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

AMICUS CURIAE BRIEF OF JOHN CRANE INC. IN SUPPORT OF RESPONDENTS

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IDENTITY AND INTEREST OF *AMICUS CURIAE*[1]

John Crane Inc. ("JCI") was founded in 1917 as Crane Packing Company. Throughout most of its history, JCI supplied packing and gaskets to customers in a number of industries, including the railroad industry. JCI supplied both packings and gaskets that contained asbestos in an encapsulated manner. Packing and gaskets are engineered mechanical seals that fill the space between two surfaces to prevent leakage. In railroad applications, packing was used to stop leaks on water and steam valves on locomotive engines, and gaskets were used on water pumps, air compressors and oil pumps on locomotives. After locomotives are built and the gaskets and packing are installed, they require periodic maintenance. JCI ceased supplying any asbestos-containing parts in 1985, more than 25 years ago.

JCI is a party to a Petition for a Writ of Certiorari currently pending before this Court, *John Crane Inc. v. Atwell*, No. 10-272 (*petition for cert. filed* Aug. 23, 2010), involving an almost identical issue. The question presented in *Atwell* is: "Whether, contrary to the ruling below, but in conformity with this Court's holding in *Napier v. Atlantic Coast Line R.R. Co.*, 272 U.S. 605 (1926), and with an 'avalanche' of decisions from both federal and

1. Pursuant to Supreme Court Rule 37.6, counsel for amicus represents that no counsel for a party authored this brief in whole or in part and that none of the parties or their counsel nor any other person or entity other than amicus, its members, or its counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Pursuant to Rule 37.3(a), counsel for amicus represents that all parties have consented to the filing of the brief. Letters reflecting their consent are on file with the Clerk.

state reviewing courts, the Boiler Inspection Act, 49 U.S.C. §§ 20701-20703 (2006), impliedly preempts the field of locomotive equipment, and thereby bars Respondent's state law claim?" JCI submits that the resolution of the instant case will impact its own pending case before this Court. JCI further desires to inform the Court of JCI's position that acceptance of Petitioner's arguments will disrupt the expectations of locomotive equipment manufacturers that have been settled for decades, and retroactively impose state law requirements on an increasingly small number of such solvent entities, decades after those entities have stopped supplying asbestos-containing products.

SUMMARY OF THE ARGUMENT

The preemption issue presented in this case is governed by this Court's 1926 decision in *Napier v. Atl. Coast Line R.R. Co.*, 272 U.S. 605 (1926). In *Napier*, this Court unanimously held that Congress intended, through its enactment of the Locomotive Inspection Act ("LIA"), 49 U.S.C. §20701-20703 (2006), and more specifically, its amendments, to preempt the entire field of locomotive equipment and safety, including "the design, the construction, and *the material of every part of the locomotive* and tender, and of all appurtenances." *Id.* at 611 (emphasis added). That decision resolved the precise issue here: whether manufacturers and designers of the parts and appurtenances of locomotives used on the interstate railroads may be subject to different standards prescribed by state tort laws, and may therefore be liable in damages under state law for failing to comply with those standards.

Napier was announced over 80 years ago, and the federal and state courts – with the exception of the

Pennsylvania state courts – have uniformly applied it during the intervening years. Congress has not addressed, much less corrected, this Court's conclusion in that case. This consistent application of the LIA in accordance with this Court's opinion in *Napier* has been relied upon by manufacturers of locomotive parts and equipment, including JCI. Overturning the Third Circuit's decision here would upset those settled expectations, and retroactively expose JCI to a series of potential common law-based tort claims premised on sales which it made more than 25 years ago. In overturning the settled expectations of manufacturers of asbestos-containing parts and materials, the retroactive obligations this Court would thrust on those manufacturers would be disproportionately borne by the few who remain in business. This Court should affirm the opinion below.

ARGUMENT

I. Respondent Correctly Identifies the Scope of Preemption and the Proper Application of the Preemption Doctrine in the Third Circuit's Opinion

JCI agrees with Respondent's position that *Napier v. Atl. Coast Line R.R. Co.*, 272 U.S. 605 (1926), governs the disposition of this case. In *Napier*, this Court resolved the precise issue here: whether manufacturers and designers of the parts and appurtenances of locomotives used on the interstate railroads may be subject to different standards prescribed by state tort laws, and may therefore be liable in damages under state law for failing to comply with those standards. As *Napier* held, and as the Third Circuit properly held here, the Locomotive Inspection Act ("LIA"), 49 U.S.C. §20701-20703 (2006), precludes that result. The Pennsylvania state courts remain the only

jurisdiction to have considered the question and come to the opposite conclusion. *Atwell v. John Crane, Inc.*, 986 A.2d 888 (Pa. Super Ct. 2009); *Norfolk & Western Ry. Co. v. Pa. Pub. Util. Comm'n*, 413 A.2d 1037 (Pa. 1980). The propriety of those cases remains pending before this Court in *John Crane Inc. v. Atwell*, No. 10-272 (*petition for cert. filed* Aug. 23, 2010).

