chicago Great W. R.R. Co. v. Schendel*, 267 U.S. 287, 291 (1925)). The Court further explained that it was "not a case where a defective car has reached a place of repair." *Id.* Accordingly, the car the worker was inspecting when he sustained his injuries was "still in use" within the meaning of the statute. *Id.*

Brady cited two cases for the proposition that a car that has "reached a place of repair" is not "in use." *See id.* (citing *Baltimore & Ohio R.R. Co. v. Hooven*, 297 F. 919, 921, 923 (6th Cir. 1924); *New York, C. & St. L.R.R. Co. v. Kelly*, 70 F.2d 548, 551 (7th Cir. 1934)). In each, the court of appeals had held that the SAA did not apply because the injury occurred

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be hauled or used on its line any car'" lacking certain safety features. *Brady*, 303 U.S. at 12 (quoting 45 U.S.C. § 11 (1934)).

[21] An injured person can rely on the LIA or the SAA to establish liability in an action for damages under state law or under FELA. *See, e.g.*, *Urie v. Thompson*, 337 U.S. 163, 188-89 (1949); *Tipton*, 298 U.S. at 148, 151; *see also supra* pp. 4-5. Under FELA, a violation of the LIA or the SAA establishes negligence *per se* and precludes the railroad from relying on the defenses of contributory negligence and assumption of risk. *See CSX Transp., Inc. v. McBride*, 131 S. Ct. 2630, 2643 n.12 (2011); *Urie*, 337 U.S. at 188-89; 45 U.S.C. §§ 53-54.

when the locomotive was under repair. In *Hooven*, the Sixth Circuit concluded that the SAA does not "cover[]" a locomotive "temporarily withdrawn from service and undergoing minor repairs in roundhouse in preparation for early return to service." 297 F. at 920; *see id.* at 921, 924 (SAA "not applicable" when the locomotive "is withdrawn temporarily from actual service" and "has reached the place of repair"). The Sixth Circuit explained that "the statutory criterion" for determining the SAA's applicability "is whether the car is 'in use' 'on its line.'" *Id.* at 922; *see also id.* ("The act forbids the 'use' or 'hauling on its line' of prescribed cars."). Similarly, in *Kelly*, the Seventh Circuit held that, "[a]fter a defective car reaches the place of repair, the Safety Appliance Act is inapplicable because such car has been withdrawn from service and is not 'in use' under the provisions of the act." 70 F.2d at 550; *see id.* at 551 ("it is clear that Congress in the enactment of the Safety Appliance Act was limiting its operation to cars hauled or permitted to be hauled or used on the line").[22]

c. Every federal court of appeals to have considered the issue has concluded that "[w]hether the LIA applies turns on whether the locomotive was 'in use.'"

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[22] In light of their similarities, courts of appeals have recognized that both the LIA and the SAA are subject to the same "in use" limitation. *See Holfester v. Long Island R.R. Co.*, 360 F.2d 369, 373 (2d Cir. 1966) ("In view of [the] identity of purpose and the similarity and overlapping of subject matter in dealing with railroad equipment and appliances, the cases defining and construing the phrase 'in use,' for the purpose of the Federal Safety Appliance Act, are authoritative for the same purpose under the Boiler Inspection Act."); *see also Lyle v. Atchison, T. & S.F. Ry. Co.*, 177 F.2d 221, 223 (7th Cir. 1949) (relying on cases under the SAA in holding that the LIA did not apply to a locomotive and tender in an inspection pit); *cf. Urie*, 337 U.S. at 188-89 (interpreting the LIA and the SAA together).

Wright v. Arkansas & Missouri R.R. Co., 574 F.3d 612, 620 (8th Cir. 2009); *see*, *e.g.*, *McGrath v. Consolidated Rail Corp.*, 136 F.3d 838, 842 (1st Cir. 1998); *Crockett*, 65 F.3d at 277; *Estes v. Southern Pac. Transp. Co.*, 598 F.2d 1195, 1198-99 (10th Cir. 1979); *Tisneros v. Chicago & N.W. Ry. Co.*, 197 F.2d 466, 467 (7th Cir. 1952); *see also Deans v. CSX Transp., Inc.*, 152 F.3d 326, 328-29 (4th Cir. 1998) (interpreting the SAA); *Trinidad v. Southern Pac. Transp. Co.*, 949 F.2d 187, 188 (5th Cir. 1991) (same).

Based on that interpretation of the LIA, the courts of appeals have uniformly determined that the Act does not apply to "injuries directly resulting from the inspection, repair, or servicing of railroad equipment located at a maintenance facility." *Angell v. Chesapeake & Ohio Ry. Co.*, 618 F.2d 260, 262 (4th Cir. 1980); *see*, *e.g.*, *Wright*, 574 F.3d at 615, 622 (locomotive on a "repair in place" track that was "undergoing a daily inspection" "was not 'in use' at the time of the accident"); *McGrath*, 136 F.3d at 842 (citing *Angell*); *Crockett*, 65 F.3d at 277 (train that was "inactive on a yard track" undergoing "light maintenance" not "in use"); *Pinkham v. Maine Cent. R.R. Co.*, 874 F.2d 875, 881 (1st Cir. 1989) ("It is well established that locomotives being serviced in a place of repair are not 'in use' within the meaning of the Boiler Inspection Act."); *Steer v. Burlington N., Inc.*, 720 F.2d 975, 976 (8th Cir. 1983) ("Locomotives being serviced in a place of repair are not 'in use' within the meaning of the Boiler Inspection Act."); *Tisneros*, 197 F.2d at 467 (locomotive in a stall in the roundhouse not "in use").

Although those cases arose in the context of injured persons' attempts to recover for violations of the LIA or the SAA, their holdings apply equally to cases, such as this one, involving assertions that the LIA

preempts the field of state-law claims. The outcomes in those cases turned on the conclusion that the LIA and the SAA do not "appl[y]" when the locomotive is not in use on a railroad line. *Wright*, 574 F.3d at 620; *accord*, *e.g.*, *Hooven*, 297 F. at 924. Because any implied field preemption under a federal statute does not extend beyond the regulated field, *see supra* p. 20, the LIA does not impliedly preempt the field of state-law claims by workers injured while repairing locomotives that are not "in use" on railroad lines.

