NO. 10-879

IN THE
Supreme Court of the United States

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

Petitioners,

v.

RAILROAD FRICTION PRODUCTS CORPORATION, *ET AL.*,

Respondents.

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

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BRIEF OF *AMICUS CURIAE* GENERAL ELECTRIC CORPORATION IN SUPPORT OF RESPONDENTS

Paul D. Clement
Counsel of Record
Nicholas J. Nelson
BANCROFT PLLC
1919 M Street, N.W.,
Suite 470
Washington, D.C. 20036
(202) 234-0090
pclement@bancroftpllc.com

Counsel for amicus curiae General Electric Corporation

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INTEREST OF *AMICUS CURIAE*

This case concerns the preemptive scope of the federal Locomotive Inspection Act ("LIA"), 49 U.S.C. § 20701 *et seq.*, which regulates the design, construction, and materials of locomotives and locomotive equipment used in interstate commerce, and the continuing vitality of this Court's decision in *Napier v. Atlantic Coast Line Rail Co.*, 272 U.S. 605, 611 (1926), which interpreted the LIA to preempt the field. Petitioners and the United States as amicus curiae argue for a dramatic contraction of the field preempted by the LIA. The United States in particular argues for a convoluted regime that would create both doctrinal confusion and practical difficulties given the realities of locomotive manufacture and repair. General Electric Corporation, through its subsidiary GE Transportation, is the world's leading manufacturer of diesel-electric locomotives, and accounts for 70% of the United States locomotive market.[1] As such, General Electric has a unique perspective on the practical difficulties created by the proposed contraction of the field preempted by the LIA and *Napier*. Moreover, because most locomotive manufacturers, parts makers, and railroads have suffered serious solvency problems or even filed for bankruptcy in recent years, in many cases General Electric will be among the few remaining potential defendants. As such, General Electric has particular concerns about a rule that would retroactively

[1] This brief was not written in whole or in part by counsel for any party, and no person or entity other than *amicus* and its counsel has made a monetary contribution to the preparation and submission of this brief. All parties consent to the filing.

impose failure-to-warn liability on locomotive manufacturers in ways that upset settled expectations that arose under *Napier* and as a practical matter are incompatible with the uniformity demanded by the LIA.

INTRODUCTION AND SUMMARY OF ARGUMENT

Nearly ninety years ago, this Court recognized that Congress's broad authorization to regulate one of the most important "instrumentalities of interstate commerce" in the LIA broadly preempts the field of locomotive safety. In particular, this Court held that the LIA preempts any effort by the states to regulate "the design, the construction, and the material of every part of the locomotive and tender and of all appurtenances." *Napier*, 272 U.S. at 611. The Court specifically rejected the states' argument that their regulations should escape preemption because they sought "to prevent sickness and disease due to excessive and unnecessary exposure," *id.* at 612, and not to regulate the design of locomotives for purposes of ensuring their safety in use. Thus, for nearly ninety years, companies like General Electric have manufactured locomotives to comply with federal law and with the settled expectation that *Napier* would permit them to focus on uniform federal standards, not on the competing laws of the multitude of states through which a locomotive might travel during its long useful life. The state law claim here, for injuries allegedly caused by "excessive and unnecessary exposure" to the presence of asbestos in materials used to produce a locomotive, falls comfortably within the preemptive rule of *Napier*.

The United States as *amicus curiae* proposes upsetting this settled landscape and proposes a significant change in this Court's approach to the LIA. The government argues that the LIA "does not apply to locomotives that are non-operational, such as locomotives undergoing repairs at a maintenance facility," and therefore that claims arising from injuries allegedly caused in repair shops by defective locomotives or locomotive parts are not within the preempted field. U.S. Br. at 11. This is an alarming proposal. It is both impractical and unprecedented. Manufacturers must design and produce locomotives knowing that they will be both operated and subjected to maintenance across the country. Providing field preemption in one circumstance but not in the other makes neither doctrinal nor practical sense. The design does not and cannot change when the locomotive enters the repair yard.

The government recognizes, *id.* at 23–24, that its proposed restriction of the scope of the preempted field threatens the uniformity demanded by the LIA. Locomotives must be manufactured with full knowledge that they will be both operated and repaired. Thus, if states were free to regulate the design, construction, and material of locomotives whenever they are at rest in the repair yard, then as a practical matter the states could impose multifarious requirements on the design and manufacture of this instrumentality of commerce.