II. Accepting Petitioner's Arguments Will Upset the Settled Expectations of Railroad Parts and Equipment Manufacturers and Result in the Unfair Imposition of Retroactive Liability on those Manufacturers

JCI has manufactured and sold packing and distributed gaskets since the 1930's. Until 1985, JCI sold packings and gaskets containing encapsulated asbestos to locomotive manufacturers. Packing and gaskets are engineered seals that fill the space between two surfaces to prevent leakage. Packing is primarily used to prevent leaks on water and steam valves on locomotive engines; gaskets are used in water pumps, air compressors and oil pumps on locomotives. These materials required periodic maintenance. Railroad workers removed used gaskets and packings from locomotive engines, and fabricated replacement parts in the railroad shops. The replacement gaskets and packing were then installed in locomotives.

The United States Congress, or by delegation, federal agencies, have exercised authority over the railroads, including the use of asbestos in the industry. Their authority originated from before the first transcontinental railroad was completed. *See Union v. Long Island R.R. Co.*, 455 U.S. 678, 687-88 (1982) (discussing history of

federal regulation of the railroads). In 1911, Congress passed the original version of the LIA. Act of Feb. 17, 1911, Pub. L. No. 61-383, ch. 103, § 2, 36 Stat. 913 (current version at 49 U.S.C. §§ 20701-20703 (2006)). The LIA was enacted for the purpose of protecting "employees and others by requiring the use of safe equipment." *Urie v. Thompson*, 337 U.S. 163, 182, at n. 20 (1949).

As originally enacted, the LIA applied only to the boiler of the locomotive and was known as the Boiler Inspection Act ("BIA"). In 1915, the Act was amended to cover "the entire locomotive and tender and all parts and appurtenances," Act of Mar. 4, 1915, Pub. L. No. 63-318, ch. 169, § 1, 38 Stat. 1192 (current version at 49 U.S.C. §§ 20701-20703 (2006)), and became known as the Locomotive Inspection Act. In 1970, Congress enacted the Federal Railroad Safety Act of 1970 ("FRSA"), Pub. L. No. 91-458, title II, 84 Stat. 971 (1970) (codified as amended in scattered sections of 49 U.S.C.), and then recodified the LIA, without substantive change, in 1994. Act of July 5, 1994, Pub. L. No. 103-272, 108 Stat. 745 (codified as amended in scattered sections of 49 U.S.C.). Congress passed one subsequent amendment to the FRSA in 2007, ("2007 FRSA Amendments"), 49 U.S.C.S. § 20106(b) (Lexis 2010).

In enacting the FRSA in 1970, Congress reaffirmed that under the LIA, and five other laws, "where the Federal Government has authority, with respect to rail safety, it preempts the field." H.R. Rep. No. 91-1194 (1970), *reprinted in* 1970 U.S.C.C.A.N. 4104, 4108. Congress further stated in 1970 that these laws "have served well" and therefore "chose to continue them without change." *Id.* at 4105. Moreover, in recodifying the BIA and other

transportation laws in 1994, Congress made clear that "[a]s in other codification bills enacting titles of the United States code into positive law, [the] bill makes no substantive change in the law," and expressly preserved "the precedent value of earlier judicial decisions," such as *Napier*. Act of July 5, 1994, Pub. L. No. 103-272 §§ 1(a), 6(a), 108 Stat. 745, 1378; H.R. Rep. No. 103-180, 3, 5 (1993), *reprinted in* 1994 U.S.C.C.A.N. 818, 820, 822.