Further, as the Third Circuit acknowledged (App. 15a), each of the federal courts of appeals to have considered whether the LIA preempts the field of state-law claims did so in a case in which the injury occurred while the locomotive was in use on a railroad line. *See Forrester v. American Dieselelectric, Inc.*, 255 F.3d 1205, 1206-07 (9th Cir. 2001) (plaintiff struck by locomotive crane in use on a track); *Oglesby v. Delaware & Hudson Ry. Co.*, 180 F.3d 458, 460 (2d Cir. 1999) (per curiam) (railroad worker injured his back when he attempted to adjust an engineer's seat in a locomotive; no indication that the locomotive was not in use on a railroad line); *First Sec. Bank v. Union Pac. R.R. Co.*, 152 F.3d 877, 878 (8th Cir. 1998) (collision between automobile and train at grade crossing); *Springston v. Consolidated Rail Corp.*, 130 F.3d 241, 243 (6th Cir. 1997) (same); *Law v. General Motors Corp.*, 114 F.3d 908, 909 (9th Cir. 1997) (railroad workers suffered hearing loss caused by bursts of sound from locomotive brakes and engines); *Marshall v. Burlington N., Inc.*, 720 F.2d 1149, 1151

(9th Cir. 1983) (Kennedy, J.) (collision between automobile and train at grade crossing).[23]

Accordingly, because the LIA does not apply to locomotives in repair facilities, state-law claims seeking to recover for injuries incurred while working in those facilities are not within any field that the LIA might preempt.

2. The LIA did not apply to manufacturers of locomotives or locomotive parts, such as respondents, when the events giving rise to petitioners' claims occurred

Any implied field preemption under the LIA could not bar petitioners' claims for the additional reason that respondents were not subject to regulation under the LIA at the time Mr. Corson was exposed to asbestos by their products.

As enacted in 1911, the LIA "appl[ied]" only to "common carrier[s]" "engaged in the transportation of passengers or property by railroad" and their "officers, agents, and employees." 1911 Act § 1, 36

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[23] In addition, none of the state supreme courts to have considered field preemption of state-law claims in this context expressly addressed the applicability of the LIA to locomotives not in use on a railroad line. *See Darby v. A-Best Prods. Co.*, 811 N.E.2d 1117, 1123-26 (Ohio 2004) (not addressing the "in use" limitation); *In re West Virginia Asbestos Litig.*, 592 S.E.2d 818, 821-24 (W. Va. 2003) (same); *General Motors Corp. v. Kilgore*, 853 So. 2d 171, 174-80 (Ala. 2002) (same); *Mickelson v. Montana Rail Link, Inc.*, 999 P.2d 985, 987 (Mont. 2000) (collision between automobile and train at grade crossing); *Scheiding v. General Motors Corp.*, 993 P.2d 996, 1004 n.5 (Cal. 2000) (finding "not timely raised" and declining to "consider" the argument that "the scope of the BIA extends only to the on-line operation of locomotives" and therefore does not preempt claims for injuries "result[ing] from work on [locomotive] equipment in roundhouses and repair shops").

Stat. 913. The Act made it "unlawful" for a "common carrier" or "its officers or agents" "to use" a locomotive unless it was in proper condition and safe to operate. *Id.* § 2, 36 Stat. 913-14. And the LIA subjected "any common carrier violating this Act" to civil penalties. *Id.* § 9, 36 Stat. 916.[24] Thus, as originally enacted, the LIA regulated only railroad carriers and not manufacturers of locomotives or locomotive parts.

Those aspects of the LIA remained essentially unchanged for nearly 80 years. In 1988, the LIA's penalty provision was revised to apply to "[a]ny person (including a railroad and any manager, supervisor, official, or other employee or agent of a railroad) violating" the Act. Rail Safety Improvement Act of 1988, Pub. L. No. 100-342, § 14(7)(A), 102 Stat. 624, 633 ("1988 Act"). That amendment also added a new sentence to the penalty provision stating that "an act by an individual that causes a railroad to be in violation of any of the provisions of" the Act "shall be deemed a violation." *Id.* § 14(7)(B). In 1992, the Act's penalty provision was amended again to apply explicitly to "[a]ny person (including but not limited to a railroad; any manager, supervisor, official, or other employee or agent of a railroad; *any owner, manufacturer, lessor, or lessee of railroad equipment*, track, or facilities; any independent contractor providing goods or services to a railroad; and any employee of such owner, manufacturer, lessor, lessee, or independent contractor)." Rail Safety Enforcement

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[24] Before the LIA's enactment, Congress considered, but did not pass, bills that would have applied not only to carriers but also to "any seller of a locomotive boiler." S. 236, 61st Cong. § 4 (1909); *see id.* § 2; H.R. Rep. No. 61-1974, at 6-7 (1911).

and Review Act, Pub. L. No. 102-365, § 9(a)(8), 106 Stat. 972, 978 (1992) (emphasis added).[25]

In 1994, the LIA was repealed as part of a comprehensive re-codification of the statutes governing railroad transportation. *See* 1994 Act § 7(b), 108 Stat. 1380. Reenacted portions of the Act apply only to "railroad carriers." *See*, *e.g.*, 49 U.S.C. § 20701(1)-(2) ("railroad carrier" is required to use only inspected equipment in proper condition); *id.* § 20702(a)(3) (Secretary of Transportation shall ensure that every "railroad carrier" inspects its equipment); *id.* § 20703 (accident reporting requirements for "railroad carrier"). The penalty provision of the Act was not reenacted as part of that re-codification, and the Secretary's authority to impose civil penalties for violations of the LIA is now contained in a section applicable to numerous railroad statutes. *See id.* § 21302. That section provides that "[a]n act by an individual that causes a railroad carrier to be in violation is a violation." *Id.* § 21302(a). According to the United States, that sentence means that "a manufacturer violates the LIA if its products cause a railroad carrier to violate the LIA." U.S. *Atwell* Br. 3.

As that statutory history demonstrates, before 1988, the LIA did not apply to manufacturers of locomotives and locomotive parts, such as respondents. Mr. Corson was exposed to asbestos between 1947 and 1974. *See* JA42 (¶ 6); App. 23a n.1. Because respondents were not subject to regulation under the LIA when Mr. Corson was exposed to asbestos by their products, the doctrine of field preemption does

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[25] The Act's substantive provisions continued to regulate only railroads. *See*, *e.g.*, 45 U.S.C. § 23 (1988). (In 1988, the Act was amended to substitute "railroad" for "carrier." *See* 1988 Act § 14, 102 Stat. 632-33.)

not bar petitioners' claims against those manufacturers. *See supra* p. 20 (explaining that any preempted field is coextensive with the regulated field); *Lorincie v. Southeastern Pennsylvania Transp. Auth.*, 34 F. Supp. 2d 929, 932-34 (E.D. Pa. 1998) (holding that the LIA does not preempt claims against manufacturers); *cf. Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 508 n.1 (1992) (noting with approval parties' decision not to address the preemptive effect of a statute enacted after the plaintiff's "claims arose"); *Marshall*, 720 F.2d at 1154 (Kennedy, J.) (identifying the relevant question as whether "state regulation was displaced *at the time of the accident*") (emphasis added).[26]