Recognizing this problem with its proposed contraction of *Napier*'s field preemption holding, the United States assures that implied conflict preemption will fill the gap and prevent states from unduly interfering with the federal policy of

uniformity. That proposal invites both doctrinal confusion and practical uncertainty. Rather than apply the straightforward rule of *Napier*, courts would need to assess first whether the claim was within or without the preempted field, and if the latter, then determine whether the state law claims "amoun[t] to" an assertion "that a locomotive containing such parts is not safe to operate," which would then "stand as an obstacle to achievement of the LIA's uniformity purpose." *Id.* at 12; *see also id.* at 24 (suggesting obstacle preemption of state tort rules that "have the effect of prescribing rules about whether a locomotive is fit for use").

Applying this novel theory of narrow-field-supplemented-with-conflict preemption, the United States suggests that state tort rules prohibiting the use of asbestos in locomotive parts should be preempted, because they "would undermine the uniformity-of-regulation objective of the LIA," *id.* at 25, but that failure-to-warn claims based on the use of asbestos should not be preempted, "because they would not require manufacturers of locomotives or railroads to alter the design or construction of their locomotives." *Id.* at 26. In other words, the government would superimpose a distinction between failure-to-warn and design defect claims on its manufactured distinction between field preempted "in-use" claims and presumptively unpreempted "at-rest" claims.

This approach has nothing to recommend it. For one thing, it directly conflicts with this Court's decision in *Napier*, which expressly rejected an invitation to have preemption turn on the purpose of the state regulation in favor of a clear test of

whether the state law "operate[s] upon the same object" as the LIA—the locomotive itself. 272 U.S. at 612. In the context of such a classic instrumentality of interstate commerce, the rule could hardly be otherwise. The need for a uniform federal rule stems from the fact that a locomotive is manufactured once and then moves through multiple states. Disparate regulation of the object creates problems without regard to the purpose behind the regulation. Moreover, the strange hybrid of field and conflict preemption proposed by the government finds no support in the text of the LIA or interpretations thereof. The LIA does not limit its regulation to locomotives in use while leaving the field of repair and inspection to the states. To the contrary, as its name suggests, the LIA and its implementing regulations deal with locomotive inspection and repair in great detail. Moreover, the government prescribes regulatory warnings of its own, which underscores that matters of both proper design and adequate warnings lie within the preempted field. The distinction also ignores the practical realities of the industry. Indeed, to the extent the government's convoluted theory is an elaborate effort to carve out failure-to-warn claims, those claims raise the same problems that fully justify the preemption of other state tort claims.

Finally, the government's proposed rule creates doctrinal confusion at the expense of the reliance interests of locomotive manufacturers. The law of preemption is confusing enough without creating a new hybrid category of partial field preemption with a conflict preemption overlay. The far better course is to preserve the rule of *Napier*. Generations of

locomotives have been put on the tracks based on the assumption that uniform federal rules governed the locomotives when both in-use and at-rest in the repair yard. There is absolutely no justification for replacing that stable rule with a convoluted preemption regime that only a lawyer could love.

ARGUMENT

I. THE LIA PREEMPTS REGULATION OF ALL LOCOMOTIVES IN INTERSTATE COMMERCE, NOT JUST WHILE THEY ARE "IN USE."

Napier contradicts the government and Petitioners' argument that the LIA only applies when locomotives are "in use," and that its preemptive force vanishes as soon as they are taken offline. The LIA regulates nouns, not verbs, and its requirements attach to locomotives themselves, not merely to the active use of those locomotives. Accordingly, the field preempted by the LIA "extends to the design, the construction, and the material of every part of the locomotive and tender and of all appurtenances." *Napier,* 272 U.S. at 611.

The government's position ignores not only this holding of *Napier*, but also the basic realities about *how* locomotives are designed and manufactured for safe use: the design and manufacture can be done only once, and obviously will determine the characteristics of the locomotive both when it is being used and when it is being repaired. Locomotives are the classic instrumentality of commerce. They demand the uniform rule that *Napier* provides.

A. The Government Misreads *Napier* and Misunderstands the Preempted Field.

The United States recognizes that *Napier* is a longstanding precedent of this Court that holds that the LIA preempts the field of locomotive safety. The government at least implicitly recognizes that principles of *stare decisis* command respect for such a well-established statutory decision of this Court. Nothing about *Napier* has proven unworkable or doctrinally problematic or otherwise has provided any justification for reconsideration. But rather than ask this Court to overturn *Napier*, the government invites this Court to eviscerate *Napier* by drastically cutting back on the field that *Napier* held to be preempted. This Court should reject this invitation to overrule *Napier* through the back door.