The legislative history of the 2007 FRSA Amendments, relevant to the preemption provision, makes it clear that in passing the amendments, Congress intended to "adopt[] a provision that would clarify the intent and interpretations of the existing preemption statute and to rectify the Federal court decisions related to the Minot, North Dakota accident that are in conflict with precedent." H.R. Rep. No. 110-259, 351 (July 25, 2007). It provides further clarification of the intention of 49 U.S.C. § 20106 (2006), as it was enacted in the FRSA, to explain what State law causes of action for personal injury, death or property damage are not preempted. It clarifies that 49 U.S.C. § 20106 (2006) does not preempt state law causes of action where a party has failed to comply with the Federal standard of care established by a regulation or order issued by the Secretary of Transportation or the Secretary of Homeland Security…" *Id.* It further states that "the modified language also contains a retroactivity provision, which clarifies that 49 U.S.C. § 20106 applies to all pending State law causes of action arising from activities or events occurring on or after January 18, 2002, the date of the Minot, North Dakota derailment." *Id.*

There is no specific Federal Railroad Administration ("FRA") regulation governing asbestos. In fact, the FRA

specifically investigated and addressed the question of asbestos in locomotive components, and concluded that the "FRA does not feel that further action with respect to the presence of asbestos in locomotive cabs is warranted at this time." *See* U.S. Dep't of Transp., Report to Congress, Locomotive Crashworthiness and Cab Working Conditions (Sept. 1996) ("1996 Report to Congress"). The Rail Safety Enforcement and Review Act of 1992 ("RSERA"), Pub. L. No. 103-365, §10, 106 Stat. 972 (1992), required the Secretary of Transportation to assess "the extent to which environmental…conditions in locomotive cabs affect…health," including consideration of "the effects on train crews of the presence of asbestos in locomotive components," and to "complete a rulemaking proceeding to consider prescribing regulations to improve the safety and working conditions of locomotive cabs." The RSERA required a "report to Congress on the reasons for that determination" if "the Secretary determines not to prescribe regulations." The FRA's 1996 Report to Congress, at 10-1, 10-12, 12-9, found that the "FRA has not identified sources of friable asbestos" on locomotives "to which crew members could be exposed," and that no asbestos regulations should be prescribed to improve the safety and working conditions of "locomotive cabs" because "the presence of asbestos" in older locomotives still on line posed no safety hazard "to humans or the environment." None of these actions by Congress or regulatory authorities questioned the propriety or application of *Napier v. Atlantic Coast Line R.R. Co.*, 272 U.S. 605 (1926).

For the six decades between this Court's decision in *Napier* and JCI's decision to stop selling asbestos-containing gaskets and packing, the law was well-settled

that the LIA preempted the field of railroad equipment, such as gaskets and packings.[2] In *Napier*, this Court, interpreting the plain language of the statute, held that the LIA extends to "the design, the *construction*, and *the material of every part of the locomotive* and tender, and of all appurtenances." *Id.* at 611 (emphasis added). It is this language that is determinative of the preemptive scope of the LIA, and "there is no indication that Congress intended the [LIA]'s broad preemptive scope to be circumscribed by the location of the locomotive. Rather, the [preemptive scope of the LIA] is directed at the *subject* of the locomotive equipment, which is 'peculiarly one that calls for uniform law…'" *Frastaci v. Vapor Corp.*, 70 Cal. Rptr. 3d 402, 412 (Cal. Ct. App. 2007).

Ten years after *Napier*, in *Southern R. Co. v. Lunsford*, the Court promulgated a broad construction of "parts and appurtenances" as encompassing non-experimental equipment and parts that are, as a matter of fact, integrated into the locomotive. 297 U.S. 398, 401 (1936) (finding the absolute duty to keep "all parts and appurtenances" of locomotives in proper condition did not extend to safety devices which do not increase the peril and which are placed on locomotives by the carrier for experimental purposes). The state and federal courts that have considered the issue, including the Third Circuit in the underlying decision here, have concluded that asbestos-containing locomotive parts, such as those

2. Significant portions of the exposure of George Corson and Thomas Atwell occurred during this time, when *Napier's* application was unquestioned. Corson worked as a machinist repairing and maintaining locomotives from 1947 to 1974. (Petitioner's Brief, p. 10). Atwell worked briefly as an electrician, and then a pipe-fitter from 1951 until 2004.

manufactured and sold by JCI, come within the "parts and appurtenances" definition. *Kurns v. A.W. Chesterton Inc.*, 620 F.3d 392 (3d Cir. 2010) (upholding district court's holding that the LIA preempted product liability tort claims, because the LIA occupied the field regulating locomotives and locomotive parts used in interstate commerce, and the brake pads and engine valves that allegedly caused asbestos exposure during installation were clearly locomotive equipment within the scope of the LIA); *Darby v. A-Best Prods. Co.*, 811 N.E.2d 1117, 1125-26 (Ohio 2004) (the LIA "preempts state-law tort claims against the manufacturers of railroad locomotives asserting injury caused by exposure to asbestos contained in railroad locomotives."); *Gen. Motors Corp. v. Kilgore*, 853 So.2d 171 (Ala. 2002) (LIA preempts claims against manufacturer for use of asbestos in locomotive parts).