B. The LIA Does Not Reflect A "Clear And Manifest" Congressional Intent To Displace State-Law Claims

This Court has "emphasized" that, when "'the field which Congress is said to have pre-empted' includes areas that have 'been traditionally occupied by the States,' congressional intent to supersede state laws

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[26] Unlike field preemption, conflict preemption is not necessarily limited to the regulated field. Thus, for example, if the Secretary of Transportation had issued a regulation under the LIA requiring locomotives to be insulated with asbestos, a state law prohibiting the manufacture of locomotives containing asbestos might have "create[d] an unacceptable 'obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Wyeth*, 129 S. Ct. at 1193-94 (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)). Such a state law might therefore have been preempted, even though the LIA did not apply to manufacturers. *Cf. Law*, 114 F.3d at 911-12. But the Third Circuit here identified no actual conflict between state law and federal law, and conflict preemption was not even argued below. *See* App. 11a n.7; *see also infra* Part II.A. Conflict preemption accordingly provides no basis on which to affirm the judgment.

must be '"clear and manifest."'" *English*, 496 U.S. at 79 (quoting *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977) (quoting in turn *Rice*, 331 U.S. at 230)). That standard applies squarely here. When Congress enacted the LIA in 1911, states played an active role in regulating railroad safety. *See supra* p. 3. Even after the LIA's enactment, states continued to provide remedies for injured persons in circumstances where FELA did not apply. *See supra* pp. 4-5. Accordingly, to establish their field-preemption defense, respondents must demonstrate a "clear and manifest" congressional intent to preclude petitioners' claims. *English*, 496 U.S. at 79 (internal quotation marks omitted).

Even apart from the fact that petitioners' claims are not within the field regulated by the LIA, respondents cannot sustain that burden. The LIA itself says nothing about displacing state-law personal-injury claims. Nor does the Act provide any federal remedy for injuries resulting from violations of its provisions. But injured persons have long relied on the LIA to establish liability under causes of action created by state law or other provisions of federal law (i.e., FELA). *See supra* pp. 4-5 & note 21. That fact severely undermines any assertion that the LIA itself was intended to occupy the field of remedies for workers injured by defective locomotives and locomotive parts.

Moreover, to the extent the current incarnation of the LIA is relevant, the Act as presently constituted hardly represents a "'scheme of federal regulation . . . so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it.'" *English*, 496 U.S. at 79 (quoting *Rice*, 331 U.S. at 230). Statutory changes in the last half-century

have transformed the LIA into a relatively minor aspect of the broader regulatory regime created by the FRSA. *See supra* pp. 5-8. The FRSA expressly negates any inference of intent to oust state remedies entirely, by providing that existing state law remains effective unless and until a federal regulation on the topic is issued. *See* 49 U.S.C. § 20106(a)(2); *see also id.* § 20105.

Further, the FRA generally has not exercised the expanded authority granted it by the FRSA to regulate rail repair and maintenance facilities. Instead, the safety of employees in those facilities is generally addressed by the Occupational Safety and Health Administration ("OSHA"), whereas the FRA generally focuses on regulating the movement of equipment over rail lines. *See* Policy Statement, Railroad Occupational Safety and Health Standards, 43 Fed. Reg. 10,583, 10,585 (Mar. 14, 1978); U.S. *Atwell* Br. 4, 15.[27] OSHA's governing statute, the Occupational Safety and Health Act of 1970, specifically *preserves* state-law rights and remedies. *See* 29 U.S.C. § 653(b)(4) (Act does not "enlarge or diminish or affect in any other manner the common law or statutory rights, duties, or liabilities of employers and employees under any law").

In sum, there is no basis for concluding that Congress has expressed a clear and manifest intent to preempt state-law claims involving injuries to rail repair workers caused by defective locomotives and

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[27] That was true before 1978 as well. *See Southern Ry. Co. v. OSHRC*, 539 F.2d 335, 338 (4th Cir. 1976) ("[T]he Department of Transportation and FRA do not purport to regulate the occupational health and safety aspects of railroad offices or shop and repair facilities.").

locomotive parts, absent an actual conflict with federal law.[28]

C. The Third Circuit's Field-Preemption Ruling Is Erroneous

The Third Circuit's reasoning supporting its field-preemption holding is incorrect, for three reasons. First, the court of appeals erroneously concluded that petitioners' claims were subject to field preemption even though those claims are based on injuries arising during repairs to locomotives that were not in use. Second, the court's reliance on *Napier* to preclude petitioners' claims was misplaced. Third, the court's ruling unjustifiably deprives injured persons of the right to seek recourse from manufacturers of unsafe products.

1. The Third Circuit erroneously concluded that the "in use" limitation on the LIA's regulatory scope does not affect the scope of field preemption under the Act

The Third Circuit acknowledged that the LIA does not apply when, as here, the locomotives at issue were not "in use at the time of" the incident giving rise to the claim. App. 10a n.5. But the court thought that the "in use" limitation on the scope of

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[28] *Cf. Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 256 (1984) ("We do not suggest that there could never be an instance in which the federal law would pre-empt the recovery of damages based on state law. But insofar as damages for radiation injuries are concerned, preemption should not be judged on the basis that the Federal Government has so completely occupied the field of safety that state remedies are foreclosed but on whether there is an irreconcilable conflict between the federal and state standards or whether the imposition of a state standard in a damages action would frustrate the objectives of the federal law.").

the regulated field had "no impact on the scope of preemption." *Id.* The court provided no authority for that counterintuitive proposition. In fact, as demonstrated above, this Court's cases are to the contrary. *See supra* p. 20. Indeed, Viad functionally confesses error in the judgment below when it concedes that "the scope of field preemption is determined by the scope of the regulated field." Viad Supp. Cert. Br. 4. Because the scope of field preemption is coextensive with the scope of the regulated field, the fact that the LIA does not regulate the repair process means that state-law claims arising from that process are not within any preempted field.

Viad argued at the certiorari stage that the LIA's "in use" limitation applies only to the substantive standard in § 20701(1) and not to the FRA's regulatory authority under other provisions of the Act. *See id.* at 4-5. But the "in use" limitation applies to all three subsections of § 20701, and the remaining provisions of the LIA likewise address requirements for the *use* of a locomotive on a railroad line. *See supra* Part I.A.1.a. Viad identifies nothing in the LIA's text mandating exclusive federal regulation of the conditions under which a locomotive or its parts can be repaired. Moreover, the Department of Transportation and the FRA have explained that "the LIA does not authorize the FRA to regulate hazards posed by the repair process." U.S. *Atwell* Br. 15. Respondents' defense of the Third Circuit's holding thus rests on the highly dubious proposition that the agency charged with implementing the LIA has misapprehended its regulatory authority.