The government suggests that the key to understanding *Napier* and field preemption is that the scope of preemption and the scope of the regulable field are co-extensive. While that proposition is correct, there are two fundamental problems with the government's application of that principle. First, the government misdescribes the field in which the LIA authorizes federal regulation. The Locomotive Inspection Act, as its name suggests, regulates locomotives and locomotive equipment, and does so when they are at rest subject to inspections and repairs and not just when they are in use. The government's effort to reimagine the preempted field as a narrow one that excludes locomotives when they enter the repair yard simply has no support in the text of the LIA. Second, and equally important, the government's view is

unfaithful to this Court's decision in *Napier*, which expressly addressed the preempted field.

The extent to which *Napier* controls this case cannot be over-emphasized. The tort claim here is based on unnecessary exposure to asbestos from the materials in the locomotives during their repair. *Napier* described the preempted field as "the design, the construction, and the material of every part of the locomotive and tender and all its appurtenances." 272 U.S. at 611. The states in *Napier* suggested that they could regulate locomotives for different purposes than those that animated the federal law. While the federal law was said to be focused on the safety of locomotives in use, state law was said to "endeavo[r] to prevent sickness and disease due to excessive and unnecessary exposure." *Id.* at 612. The Court rejected that argument on the ground that both state and federal law focused on the same object: the locomotive itself. Under those circumstances, it did not matter whether the laws had different purposes or whether the federal government had exercised its regulatory power—a federal law controlled. Simply put, *Napier* controls this case.

Moreover, because this case turns on the scope of *Napier*, this Court owes no special deference to the views of the government. Indeed, even the government does not claim any entitlement to deference, and for good reason. This Court is obviously in a better position than the executive branch or anyone else to determine the scope of the Court's decision in *Napier*.

B. The Government's Constricted View of the Preempted Field Has No Support in the Text of the LIA or the Case Law Interpreting It.

1. The Text of the LIA Provides No Support.

The government's position appears premised on the assumption that in the LIA Congress somehow limited the field of federal concern to locomotives that are in active use, and that repair yards therefore are an "LIA-free zone." That is fundamentally wrong on at least two levels.

First, the LIA's primary concern is with the locomotives themselves as instrumentalities of interstate commerce. The LIA works to ensure that those instrumentalities are safe. While locomotives have their most obvious capacity to be unsafe when they are moving at high speeds while in active use, that is not the exclusive or even primary focus of the LIA. The LIA regulates the locomotives as nouns, rather than regulating the verb of active interstate use of the rails.

Second, and fully consistent with the congressional intent to ensure that these instrumentalities are safe for use, the LIA actively regulates locomotives when they are not in active use, but are in the inspection or repair yard. The LIA is, after all, an *inspection* act—along with prohibiting use of locomotives that are unsafe, it requires the Secretary of Transportation to "inspect every locomotive and tender and its parts and appurtenances" and to mandate that railroads do the same, and repair any defects discovered. 49 U.S.C. § 20702(a)(2) & (3). Railroads must also keep records of all inspections

and repairs, *id.* § 20702(c), and cannot change their inspection procedures without approval by the Secretary, *id.* § 20702(d). The LIA prohibits the use of locomotives not inspected or repaired according to the Secretary's regulations. 49 U.S.C. § 20701(2) & (3).

Pursuant to this authority, the Department of Transportation has promulgated detailed regulations governing locomotive inspection and repair. *See generally* 49 C.F.R. Part 229(B); *see also id.* Part 230 (same, for steam locomotives). Most locomotives must be inspected on a daily basis, and conditions that do not comply with the host of substantive regulations promulgated under the LIA must be repaired and reported. *Id.* § 229.21. More in-depth inspections must occur at least every 92 days, *id.* § 229.23(a), during which a locomotive must undergo a series of tests described in great detail in the regulations, *see id.* § 229.25. Further sets of prescribed repairs and inspections must be conducted annually, *id.* § 229.27, and biannually, *id.* § 229.29 & 31. In other words, when a locomotive sits in the repair yard—that is, at the very moment when the government and petitioners claim it is somehow outside the field regulated by the LIA—it is very often there because the LIA requires it. The locomotive is undergoing inspections and repairs required under the LIA, in a manner governed by the LIA, using parts that are required or permitted under the LIA.