Inclusion of gaskets and packing as a "part or appurtenance" also comports with the plain meaning of a "part" or "appurtenance." A "part," is defined as "one of the often indefinite or unequal subdivisions into which something is or is regarded as divided and which together constitute the whole." WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY, 855-86 (9th ed. 1983). An "appurtenance" is defined as "a subordinate part or adjunct." *Id.* at 98. The asbestos-containing gaskets and packing here were elements of, and integrated into, the locomotive engines, water pumps, air compressors and oil pumps. As such, they fit within *Lunsford*'s broad construction and the plain meaning of a "part or appurtenance." In other words, in the terms used by this Court in *Napier*, they were the "material" of railroad locomotive parts.

Furthermore, no limited reading of the "part or appurtenance" holding of *Napier* is allowed by the plain language of the LIA, which does not contain the phrase "in use," but *does* contain the phrase "allow to be used." "Allow to be used" contemplates the existence of an inspection and decision-making process concerning the safety of parts used in locomotives. Decisions about whether parts and material are "allowed to be used" are made when the locomotive is not "in use." Rather, such decisions are made as part of the "uniform national inspection and regulation scheme for locomotive equipment" that was created by the LIA. *United Transp. Union v. Foster*, 205 F.3d 851, 860 n. 16 (5th Cir. 2000).

There is "an overwhelming body of case law" following *Napier* that holds, without exception, that the LIA preempts common law and statutory claims against railroad operators and locomotive manufacturers related to the design, construction, or material of locomotives and their parts and appurtenances. *In re West Virginia Asbestos Litig.*, 592 S.E.2d 818, 822 (W. Va. 2003), *cert. denied sub nom. Abbott v. A-Best Prods. Co.*, 549 U.S. 823 (2006); *see, e.g., Darby v. A-Best Prods. Co.*, 811 N.E.2d 1117 (Ohio 2004) (LIA preempts state law tort claims against the manufacturers of railroad locomotives asserting injury caused by exposure to asbestos contained in railroad locomotives), *cert. denied*, 543 U.S. 1146 (2005); *Gen. Motors Corp. v. Kilgore*, 853 So. 2d 171 (Ala. 2002) (LIA preempts claims against manufacturer for use of asbestos in locomotive parts); *Scheiding v. Gen. Motors Corp.*, 993 P.2d 996 (Cal. 2000) (LIA preempts state law defective design and failure-to-warn claims against manufacturer), *cert. denied*, 531 U.S. 958 (2000); *Wright v. Gen. Electric Co.*, 242 S.W.3d 674 (Ky. App. Ct. 2007) (LIA

preempts state common law tort claims against carriers, locomotive manufacturers, and locomotive component part manufacturers); *Frastaci v. Vapor Corp.*, 70 Cal. Rptr. 3d 402 (Cal. Ct. App. 2007) (LIA preempts state tort claims against locomotive manufacturers for defective design of their product); *Caradonna v. A.W. Chesterton Co., Inc.*, 2007 N.Y. Misc. LEXIS 8994 (N.Y. Slip Op. April 25, 2007) (LIA preempts claims of railroad worker, against various manufacturers of locomotives and their components and parts); *Seaman v. A.P. Green Indus.*, 707 N.Y.S.2d 299 (N.Y. Sup. Ct. 2000) (LIA preempts state tort claims against locomotive manufacturer); *Forrester v. American Dieselelectric, Inc.*, 255 F.3d 1205, 12010 (9th Cir. 2001) (LIA preempts non-employee product liability actions against manufacturer of locomotive cranes); *Law v. Gen. Motors Corp.*, 114 F.3d 908 (9th Cir. 1996) (LIA preempts design defect and failure to warn claims against manufacturer concerning engine insulation and brake noise); *First Sec. Bank v. Union Pac. R.R. Co.,* 152 F.3d 877 (8th Cir. 1998) (LIA preempts state common law remedies against railroad manufacturers for injuries arising out of alleged design defects); *Springston v. Consol. Rail Corp.*, 130 F.3d 241 (6th Cir. 1997) (LIA preempts claim based on inadequacy of warning devices), *cert. denied*, 523 U.S. 1094 (1998); *Oglesby v. Delaware & Hudson Ry.*, 180 F.3d 458 (2d Cir. 1999) (LIA preempts claim that manufacturer should have placed warning label on defective seat), *cert. denied sub nom. Oglesby v. Gen. Motors Corp.*, 528 U.S. 1004 (1999); *United Transp. Union v. Foster*, 205 F.3d 851 (5th Cir. 2000) (LIA preempts statute requiring engine be equipped with signal devices); *Mo. Pac. R.R. Co. v. R.R. Comm'n of Tex.*, 833 F.2d 570 (5th Cir. 1987) (LIA preempts state requirement for emergency equipment); *Roth v. I & M Rail Link LLC*,