2. The Third Circuit erroneously relied on *Napier*

The Third Circuit relied heavily on this Court's decision in *Napier* in concluding that implied field preemption bars petitioners' claims. *See*, *e.g.*, App. 16a. But *Napier* is different from this case in multiple relevant respects, and the Court's analysis in that case in fact supports the conclusion that any field preempted by the LIA does not extend to petitioners' claims.

In *Napier*, Georgia and Wisconsin had passed legislation requiring that locomotives used within their respective borders be equipped with particular safety devices. The Georgia statute required "an automatic door to the firebox," and the Wisconsin act required "a cab curtain." 272 U.S. at 607. Railroads in each state brought suit "to enjoin state officials from enforcing, in respect to locomotives used on [their] lines, a state law which prohibits use within the state of locomotives not equipped with the device prescribed." *Id.* The question presented in this Court was "whether the Boiler Inspection Act has occupied the field of regulating locomotive equipment used on a highway of interstate commerce, so as to preclude state legislation." *Id.* The Court answered that question affirmatively, explaining that "state legislation is precluded, because the Boiler Inspection Act, as we construe it, was intended to occupy the field." *Id.* at 613; *see also id.* at 611 & n.2. The Court based that conclusion on "[t]he broad scope of the authority conferred upon the [ICC]," which it described as including authority "to prescribe the rules and regulations by which fitness for service shall be determined." *Id.* at 612, 613.

Napier does not support the Third Circuit's ruling for three reasons.

First, *Napier* reflects the "in use" limitation on the LIA's regulatory scope. There, the railroads sought to enjoin the enforcement of state laws regulating "locomotives *used on [their] lines*." *Id.* at 607 (emphasis added). And this Court described the question presented as whether the LIA "occupied the field of regulating locomotive equipment *used on* a highway of interstate commerce." *Id.* (emphasis added). In finding the state statutes preempted, the Court relied on the ICC's authority to prescribe rules for determining whether a locomotive is "fit[] *for service*" and "'in proper condition' *for operation*." *Id.* at 612 (emphases added). Nothing in the Court's opinion suggests that the LIA applied to or preempted state-law claims based on injuries arising from work on non-operational locomotives in maintenance facilities.[29]

The Third Circuit read this Court's statement that the ICC's authority under the LIA extended to "the design, the construction, and the material of every part of the locomotive and tender and of all appurtenances," *id.* at 611, to require field preemption of all "causes of action which *involve*" any of those subjects, App. 16a (emphasis added). But *Napier* addressed whether state legislation requiring locomo-

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[29] Nor does *Napier* support barring state-law claims against locomotive and equipment manufacturers based on conduct that took place before those parties were subject to regulation under the Act. *See Lorincie*, 34 F. Supp. 2d at 934. The state statutes at issue in *Napier* applied only to railroad carriers. *See* Br. of Appellant at 3-4, *Napier*, *supra* (No. 87) (reproducing Georgia statute in full); Br. for Def. in Error at 3, *Napier*, *supra* (Nos. 310 & 311) (reproducing Wisconsin statute in full).

tives in use on a railroad line to have certain safety equipment impermissibly interfered with the ICC's authority "to prescribe the rules and regulations by which *fitness for service* shall be determined." 272 U.S. at 612 (emphasis added). That was the "field" that the LIA "was intended to occupy," according to *Napier*. *Id.* at 613. *Napier* did not suggest that the LIA preempted the field of state-law claims arising *outside* that field, even if they somehow "involve" locomotives or locomotive parts. Here, petitioners do not allege that respondents were required to include any additional safety equipment on their products to make them fit for service on rail lines.[30]

Second, *Napier* involved state *legislation*, not common-law claims. This Court has recognized on multiple occasions that a preempted field does not necessarily include state common law. For example, in *Sprietsma v. Mercury Marine*, 537 U.S. 51 (2002), the Court held that, even if the Federal Boat Safety Act "occup[ied] the field with respect to state positive laws and regulations," that statute's "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."

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[30] There is no merit to the Third Circuit's suggestion that, unless the LIA preempts the field of state-law claims for injuries caused by exposure to asbestos in maintenance facilities, locomotive "equipment would have to be designed so that it could be changed to fit [state-law] standards as the trains crossed state lines, or adhere to the standard of the most restrictive states." App. 13a-14a. The court made no attempt to explain how a judgment in petitioners' favor on any of their claims could have such an effect. On the contrary, the court reasoned that field preemption bars a claim so long as its "gravamen" is that "the decedent suffered harmful consequences as a result of his exposure to asbestos contained in locomotive parts and appurtenances." App. 13a n.8.

Id. at 69 (quoting *English*, 496 U.S. at 79). The Court recognized that "common-law claims" – "unlike most administrative and legislative regulations" – "necessarily perform an important remedial role in compensating accident victims." *Id.* at 64. It also explained that the desire to "foster[] uniformity," while "undoubtedly important to the industry," was "not unyielding." *Id.* at 70. The Court concluded that, "[a]bsent a contrary decision" by the responsible federal agency, the uniformity concern did not "justify the displacement of state common-law remedies that compensate accident victims and their families and that serve the Act's more prominent objective . . . of promoting boating safety." *Id.*; *see also English*, 496 U.S. at 80-86 (federal statutes occupying the field of nuclear safety did not preempt state-law claim for intentional infliction of emotional distress brought by employee of nuclear operator); *Silkwood*, 464 U.S. at 249-56 (preempted field of nuclear safety did not include claim for punitive damages arising from plutonium discharge by federally licensed nuclear facility).[31]

Here, as in *Sprietsma*, the statute's primary purpose is promoting safety. *See Urie*, 337 U.S. at 191 ("[T]he prime purpose of the Boiler Inspection Act was the protection of railroad employees and perhaps also of passengers and the public at large from injury due to industrial accident. The safety of all those affected by railroading was uppermost in the legis-

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[31] This is not to say that state common-law claims have no incidental regulatory effect. *Cf.*, *e.g.*, *PLIVA*, 131 S. Ct. at 2573-74, 2577. Rather, the point is that, when a federal statute's primary purpose is promoting safety, a state-law claim that both serves that objective and provides compensation for injured victims is not preempted unless there is an actual conflict with federal law.

lative mind.") (citation omitted); RFPC Br. in Opp. 2. Accordingly, even when the LIA applies, the desire for uniformity should not be held to displace state common-law remedies unless the FRA has reached a "contrary decision" regarding the matter in question. *Sprietsma*, 537 U.S. at 70. In any event, when, as here, the claims at issue do not involve the field regulated by the statute, there is no basis for implying field preemption of state law.