The government relies on *Northwest Central Pipeline Corp. v. State Corp. Commission of Kansas*, 489 U.S. 493, 510–22 (1989), as authority for its narrow conception of the preempted field. But

decisions interpreting other statutory schemes provide little help in interpreting the field preempted by the LIA. Indeed, the differences between the LIA and the statute at issue in *Northwest Central* only underscore the problems with the government's miserly view of the field preempted by the LIA and *Napier*. *Northwest Central* involved the federal Natural Gas Act, which governs many aspects of the sale and distribution of natural gas, but "expressly carves out a regulatory role for the States" in matters regarding "intrastate transportation, local distribution, and distribution facilities, and over the production or gathering of natural gas." *Id.* at 507 (internal quotation marks omitted). In limiting the scope of the field preempted by the Act, the Court simply interpreted it not to intrude on the state authority expressly carved out in the Act. *See id.* at 512–14. There is nothing remotely like such a carve-out in the LIA. Instead, as noted, the inspection and repair process is an integral part of the federal scheme and not some area of especial state concern.

2. Napier *and Near-Unanimous Lower-Court Authority Reject the Government's View.*

The biggest obstacle to the government's effort to recast *Napier* as recognizing only a narrow field of preemption is *Napier* itself. The government proposes to define the field preempted by the LIA not by the physical objects being regulated—locomotives and their parts and appurtenances—but instead by the *purpose* of the statute, which the government asserts is the safety of in-use locomotives. It thus maintains that state

regulations of locomotives that pursue *other* purposes—here the safety of the repair yard and the locomotive while being repaired—should not come within the preempted field. As noted, this is exactly the approach that this Court considered and rejected in *Napier*. There, "[t]he argument mainly urged by the states in support of the claim that Congress has not occupied the entire field, [was] that the federal and the state laws [were] aimed at distinct and different evils." 272 U.S. at 612–13. *See also* Br. for Def. In Error, *Chi. & N.W. Ry. Co. v R.R. Comm'n of Wisc.*,[2] Nos. 310 & 311 (U.S. Oct. 12, 1926), at 30–31 (in subsection entitled "Object sought by legislation rather than physical elements affected by legislation determines field entered by Congress," arguing that "[t]he clash between federal and state legislation does not come about because they affect the same object. It comes about when the state legislation tends to or does interfere with the full fruition of the federal policy, and as is demonstrated by the facts of this case, it is entirely possible for state legislation to affect the same object that is affected by federal legislation, and still have both stand if they are aimed at different evils."); Br. of Appellant, *Napier*, No. 87 (U.S. 1925), at 31 (contending that ICC's authority extended only to requiring equipment "necessary to carry out the purpose of the Act, namely, safety in operation"); *id.* at 34 ("[T]he Federal Boiler Inspection Act covers and is limited to the field of inspection to promote safety in operation,

[2] This Court considered *Napier* and *Chicago and Northwestern* on a consolidated basis, and its opinion covered both cases. *See Napier*, 272 U.S. at 607.

and . . . this does not occupy the entire field of regulation.").

This Court, however, declined to adopt a purpose-oriented approach to preemption, instead expressly holding that preemption applied because "[t]he federal and the state statutes are directed to the same subject—the equipment of locomotives. They operate upon the same object." *Napier*, 272 U.S. at 612. Especially when that object is a classic instrumentality of interstate commerce, the decision in *Napier* makes perfect sense and in no way suggests that states can regulate that object for some other purpose.

The government stresses *Napier*'s acknowledgement that the LIA regulates locomotives "used on a highway of interstate commerce," claiming that this demonstrates that the statute's field-preemptive scope extends only to state rules directed at in-use locomotive safety. U.S. Br. at 16 (emphasis omitted) (quoting *Napier*, 272 U.S. at 607). But this language does not support the government's distinction in the least. The *Napier* Court did not describe the LIA as regulating the use of locomotives in interstate commerce or locomotives while in use. Neither description would have been accurate. Instead, the Court clarified that the objects of the regulation were instrumentalities of interstate commerce, *i.e.,* locomotives "used on a highway of interstate commerce," even if operated exclusively within a single state, because the rail system itself was a highway of interstate commerce. The repair yards too are part of that system. More to the point, nothing in that passage remotely suggested that only locomotives in active use could

be reached by the federal scheme. To the extent the passage has any relevance it suggests the contrary.[3]

Almost every state and federal court to consider the issue has read *Napier* in just this way—*i.e.*, that the field preempted by the LIA must be defined not by the statute's purpose but by the object that it regulates. *See Frastaci v. Vapor Corp.*, 70 Cal Rptr. 3d 402, 411 (Cal. Ct. App. 2007) (rejecting claim arising from asbestos exposure during locomotive repair because "[t]here is no indication Congress intended the BIA's broad preemptive scope to be circumscribed by the location of the locomotive. Rather, the BIA is directed at the *subject* of locomotive equipment, which is peculiarly one that calls for uniform law.") (internal quotation marks and ellipsis omitted); *Seaman v. A.P. Green Indus., Inc.*, 707 N.Y.S.2d 299, 302 (N.Y. Sup. Ct. 2000) ("It is . . . irrelevant whether the plaintiff was exposed to asbestos from locomotives in use or 'off-line,' because