179 F. Supp. 2d 1054 (S.D. Iowa 2001) (LIA preempts state law negligence claims against the manufacturer of a locomotive); *Norfolk S. Ry. Co. v. Denson*, 774 So. 2d 549 (Ala. 2000) (LIA preempts state law claim seeking to hold locomotive manufacturer liable for failure to install air conditioning); *Mickelson v. Mont. Rail Link, Inc.*, 999 P.2d 985 (Mont. 2000) (LIA preempts common law claims against railroad concerning locomotive equipment); *In re Train Collision at Gary, Ind.*, 670 N.E.2d 902 (Ind. App. Ct. 1996) (LIA preempts claims regarding alleged defects in the design and structure of train cars), *appeal denied sub nom. Dillon v. Chicago Southshore & South Bend R.R. Co.*, 683 N.E.2d 591 (Ind. 1997), *cert. denied sub nom. Dillon v. Northern Ind. Commuter Transp. Dist.*, 522 U.S. 914 (1997); *Stevenson v. Union Pac. R.R. Co.*, No. 4:07CV00522BSM, 2009 U.S. Dist. LEXIS 6148 (E.D. Ark. Jan. 20, 2009) (LIA preempts a contribution and indemnification claim because the underlying claim was preempted by the LIA); *Key v. Norfolk S. Ry. Co.*, 491 S.E.2d 511 (Ga. App. Ct. 1997) (LIA preempts common law claims against railroad by employee injured in fall from locomotive steps); *In re Amtrak "Sunset Limited" Train Crash in Bayou Canot, Ala. On Sep. 22, 1993*, 188 F. Supp. 2d 1341 (S.D. Ala. 1999) (LIA preempts passenger and employee common law negligence and design defect claims against Amtrak).

The expectations of locomotive parts and equipment suppliers, including JCI, have remained well-settled in light of this "avalanche" of case law. It is for this reason that this Court does not so easily overturn its rulings: doing so "would ill serve the goals of 'stability' and 'predictability' that the doctrine of statutory *stare decisis* aims to ensure." *CSX Transp., Inc. v. McBride*, 131 S.

Ct. 2630, 2641 (2011). In *CSX Transp., Inc.*, a Federal Employers' Liability Act ("FELA"), 45 U.S.C. §§ 51-60 (2006), case concerning a railroad employee's negligence action, this Court reiterated that "[c]onsiderations of *stare decisis* have special force in the area of statutory interpretation" and, that having repeated where an instruction was repeated "in subsequent opinions, and lower courts have employed it for over 50 years. To unsettle the law . . . would show scant respect for the principle of *stare decisis*." *Id.*, at 2636, 2639 n. 4 (2011), citing and quoting *Patterson v. McLean Credit Union*, 491 U.S. 164, 172 (1989). This Court's "precedent is to be respected unless the most convincing of reasons demonstrates that adherence to it puts us on a course that is sure error." *Citizens United v. FEC*, 130 S. Ct. 876, 911-912 (2010). Indeed, "[f]idelity to precedent – the policy of *stare decisis* – is vital to the proper exercise of the judicial function." *Id*. at 920 (Roberts, C.J., concurring) (internal quotation and citation omitted).

Petitioner puts forth no such "most convincing" reasons, and instead argues that the federal courts, and state courts aside from those in Pennsylvania, have overread *Napier*. (Pet. Brief, p. 14, 17, 36). This argument is incorrect. The courts following *Napier* have expressly rejected Petitioner's claims that the holding of *Napier* has been, or should be, limited. *See, e.g.*, *In re West Virginia Asbestos Litig.*, 592 S.E.2d at 822; *Forrester v. American Dieselelectric, Inc.*, 255 F.3d 1205, 1210 (9th Cir. 2001) ("None of the Court's more recent preemption cases have questioned the authority of *Napier*, and, in any event, the rule is too well established to permit such a qualification by a lower court"); *Wright v. Gen. Electric Co.*, 242 S.W.3d 674, 679 (Ky. App. Ct. 2007) (rejecting plaintiffs' argument

that modern preemption jurisprudence has undermined the continuing viability of *Napier*); *Gen. Motors Corp. v. Kilgore*, 853 So. 2d 171, 177-78 (Ala. 2002) (rejecting plaintiffs' claim that the field of the LIA's preemption has been narrowed by recent Supreme Court jurisprudence).