Third, *Napier* must be understood in its historical context. In the pre-New Deal era in which *Napier* was decided, courts generally concluded that, when the federal government decided to regulate a given subject, any state law governing the same area was automatically invalid. *See* Note, *A Framework for Preemption Analysis*, 88 Yale L.J. 363, 375-76 (1978) ("Prior to the 1930s . . . the Court followed the doctrine that national and state regulation were mutually exclusive: once Congress regulated a subject, the states could not regulate it.") (footnote omitted); Stephen A. Gardbaum, *The Nature of Preemption*, 79 Cornell L. Rev. 767, 801-05 (1994); Laurence H. Tribe, *American Constitutional Law* 1195 (3d ed. 2000). As a broader conception of Congress's legislative authority took root, the Court's preemption jurisprudence evolved as well. *See* Gardbaum, 79 Cornell L. Rev. at 806. Instead of concluding that federal preemption of state law was "automatic," the Court imposed "a new requirement that a federal statute would be considered to have taken over a given field only if Congress clearly manifested its intent to do so." *Id.* Thus, by 1947, the Court explained in *Rice* that the states' historical police powers would not be found to have been preempted "unless that was the clear and manifest purpose of

Congress." *Rice*, 331 U.S. at 230. *Napier*'s historical context is a further consideration weighing against extending the decision in that case to bar state-law claims involving conduct that is not subject to regulation under the LIA.

Indeed, the contrast between this case and those modern decisions in which this Court has found implied field preemption is stark. In *United States v. Locke*, for example, this Court carefully distinguished the federal regulatory regimes that gave rise to field preemption from those that supported conflict preemption. Thus, for example, in the field of international vessel standards, "Congress has legislated in the field from the earliest days of the Republic, creating an extensive federal statutory and regulatory scheme" and negating any "beginning assumption that concurrent regulation by the State is a valid exercise of its police powers." *Locke*, 529 U.S. at 108. The Court stressed that the state "has enacted legislation in an area where the federal interest has been manifest since the beginning of our Republic and is now well established." *Id.* at 99. And it emphasized that the Ports and Waterways Safety Act of 1972 ("PWSA") established two different modes for preemption of state law: field preemption under PWSA Title II, in which Congress "require[d] the Coast Guard to issue regulations" on a range of subjects including "repair" and "maintenance" standards; and conflict preemption under PWSA Title I, in which the Coast Guard permissively issued regulations (but was not required by statute to do so) and state law conflicted with those regulations. *Id.* at 101. In contrast to that longstanding field preemption of vessel "construction, alteration, repair, [and] maintenance" standards applicable to oil tankers under the PWSA,

id., the ICC (and subsequently the FRA) under the LIA was not authorized, let alone *required*, to issue any regulations governing the safety of railroad repair and maintenance.

3. The Third Circuit's decision leaves injured workers without a remedy

The Third Circuit also incorrectly concluded that "railroad industry employees" exposed to asbestos in repair facilities would have recourse under FELA. App. 17a. In fact, the Third Circuit's field-preemption ruling leaves many injured persons and their families without a remedy, under FELA or otherwise.

Under the Third Circuit's ruling, a worker in a railroad maintenance facility injured by a defective locomotive or locomotive part would have no recourse against the manufacturer. The worker would have no claim against the manufacturer (or the railroad that operated the facility) under state law, because (under the decision below) all state-law duties would be preempted by the LIA.[32] Although preemption would not preclude a state cause of action against the manufacturer based on a violation of the LIA, *see supra* pp. 4-5 & note 21, the worker would not be able to establish such a violation, both because the locomotive was not in use when he was injured and because (during the time period at issue here) the LIA did not apply to the manufacturer.

In addition, although FELA provides a railroad employee (such as Mr. Corson) with a cause of action against the *railroad* that employed him, FELA does

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[32] State workers' compensation laws typically exclude rail workers. *See Hilton v. South Carolina Pub. Rys. Comm'n*, 502 U.S. 197, 202 (1991).

not provide a cause of action against manufacturers of locomotives or locomotive parts. *See* 45 U.S.C. § 51. Thus, unless the railroad also was negligent (and therefore liable under FELA), a railroad employee would be left without a remedy entirely. Further, under the Third Circuit's rule, a railroad held liable under FELA for an injury to one of its employees caused by a defective locomotive or locomotive part would be unable to seek contribution or indemnity under state law against the manufacturer. *Cf. Norfolk & W. Ry. Co. v. Ayers*, 538 U.S. 135, 141 (2003) (FELA "allow[s] a worker to recover his entire damages from a railroad whose negligence jointly caused an injury (here, the chronic disease asbestosis), thus placing on the railroad the burden of seeking contribution from other tortfeasors").[33]

The fact that the Third Circuit's ruling would deprive many injured workers and their families of a remedy for misconduct and negligence provides an additional reason for limiting any implied field preemption under the LIA to the regulated field. *Cf. Silkwood*, 464 U.S. at 251 ("It is difficult to believe that Congress would, without comment, remove all means of judicial recourse for those injured by illegal conduct.").

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[33] Moreover, if the worker was an independent contractor or other non-railroad employee, he would not even have a FELA claim, because FELA provides a cause of action only for railroad employees (and their families). *See Kelley v. Southern Pac. Co.*, 419 U.S. 318, 323-25 (1974).

II. CONFLICT PREEMPTION PROVIDES NO BASIS FOR AFFIRMING THE JUDGMENT

A. Conflict Preemption Is Not Properly Presented Here

The question whether petitioners' claims are preempted because they conflict with the LIA or a regulation implementing the LIA is not properly presented here.