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[3] The government's effort to rely on an early regulatory statement suffers from the same basic flaw. The government attempts to draw support for its position from the Interstate Commerce Commission's 1922 statement 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." U.S. Br. at 15 (quoting ICC, *Inspection of Locomotive Boilers: Report of the Comm'n to the Senate*, 73 I.C.C. 761, 763 (Aug. 29, 1922)). But the government's reliance on that statement conflates the regulatory violation with the regulated field. It may be that a violation of the Act required use in an unsafe state, and it did not create an inchoate violation when a locomotive sat on the repair yard in an as-yet unrepaired state. But that does not mean that the unrepaired, yet stationary locomotive was not within the regulated field. It certainly was, as evidenced by the fact that federal law prohibited its use unless and until it was repaired.

a locomotive's design, construction, parts and materials, which are regulated by the BIA, are the same whether or not the locomotive is in use."); *Lorincie v. S.E. Pa. Transp. Auth.*, 34 F. Supp. 2d 929, 932 (E.D. Pa. 1998) ("[T]he plaintiffs in *Napier* sought specifically to distinguish between the BIA's purpose (railroad safety) and the purpose of the state regulations (engineer health and comfort)," but this Court "held such a distinction insignificant."); *Springston v. Consol. Rail Corp.*, 863 F. Supp. 535, 541 (N.D. Ohio 1994) ("[T]he very language of the *Napier* opinion refutes plaintiff's argument that because the purpose of the BIA was to protect railroad employees rather than bystanders, plaintiff's state law tort claims are not preempted. . . . [I]t is not the purpose of locomotive requirements that is important."), *aff'd*, 130 F.3d 241 (6th Cir. 1997).

C. The Government's Proposed Hybrid Approach Is Doctrinally Incoherent.

The government recognizes that simply constricting the field preempted by *Napier* would not work. If implemented in isolation, this narrowing of the LIA's preemptive scope would allow the states to regulate every aspect of the design, manufacture and materials used in locomotive equipment production in the name of ensuring the locomotives' safety while at the repair yard. That result would severely burden interstate commerce and entirely frustrate the purpose of uniform federal regulation of these instrumentalities of commerce. To avoid this scenario, the government proposes that the newly-restricted LIA field preemption be supplemented with a dose of previously-unnecessary conflict preemption

that would prevent most state regulation—with the exception, we are told, of most failure-to-warn claims. Under the government's novel two-steps-backward-one-step-forward approach, courts would first determine whether a state tort suit or regulation implicated the regulated field. If not, the government would then have the courts ask whether the state law "would have the effect of prescribing rules about whether a locomotive is fit for use." U.S. Br. at 24. Laws that had this effect would, in the government's view, be conflict preempted by the LIA, because if there were "different rules in different States regarding locomotives' fitness for service," this would "undermine one of the important objectives of the LIA." *Id.* This effort to superimpose conflict preemption on field preemption is doctrinally incoherent.

The government does not mean to supplement field preemption with a demanding form of obstacle preemption such that in the repair yard states would have a relatively free hand to regulate absent a direct conflict between an on-point federal regulation and the state law. To the contrary, the government seems to envision a form of conflict preemption broad enough to prevent almost any effort by states to regulate locomotive design in the name of repair yard safety. For instance, although there currently is no federal regulation either prohibiting or expressly permitting the use of asbestos in locomotives, the government asserts that state-law rules restricting the presence of asbestos in locomotive parts nevertheless should be conflict preempted by the LIA "even if [they] arose in a claim concerning an asbestos-related injury sustained

while a locomotive was in a repair shop," because allowing such claims "would undermine the uniformity-of-regulation objective of the LIA." U.S. Br. at 25.

That result, while perfectly sensible, is practically indistinguishable from the field preemption the government says it does not want. Field preemption arises "from a 'scheme of federal regulation so pervasive as to make reasonable the inference that Congress left no room to supplement it.'" *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 204 (1983) (quoting *Fidelity Fed. Savings & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 153 (1982)). When it comes to the design of locomotives, this seems to be exactly what the government wants. But embracing *Napier*'s broad field preemption over locomotive design, construction and materials interferes with the government's evident desire to preserve some failure-to-warn claims. The government (correctly) recognizes that field preemption over the broader field recognized by *Napier* would render such claims preempted. But the government's apparent interest in preserving failure-to-warn claims does not justify reverse engineering a rule of preemption that produces such profound doctrinal confusion. Preemption law is difficult enough without creating some new hybrid to preserve failure-to-warn claims that are clearly within the field preempted by *Napier* and implicate all of the same concerns as the state laws the government acknowledges to be preempted. See Part I.D., *infra*.