This Court addressed, and rejected, a similar argument as to a purported overreading of this Court's holdings in *CSX Transp., Inc.*, 131 S. Ct. 2630. There, the railroad employer appealed the decisions of the Seventh Circuit Court of Appeals, which upheld a jury instruction concerning proximate cause. *Id.* 2632. That instruction was a recitation of this Court's enunciation of the "any part . . . in producing the injury" proximate cause test to be applied in FELA negligence actions, first described in *Rogers v. Missouri Pacific R. Co.*, 352 U.S. 500 (1957). *CSX Transp., Inc.*, 131 S. Ct. at 2636, 2638, 2640. CSX argued that the lower courts had overread *Rogers*, which, it argued, was a narrowly focused, fact-based, decision that did not displace common-law formulations of proximate cause. *Id.* at 2636-67.

The Court rejected that line of reasoning, stating that *Rogers* was "most sensibly read as a comprehensive statement of the FELA causation standard," *id.* at 2638, and that subsequent decisions "confirmed that Rogers announced a general standard for causation in FELA cases." *Id.* at 2639. The Court also considered that *Rogers* was "accepted as settled law for several decades," that Congress had had more than 50 years to correct the decision, but had not, and "[c]ountless judges have instructed countless juries in language drawn from *Rogers*. To discard or restrict the *Rogers* instruction now would ill serve the goals of 'stability' and 'predictability'

that the doctrine of statutory *stare decisis* aims to ensure." *Id.* at 2641.

No different outcome is warranted here. *Napier* was announced over 80 years ago, and the federal and state courts – with the exception of the Pennsylvania state courts – have uniformly applied it during the intervening years. Congress has not addressed, much less corrected, this Court's conclusion in that case. Prior to JCI's cessation of the distribution of asbestos-containing gaskets and packings to the railroad industry in 1985, JCI had every reason to believe the LIA applied to those sales. Overturning the Third Circuit's decision here would upset those settled expectations, and retroactively expose JCI to a series of potential common law-based tort claims premised on sales which it made more than 25 years ago.

"Retroactivity is generally disfavored in the law." *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988). In other contexts, this Court has rejected measures that would invite such results, where the "distance into the past" reached to impose liability is great. *See, e.g., Eastern Enters. v. Apfel*, 524 U.S. 498, 534 (1998). Retroactive imposition of state law liability is particularly unsuitable in the field of asbestos liability, as the remaining number of solvent companies will be forced to defend against and ultimately bear the burden of the retroactive state court liability sought to be imposed by Petitioner here. As this Court is aware, in the intervening decades, many manufacturers and suppliers of asbestos-containing equipment and parts have gone bankrupt. *Amchem Prod., Inc. v. Windsor*, 521 U.S. 591, 632 (1997) (J. Breyer, dissenting) (noting general problems in asbestos-related liability cases, including increasing numbers

of bankruptcies); L. Dixon and G. McGovern, *Asbestos Bankruptcy Trusts and Tort Compensation,* in RAND Institute for Civil Justice (2001), p. 2 (as of March, 2011, 96 companies with asbestos liabilities had filed for reorganization and 56 trusts had been established).

There is no compelling reason here to overturn *Napier*, thereby inviting that result. To the contrary, the parties' positions compel the opposite result. In overturning the settled expectations of manufacturers of asbestos-containing parts and materials, the retroactive obligations this Court would thrust on those manufacturers would be disproportionately borne by the few who remain in business. Courts recognize that retroactivity "may undermine rule-of-law values that enable people to know what the law is, and to have confidence about the legal consequences of their actions." *City of New York v. Permanent Mission of India*, 618 F.3d 172, 195 (2d Cir. 2010) (dismissing plaintiff's lawsuit seeking to tax properties owned by governments of India and Mongolia and discussing retroactive application of Vienna Convention on Consular Relations and related rules). That is precisely what would result from overturning the Third Circuit's decision here.

CONCLUSION

For the foregoing reasons, JCI respectfully requests that the Court affirm the decision of the court below.

Respectfully submitted,

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