The issue of conflict preemption was neither pressed nor passed upon below. Respondents did not raise conflict preemption in their motions for summary judgment in the district court or in their briefs in the court of appeals. *See supra* pp. 12-15. And neither the district court nor the court of appeals considered conflict preemption. Instead, both lower courts relied on implied field preemption, holding that petitioners' claims were preempted regardless of whether there was any actual conflict with federal law. *See* App. 10a ("any state law in [the] area" regulated by the LIA is "preempted, regardless of whether the [federal] agency actually exercised [its] powers" under the Act), 27a-28a. Indeed, the Third Circuit distinguished *Wyeth v. Levine* on the ground that it involved "implied conflict preemption," whereas this case involves "field preemption under the LIA." App. 11a n.7. The court therefore held that it "need not analyze implied conflict preemption." *Id.*

Because conflict preemption was neither pressed nor passed on below, that issue is not properly presented here, and this Court should not consider it in the first instance. *See*, *e.g.*, *Davis v. United States*, 495 U.S. 472, 489 (1990) ("Because this argument was neither raised before nor decided by the Court of Appeals, we decline to address it here."); *City of Canton v. Harris*, 489 U.S. 378, 386 n.5 (1989) ("[W]e

decline to determine whether respondent's contention that such a 'custom' existed is an alternative ground for affirmance. The 'custom' claim was not passed on by the Court of Appeals – nor does it appear to have been presented to that court as a distinct ground for its decision. Thus, we will not consider it here.") (citation omitted); *see also Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103, 110 (2001) (per curiam) ("this is a court of final review and not first view") (internal quotation marks omitted).[34]

Moreover, in this case, practical concerns confirm the propriety of following this Court's usual practice of declining to consider issues in the first instance. Conflict-preemption analysis requires a court "to compare federal and state law" to determine whether they "directly conflict." *PLIVA*, 131 S. Ct. at 2573, 2577. That detailed inquiry is best undertaken with the benefit of considered rulings by the lower courts based on arguments from the parties.[35]

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[34] That is true regardless of whether the issue could be considered to have been encompassed within the language of the question presented in the petition. *See Delta Air Lines, Inc. v. August*, 450 U.S. 346, 362 (1981) ("Although defendant's petition for certiorari presented the question of the District Judge's abuse of discretion in denying defendants costs under Rule 54(d), that question was not raised in the Court of Appeals and is not properly before us."); *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970) ("Although in her certiorari petition, petitioner challenged this ruling, . . . examination of the record shows that petitioner never raised [the] issue . . . before the Court of Appeals. . . . We [accordingly] decline to [consider it].").

[35] A first step in conducting that analysis would be to determine what state's law applies to petitioners' claims – the law of the forum state (Pennsylvania), the law of the state in which Mr. Corson lived and worked for most of his career (Montana), or another state's law. The fact that no choice-of-law analysis was performed in the lower courts reinforces the conclusion

B. In Any Event, State-Law Claims Based On Exposure To Asbestos In Rail Repair Facilities Do Not Conflict With The LIA

If the Court determines that it is appropriate to provide guidance to the lower courts at this time on how conflict preemption applies under the LIA, the following analysis should govern.

State law is impliedly preempted to the extent that it "actually conflicts" with federal law, *English*, 496 U.S. at 79, either because "compliance with both federal and state regulations is a physical impossibility," *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963), or because state law "creates an unacceptable 'obstacle to the accomplishment and execution of the full purposes and objectives of Congress,'" *Wyeth*, 129 S. Ct. at 1193-94 (quoting *Hines*, 312 U.S. at 67). In this context, neither failure-to-warn nor design-defect claims "actually conflict[]" with the LIA.

1. Failure-to-warn claims do not conflict with the LIA

State-law claims based on a failure to provide proper warnings and instructions regarding the dangers of asbestos in locomotives and locomotive parts create no "actual[] conflict" with the LIA. *English*, 496 U.S. at 79. Nothing in the LIA or any regulation implementing it addresses such warnings or instructions. The statute and regulations neither prescribed any particular warnings or instructions nor precluded new or additional warnings or instruc-

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that any conflict-preemption argument that respondents might seek to raise would be unsuitable for resolution in this Court in the first instance. Conflict preemption should be addressed, if at all, on remand, if the lower courts conclude that such an argument has been properly preserved.

tions. *Cf. PLIVA*, 131 S. Ct. at 2577-78 (failure-to-warn claim preempted when federal law prohibited a stronger warning). Absent any federal requirement respecting warnings or instructions regarding asbestos in locomotives and locomotive parts, a state-law claim alleging a failure to provide such a warning or instruction does not conflict with federal law. *See*, *e.g.*, *Wyeth*, 129 S. Ct. at 1198-99 (no conflict preemption where federal law permitted manufacturer to provide a warning); *see also PLIVA*, 131 S. Ct. at 2581; U.S. *Atwell* Br. 17.

2. Defective-design claims do not conflict with the LIA

Design-defect claims such as petitioners' likewise create no actual conflict with the LIA. Whether based on concepts of strict products liability or negligence, the basic premise of such a claim in this context is that the locomotive boiler or brake shoes were, because of their design, unreasonably dangerous to maintenance workers such as Mr. Corson. *See generally* Restatement (Second) of Torts § 402A (1965).[36] Permitting such a claim to proceed poses no conflict with the federal regime because nothing in the LIA or its implementing regulations contained any federal requirement regarding the use of asbestos in locomotives or locomotive parts.

On the contrary, to the extent the FRA has considered the issue of asbestos in locomotives, it has not chosen to take any regulatory action. In a 1996

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[36] A manufacturer would not necessarily have been required to eliminate asbestos from its products to avoid being subject to liability under such a claim. For example, it might have been able to package the asbestos insulation differently, so that performing maintenance work did not involve releasing asbestos dust.

report to Congress on working conditions for locomotive cab crews, the FRA discussed in detail the health hazards asbestos presents. *See* 1996 FRA Report at 10-10 to 10-11. It found that, whereas older steam locomotives contained asbestos, that source of asbestos "was eliminated in the 1970's." *Id.* at 10-11. The FRA further found that the two primary manufacturers of locomotives had eliminated asbestos from their new locomotives. *See id.* at 10-11 to 10-12. Having found that the use of asbestos in locomotives had essentially been discontinued, the FRA concluded that, under then-existing conditions, asbestos did not present a sufficient risk to the safe *operation* of locomotives to justify prospective regulations.[37] The agency explained that it did "not feel that further action with respect to the presence of asbestos in locomotive cabs [was] warranted at [that] time." *Id.* at 10-12.[38] The FRA's decision not to take regulatory action on asbestos in 1996 is indistinguishable from the Coast Guard's decision not to require propeller guards on motorboats that this Court held lacked preemptive effect in *Sprietsma*. *See* 537 U.S. at 64-68; *Freightliner Corp. v. Myrick*, 514 U.S. 280, 289-90 (1995).

The context in which this case arises makes a conflict with the LIA particularly unlikely. The LIA's

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[37] *See* 1996 FRA Report at 10-12 ("While previous locomotive design incorporated the use of asbestos, and older locomotives remaining in service may still contain limited amounts of asbestos, there is no evidence that the presence of asbestos poses a problem to humans or the environment.").