In contrast to the relative simplicity of the *Napier* rule, the government's novel hybrid approach would

create difficulties for the courts in determining whether a given provision of state law comes within the preempted field or instead is subject to the "uniformity obstacle preemption" the government proposes. According to the government's own descriptions, a court facing this inquiry would be required to decide whether the statute "regulat[es] locomotive equipment used on a highway of interstate commerce," U.S. Br. at 12 (quoting *Napier*, 272 U.S. at 607), so as to be field preempted, or instead merely would interfere with Congress's "purpose of imposing uniform national standards on common carriers," *id.* at 23, so as to implicate only conflict preemption. The government itself gives little sense of how this rather metaphysical distinction should be made.

Another doctrinal difficulty with the government's position is that it requires the same statutory text to project both a limited preempted field and an additional fairly broad realm of conflict preemption. That is a great deal to ask of a single statutory provision.

The government cites *United States v. Locke*, 529 U.S. 89 (2000), as a purported precedent for the proposition that a single statute can give rise to both a preempted field and obstacle preemption outside that field. U.S. Br. at 23. But *Locke* does not help the government, because it involved field preemption and obstacle preemption that arose from *different provisions* of a statute, regulating different matters. In *Locke*, this Court noted that the Ports and Waterways Safety Act features "two somewhat overlapping titles, both of which may . . . preclude enforcement of state laws, though not by the same

pre-emption analysis." 529 U.S. at 101. Specifically, Title II requires the Coast Guard to regulate the various aspects of marine vessel design, construction, and maintenance, and gives rise to field preemption, whereas Title I merely *authorizes* Coast Guard regulations of vessel traffic and environmental safety, and gives rise only to conflict preemption. *Id.* at 101, 111–12. The Court expressly noted that Title II's field preemptive effect resulted from the fact that "[a] state law in this area . . . would frustrate the congressional desire of achieving uniform, international standards." *Id.* at 110 (parenthetically quoting *Ray v. Atl. Richfield Co.*, 435 U.S. 151, 168 (1978)). Conversely, in Title I Congress intended to leave room for "state authority to regulate the peculiarities of local waters if there was no conflict with federal regulatory determinations," and so did not preempt the field. *Id.*

Here, the government does nothing to distinguish separate parts of the LIA that give rise to its proposed separate regimes of field and conflict preemption. Moreover, both the government's field and conflict preemption arguments rest on the same interest in uniformity (which, of course, is the same interest that caused the court to find Title II field preemptive in *Locke*). And finally, as Respondents point out, see Resp. Br. at 55, the government itself prescribes warnings as part of its overall regulatory effort under the LIA. As a result, there is no coherent basis for treating failure-to-warn claims as somehow falling outside the regulated and preempted field.

The government protests that finding field preemption might leave some plaintiffs without remedies. U.S. Br. at 19–20. But preemption—whether conflict or field, express or implied—*always* has the effect of leaving plaintiffs without a state law remedy. Moreover, the whole point of field preemption is that it preempts an entire field beyond the specific issues addressed by particular federal regulations, which may or may not provide a federal remedy. *Napier* itself emphasized that federal regulation of a specific topic within the LIA's scope was not necessary for field preemption to apply to state rules on that topic. 272 U.S. at 612–13. The government cannot be arguing that the preemptive scope of federal law for field or conflict preemption should be judged by reference to federal laws providing a remedy, as opposed to the federal laws pervasively regulating a field. That would be getting matters backwards. Remedial provisions are generally only a small part of a federal regulatory regime. It is commonplace for a finding of even conflict preemption to render the plaintiff without a remedy, and the nature of field preemption makes that result even more likely. As the government itself recognizes, the scope of the field preempted is co-extensive with the regulable field, but not with the scope of the federal remedial scheme. Indeed, preemption is often necessary precisely because allowing a state remedy—with the attendant costs to the regulated party in terms of litigation expenses and state-law judgments—in circumstances where federal law does not provide a remedy is inconsistent with the federal scheme.

D. The Government's Approach Ignores The Practical Realities of Locomotive Manufacture and Operation.

The government's proposed approach not only creates doctrinal confusion, but it simply fails to reflect the practical realities of locomotive manufacture and operation. The field preempted by the LIA has always been understood to cover locomotives "used in interstate commerce" and not only locomotives while in use, because any effort to limit regulation to the latter would be a practical impossibility. Locomotives are designed to be instrumentalities of interstate commerce that transcend state borders. They are designed to have long useful lives that necessitate the need for continual inspection and occasional repair. To carve out the repair yard or some broader swath of regulation that does not implicate locomotives while in use simply does not work. The Court recognized as much in *Napier*.