[38] The 1996 FRA Report was expressly limited to addressing working conditions in "locomotive cabs" and safety risks to locomotive "crew[s]." 1996 FRA Report at i. It did not address risks to repair and maintenance workers created by asbestos in locomotives and locomotive parts.

objective is to ensure the safe use of locomotives on railroad lines. The Act does not address hazards posed by the repair process. Asbestos insulation in locomotives and locomotive parts poses a particular danger to repair workers because asbestos is most hazardous when the insulation has been broken or torn, releasing asbestos dust that can be breathed into the lungs.[39] Unlike maintenance workers such as Mr. Corson, the crew of a properly designed locomotive in use on a railroad line (i.e., workers the LIA was enacted to protect) would not necessarily confront that type of hazard in their daily work.

In addition, even a design-defect claim that (unlike petitioners' claims) *does* involve a hazard relating to the operation of a locomotive would not necessarily conflict with the LIA. This Court has recognized in other contexts that a state common-law duty that parallels a federal safety standard does not impose requirements in addition to or different from the federal standard. *See*, *e.g.*, *Bates v. Dow AgroSciences LLC*, 544 U.S. 431, 447-48 (2005). And there can be no claim that the mere existence of a state remedy for violation of the standards set forth in the LIA impermissibly interferes with the federal scheme. This Court has long approved of injured parties pursuing state-created remedies for violations of the LIA. *See*, *e.g.*, *Tipton*, 298 U.S. at 150-51; *supra* pp. 4-5 & note 21.[40] Therefore, to the extent that an

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[39] *See supra* pp. 10-11; *see also* 1996 FRA Report at 10-11 ("Whenever the steam generator was disassembled and the coils had to be removed, the asbestos cement was broken up and removed, releasing asbestos particles which could be inhaled into the lungs.").

[40] *See also Urie*, 337 U.S. at 165-66, 194 (member of locomotive cab crew who developed the pulmonary disease silicosis

injured worker's state-law claim parallels the LIA's safety standard – which requires locomotives and their parts and appurtenances to be "in proper condition and safe to operate without unnecessary danger of personal injury," 49 U.S.C. § 20701(1) – there would be no conflict preemption.

The way in which courts have construed the LIA's safety standard further reduces the risk that a state-law claim paralleling the federal duty would pose an unacceptable obstacle to the federal regime. Cases applying the LIA have long distinguished between claims based on a failure to install an additional safety device that the FRA had not required (such claims cannot be maintained under the Act) and claims based on an actual defect in an existing locomotive part (such claims are permitted).[41] That

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from inhaling silica dust blown into cabs of running locomotives stated a claim for violation of LIA).

[41] *See*, *e.g.*, *King v. Southern Pac. Transp. Co.*, 855 F.2d 1485, 1489 (10th Cir. 1988) ("'failure to maintain' claims have been widely recognized as meritorious" but "those claims are entirely different from claims that a railroad is liable for failing to *install additional* safety devices which the Secretary of Transportation has not seen fit to require"); *Mosco v. Baltimore & Ohio R.R.*, 817 F.2d 1088, 1091 (4th Cir. 1987) ("[A] carrier cannot be held liable under the Boiler Inspection Act for failure to install equipment on a locomotive unless the omitted equipment (1) is required by applicable federal regulations; or (2) constitutes an integral or essential part of a completed locomotive."); *Herold v. Burlington N., Inc.*, 761 F.2d 1241, 1245-46 (8th Cir. 1985) (although "the state, through statute or common law, may not require the railroad to install and maintain amber beacons," "once any part or appurtenance is attached to a locomotive, the Boiler Inspection Act requires it be maintained in good repair at all times"); *Engvall v. Soo Line R.R. Co.*, 632 N.W.2d 560, 566-67 (Minn. 2001) ("[A]lthough a fact finder may not decide whether a locomotive part or appurtenance must be equipped with a particular device in order to comply with the requirements

distinction derives from this Court's decision in *Baltimore & Ohio Railroad Co. v. Groeger*, 266 U.S. 521 (1925), which held that a trial court erred in instructing a jury considering a claim under the LIA to decide whether the Act required a particular piece of equipment ("a fusible safety plug"). *Id.* at 531. The Court explained that, although a railroad's "duty" under the Act "to have the boiler in a safe condition to operate so that it could be used without unnecessary peril to its employees was absolute and continuing," the Act "left to the carrier the choice of means to be employed to effect that result." *Id.* at 527, 530.[42] In light of those longstanding principles, a tort claim based on a state-law duty that parallels the LIA's safety standard would not subject a manu-

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of the LIA, a fact finder may determine the broader question of whether the part or appurtenance was 'in proper condition and safe to operate' without unnecessary danger of personal injury.") (quoting 49 U.S.C. § 20701(1)); *see also McGinn v. Burlington N.R.R. Co.*, 102 F.3d 295, 299 (7th Cir. 1996) ("There are two ways a rail carrier can violate the BIA. A rail carrier may breach the broad duty to keep all parts and appurtenances of its locomotives in proper condition and safe to operate without unnecessary peril to life or limb, . . . or a rail carrier may fail to comply with the regulations issued by the FRA.").

[42] Applying that distinction, the same result could have been reached in *Marshall v. Burlington Northern, Inc.* through application of conflict preemption, as opposed to field preemption. The court in *Marshall* noted that "[t]here is no allegation here that strobe or oscillating lights were attached to the locomotive at the time of the accident, and that Burlington had negligently failed to maintain them. Rather, the allegation is that Burlington was liable for failure to attach strobe or oscillating lights." 720 F.2d at 1152 (Kennedy, J.). *Marshall* thus involved a failure to install an additional safety device that the FRA had not required – precisely the type of claim that courts have held cannot be maintained under the LIA.

facturer to liability for failure to install particular safety equipment that the FRA had not required.

Accordingly, to the extent the Court decides to address conflict preemption under the LIA, it should conclude that failure-to-warn and design-defect claims arising from injuries caused by asbestos in locomotives and locomotive parts do not actually conflict with the LIA.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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ADDENDUM

1. 49 U.S.C. § 20101 provides:

§ 20101. Purpose

The purpose of this chapter is to promote safety in every area of railroad operations and reduce railroad-related accidents and incidents.

2. 49 U.S.C. § 20106 provides:

§ 20106. Preemption

(a) National uniformity of regulation.—(1) Laws, regulations, and orders related to railroad safety and laws, regulations, and orders related to railroad security shall be nationally uniform to the extent practicable.

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

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

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

(C) does not unreasonably burden interstate commerce.