For the most part, the government too seems to recognize the need for uniform rules for the design and manufacture of instrumentalities of interstate commerce like locomotives. The government acknowledges that such design questions for locomotives in use are within the field preempted by *Napier*. The government also appears to recognize the threat to uniformity from state laws that would require locomotives to be equipped differently in different jurisdictions, even for purposes of facilitating repairs. If different states had conflicting requirements, then the threat to interstate commerce would be palpable. Certain locomotives would be limited to service in certain

states. And even in the absence of a direct conflict, the rule of the most demanding state would be substituted for an optimal federal rule.

The government seems to think that failure-to-warn claims are somehow different. They are not. The manufacturer of a locomotive and its parts and appurtenances cannot possibly control the multitude of possible circumstances in which a locomotive, once manufactured, will be inspected or repaired. As even the government recognizes, the most the manufacturer could do is attach a warning label to the locomotive, or to the relevant part or appurtenance. But which label? The government admits that, because different states likely would require different (and possibly conflicting) warnings about differing topics, under its approach locomotive and locomotive-parts manufacturers would be forced to "either affix the most stringent form of warning required by any particular State or affix a label that incorporates requirements imposed by several States." U.S. Br. at 27. Even then, of course, the evolving nature of state tort requirements would often make it difficult for a manufacturer to determine whether it had actually identified the most restrictive requirement, or whether its label had captured every variation of warning required by the various states. It appears the government imagines a map of the fifty states prominently displayed on the side of each locomotive with the appropriate warning affixed on each state on the map (and perhaps much smaller maps on the individual component parts also covered by the LIA). Presumably, there could be recalls from time to time to update the maps to keep pace with evolving tort

law. That would be an odd way to regulate an instrumentality of interstate commerce, and needless to say there is no hint in the LIA or *Napier* that Congress intended such an absurd result.

But the alternatives to adding fifty-state labels to locomotives are not obvious. The government seems insensitive to the fact that the nature of the railroad business means that manufacturers cannot predict where, under what circumstances, or even by whom their locomotives will be repaired. Locomotives can of course be used—and repaired—in any state, and at various locations. The government's only response to this is to suggest that "[m]anufacturers and railroads may post warnings in repair shops themselves . . . or on the packaging for the materials in question," U.S. Br. at 27, but even this would leave manufacturers unprotected against many claims. As an initial matter, the government ignores the fact that repair shops generally are owned by the railroads, not by the manufacturers. Whatever the government's ability to force such postings in the workplace, locomotive manufacturers lack the power to ensure that repair yards carry the appropriate warnings. It would not even work to have a manufacturer insist on the posting of warnings as a condition of sale because locomotives are repaired when and where the locomotive needs the repair, which will not necessarily be in a railyard owned by the railroad that purchased the locomotive. Indeed, as Respondents point out, see Resp. Br. at 57, locomotives often need to be repaired in remote repair shops that are outside the control of both the manufacturer and the railroad that purchased and operates the locomotives. And, especially in light of

the long useful lives of locomotives, a manufacturer cannot know whether a railroad purchasing its products might re-sell them to another railroad, with whom the manufacturer might not have any such contractual arrangement.

This very case demonstrates that the government's other suggestion—placing warnings on packaging—also often would be insufficient. Mr. Corson allegedly was injured by inhaling asbestos dust from parts he was *removing* from locomotives, meaning that any packaging on which a warning could have been printed would no longer have been in existence. Although a manufacturer could attempt to address such situations by printing warnings on the packaging of replacement parts, it would have no way of knowing whether its own replacement parts would be used in any given instance, or indeed whether the workers removing the worn parts necessarily would unpack the replacements from their shipping crates or otherwise handle them (and thus be exposed to the warnings) before removing the worn parts. Practically speaking, then, in order to avoid potential liability for state-law failure-to-warn claims pertaining to the alleged dangerousness of its locomotives in the repair process, the manufacturer would have no choice but to print the required warnings on the locomotive itself. As these warnings would necessarily remain on the locomotive while it was in use, the result would be that in-use locomotives—the core concern of the LIA—would wind up festooned with warning labels required by state law. Worse still, since exhaustive multi-state warnings are wholly impractical, the only realistic option for avoiding liability would be

for manufacturers of locomotives and locomotive parts to alter designs according to the requirements of state law so as to obviate the need for a warning.

In short, the government's elaborate efforts to reconceive preemption doctrine to allow failure-to-warn claims to escape the reach of *Napier* does not work as a legal or practical matter. It takes the Court's already elaborate preemption jurisprudence and adds a new hybrid. And the government struggles mightily to preserve failure-to-warn claims that raise the same threat to uniformity that the government generally credits. The simple and correct course is to preserve *Napier* and reject the government's novel proposal. The reliance interests in a faithful application of *Napier* provide just one more reason to stay the course.

E. Locomotive Manufacturers Have Significant Reliance Interests in the Faithful Application of *Napier*.

From the perspective of a locomotive manufacturer considering how to design or build the locomotive, there is no difference between a locomotive "in use" or "at rest." The locomotive will inevitably be used in interstate commerce and occasionally sit in the repair yard awaiting inspection or repair. A locomotive, after all, is a single object, and cannot be designed or constructed in one manner or with one set of materials for purposes of in-use safety, and in another manner or with different materials only for purposes of repair (or aesthetics, or speed, or fuel efficiency). For almost ninety years, manufacturers have been producing locomotives and locomotive equipment knowing that federal regulation governs the object—the instrumentality of interstate

commerce—and that state laws that purport to regulate the design, manufacture or choice of materials are preempted no matter what the state's purported interest in regulating.

As noted earlier, the government has not been so bold as to ask for *Napier* to be expressly overturned, and for good reason. *Napier* is an 85-year-old precedent that has been respected and applied in the lower courts, has gained the imprimatur of Congress in its later rail legislation and has engendered substantial reliance interests. But all the same factors that would preclude *Napier*'s overruling counsel just as forcefully against its evisceration by substantially restricting the scope of the preempted field.

For many decades, relying on *Napier*, locomotive manufacturers have operated on the premise that if they complied with the LIA, their designs and manufacturing processes would not be questioned under state law. As a result, locomotive manufacturing, design and materials standards are geared toward LIA compliance. If *Napier* now were to be overturned, the result would be a flood of lawsuits by plaintiffs allegedly injured over many decades. Some would claim that the manufacturers failed to comply with design standards that the manufacturers, relying on *Napier*, did not plan for at the time they built their locomotives. Other plaintiffs would allege that the manufacturers failed to include warnings that, again based on *Napier*, they very reasonably believed were not required.

Both the nature of the industry and the relative paucity of solvent manufacturers make the threat of unfair retroactive liability particularly acute

precisely for the failure-to-warn claims the government works so hard to save from preemption. As noted, a given locomotive may be repaired in a yard owned by a different company far from the locomotive's home base. By the same token, a repair yard worker will see any number of different locomotives from different manufacturers and operated by different railroads. It would be no easy task for a repair yard worker with an exposure claim to pinpoint the precise repairs and the precise "failures to warn" that produced an injury. Moreover, in an industry with few remaining solvent manufacturers, the potential for workers mistakenly to associate their injury with the few remaining solvent entities is very real. Needless to say, there is nothing any manufacturer can do at this point to warn about these injuries. Thus, to impose failure-to-warn liability at this late stage on manufacturers who operated with a settled understanding of *Napier*'s scope would implicate reliance interests of the highest order.

In situations like this, where a decision by this Court "has engendered substantial reliance and has become part of the basic framework of a sizable industry," the principle of *stare decisis* takes on its greatest strength. *Quill Corp. v. North Dakota ex rel. Heitkamp*, 504 U.S. 298, 317 (1992); *see also Allied-Signal, Inc. v Dir., Div. of Taxation*, 504 U.S. 768, 785 (1992) (declining to "defeat the reliance interest of those corporations that have structured their activities and paid their taxes based upon the well-established rules we here confirm."). It would be fundamentally unfair to pull the rug out from under the industry that has relied on *Napier* for so

long. The Court should decline the invitation to replace nearly a century of clarity with a hybrid preemption regime that seems gerrymandered to preserve failure-to-warn claims that impose the same basic difficulties as claims all agree should be preempted. Especially in light of the substantial reliance interests in *Napier*, this Court should faithfully apply that decision and affirm the decision below.

CONCLUSION

For all the reasons stated herein, the judgment of the Court of Appeals for the Third Circuit should be affirmed.

Respectfully submitted,

Paul D. Clement
Counsel of Record
Nicholas J. Nelson
BANCROFT PLLC
1919 M Street, N.W.,
Suite 470
Washington, D.C. 20036
(202) 234-0090
pclement@bancroftpllc.com

Counsel for amicus curiae General Electric Corp.

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