(b) Clarification regarding State law causes of action.—(1) Nothing in this section shall be construed to preempt an action under State law seek-

ing damages for personal injury, death, or property damage alleging that a party—

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

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

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

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

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

3. 49 U.S.C. § 20302 provides:

§ 20302. General requirements

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

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

(A) couplers coupling automatically by impact, and capable of being uncoupled, without the

necessity of individuals going between the ends of the vehicles;

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

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

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

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

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

(5) a train only if—

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

(B) at least 50 percent of the vehicles in the train are equipped with power or train brakes and the engineer is using the power or train brakes on those vehicles and on all other vehicles equipped with them that are associated with those vehicles in the train.

(b) Refusal to receive vehicles not properly equipped.—A railroad carrier complying with sub-

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

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

(d) Authority to change requirements.—The Secretary may—

(1) change the number, dimensions, locations, and manner of application prescribed by the Secretary for safety appliances required by subsection (a)(1)(B) and (C) and (2) of this section only for good cause and after providing an opportunity for a full hearing;

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

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

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

4. 49 U.S.C. § 20701 provides:

§ 20701. Requirements for use

A railroad carrier may use or allow to be used a locomotive or tender on its railroad line only when the locomotive or tender and its parts and appurtenances—

(1) are in proper condition and safe to operate without unnecessary danger of personal injury;

(2) have been inspected as required under this chapter and regulations prescribed by the Secretary of Transportation under this chapter; and

(3) can withstand every test prescribed by the Secretary under this chapter.

5. 49 U.S.C. § 20702 provides:

§ 20702. Inspections, repairs, and inspection and repair reports

(a) General.—The Secretary of Transportation shall—

(1) become familiar, so far as practicable, with the condition of every locomotive and tender and its parts and appurtenances;

(2) inspect every locomotive and tender and its parts and appurtenances as necessary to carry out this chapter, but not necessarily at stated times or at regular intervals; and

(3) ensure that every railroad carrier makes inspections of locomotives and tenders and their parts and appurtenances as required by regulations prescribed by the Secretary and repairs every defect that is disclosed by an inspection before a defective locomotive, tender, part, or appurtenance is used again.

(b) Noncomplying locomotives, tenders, and parts.—(1) When the Secretary finds that a locomotive, tender, or locomotive or tender part or appurtenance owned or operated by a railroad carrier does not comply with this chapter or a regulation prescribed under this chapter, the Secretary shall give the carrier written notice describing any defect resulting in noncompliance. Not later than 5 days after receiving the notice of noncompliance, the carrier may submit a written request for a reinspection. On receiving the request, the Secretary shall provide for the reinspection by an officer or employee of the Department of Transportation who did not make the original inspection. The reinspection shall be made not later than 15 days after the date the Secretary gives the notice of noncompliance.

(2) Immediately after the reinspection is completed, the Secretary shall give written notice to the railroad carrier stating whether the locomotive, tender, part, or appurtenance is in compliance. If the original finding of noncompliance is sustained, the carrier has 30 days after receipt of the notice to file an appeal with the Secretary. If the carrier files an appeal, the Secretary, after providing an opportunity for a proceeding, may revise or set aside the finding of noncompliance.

(3) A locomotive, tender, part, or appurtenance found not in compliance under this subsection may be used only after it is—

(A) repaired to comply with this chapter and regulations prescribed under this chapter; or

(B) found on reinspection or appeal to be in compliance.

(c) Reports.—A railroad carrier shall make and keep, in the way the Secretary prescribes by regulation, a report of every—

(1) inspection made under regulations prescribed by the Secretary; and

(2) repair made of a defect disclosed by such an inspection.

(d) Changes in inspection procedures.—A railroad carrier may change a rule or instruction of the carrier governing the inspection by the carrier of the locomotives and tenders and locomotive and tender parts and appurtenances of the carrier when the Secretary approves a request filed by the carrier to make the change.

6. 49 U.S.C. § 20703 provides:

§ 20703. Accident reports and investigations

(a) Accident reports and scene preservation.—When the failure of a locomotive, tender, or locomotive or tender part or appurtenance results in an accident or incident causing serious personal injury or death, the railroad carrier owning or operating the locomotive or tender—

(1) immediately shall file with the Secretary of Transportation a written statement of the fact of the accident or incident; and

(2) when the locomotive is disabled to the extent it cannot be operated under its own power, shall preserve intact all parts affected by the accident or incident, if possible without interfering with traffic, until an investigation of the accident or incident is completed.

(b) Investigations.—The Secretary shall—

(1) investigate each accident and incident reported under subsection (a) of this section;

(2) inspect each part affected by the accident or incident; and

(3) make a complete and detailed report on the cause of the accident or incident.

(c) Publication and use of investigation reports.—When the Secretary considers publication to be in the public interest, the Secretary may publish a report of an investigation made under this section, stating the cause of the accident or incident and making appropriate recommendations. No part of a report may be admitted into evidence or used in a civil action for damages resulting from a matter mentioned in the report.

7. 49 U.S.C. § 21302 provides:

§ 21302. Chapter 201 accident and incident violations and chapter 203-209 violations

(a) Penalty.—(1) Subject to section 21304 of this title, a person violating a regulation prescribed or order issued under chapter 201 of this title related to accident and incident reporting or investigation, or violating chapters 203-209 of this title or a regulation or requirement prescribed or order issued under chapters 203-209, is liable to the United States Government for a civil penalty. An act by an individual that causes a railroad carrier to be in violation is a violation. A separate violation occurs for each day the violation continues.

(2) The Secretary of Transportation imposes a civil penalty under this subsection. The amount of the penalty shall be at least $500 but not more than $25,000. However, when a grossly negligent violation or a pattern of repeated violations has caused an imminent hazard of death or injury to individuals, or has caused death or injury, the amount may be not more than $100,000.

(3) The Secretary may compromise the amount of the civil penalty under section 3711 of title 31. In determining the amount of a compromise, the Secretary shall consider—

(A) the nature, circumstances, extent, and gravity of the violation;

(B) with respect to the violator, the degree of culpability, any history of violations, the ability to pay, and any effect on the ability to continue to do business; and

(C) other matters that justice requires.

(4) If the Secretary does not compromise the amount of the civil penalty, the Secretary shall refer the matter to the Attorney General for collection.

(b) Civil actions to collect.—The Attorney General shall bring a civil action in a district court of the United States to collect a civil penalty that is referred to the Attorney General for collection under subsection (a) of this section. The action may be brought in the judicial district in which the violation occurred or the defendant has its principal executive office. If the action is against an individual, the action also may be brought in the judicial district in which the individual resides.