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 AMICUS CURIAE NATIONAL ASSOCIATION OF RETIRED AND VETERAN RAILWAY EMPLOYEES IN SUPPORT OF PETITIONERS

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INTEREST OF THE AMICUS CURIAE[1]

The National Association of Retired and Veteran Railway Employees ("NARVRE") is an organization of over 20,000 former railroad workers. Its members were exposed to asbestos products while employed as railroad workers. Many have contracted asbestos disease, and others are at risk of developing asbestos disease. Their right to compensation from the manufactures of asbestos products will be affected by the outcome of this appeal.

INTRODUCTION

NARVRE agrees with Petitioners that the Third Circuit was in error when it found that the Locomotive Inspection Act preempted a field that was broader than the field that the act regulated. NARVRE argues further that the Third Circuit was in error when it found that a state could not adopt a law or order regarding railroad safety, notwithstanding Congress's express authorization to states to "adopt or continue in force a law, regulation, or order related to railroad safety" until the specific subject matter of the state law is covered by federal regulation. 49 U.S.C. § 20106(a)(2). Because federal regulation does not cover asbestos hazards on locomotives or the warnings

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[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 this brief. Letters reflecting their consent are on file with the Clerk.

necessitated by such hazards, Petitioners' claims are authorized by Congress.

STATEMENT

NARVRE adopts the statement of the case made by the Petitioners, Gloria Kurns and Freida Jung Corson. NARVRE supplements their statement as follows.

In 1911, Congress enacted the Boiler Inspection Act ("BIA"), which made it unlawful for common carriers "to use any locomotive in moving interstate or foreign traffic unless the boiler" or its appurtenances were "in proper condition and safe to operate" in "active service". ch. 103, 36 Stat. 913. In 1915, Congress amended the statute to apply to the entire locomotive and tender; and it became known as the Locomotive Inspection Act ("LIA"). ch. 169, 38 Stat. 1192. The LIA was codified at 45 U.S.C. §§ 22-34. Section 5 of the LIA, codified at 45 U.S.C. § 28, gave the Interstate Commerce Commission ("Commission"), which at the time had the authority now possessed by the Secretary of Transportation ("Secretary"), authority to issue or approve rules regarding locomotives used by common carriers.

When the LIA was passed, the railroad carriers had in place rules and instructions for the inspection of their locomotive boilers and appurtenances. *United States v. Baltimore & O. R.R. Co.*, 293 U.S. 454, 460 (1935). Under Section 5 of the LIA, those rules and instructions came under authority of the Commission and became the starting point for the Commission's rule making. *Id.*, at 461. A railroad carrier's rules became "obligatory upon such carrier" once the Commission approved its rules. BIA, § 5, 36 Stat. 914-915. If the carrier failed to file rules and instructions, Section 5 gave the federal inspector

authority to prepare rules and instructions for the carrier; and they became obligatory upon the carrier once approved by the Commission. *Ibid.*[2] This Court has found that these provisions authorized the Commission to act on its own initiative to require modification of the carriers' rules and instructions. *U. S. v. Baltimore & O. R.R. Co.*, 293 U.S. at 461.

In 1970, Congress enacted the Federal Railroad Safety Act ("FRSA"). Pub. L. No. 91-458, 84 Stat. 971.[3] The

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[2] Section 5 of the BIA provided:

Sec. 5. That each carrier subject to this Act shall file its rules and instructions for the chief inspector within three months after the approval of this Act, and after hearing and approval by the Interstate Commerce Commission, such rules and instructions, with such modifications as the commission requires, shall become obligatory upon such carrier: Provided, however, That if any carrier subject to this Act shall fail to file its rules and instructions the chief inspector shall prepare rules and instructions not inconsistent herewith for the inspection of locomotive boilers, to be observed by such carrier; which rules and instructions, being approved by the Interstate Commerce Commission, and a copy thereof being served upon the president, general manager, or general superintendent of such carrier, shall be obligatory, and a violation thereof punished as hereinafter provided: Provided also, That such common carrier may from time to time change the rules and regulations herein provided for, but such change shall not take effect and the new rules and regulations be in force until the same shall have been filed with and approved by the Interstate Commerce Commission. The chief inspector inspection shall also make all needful rules, regulations, and instructions not inconsistent herewith for the conduct of his office and for government of the district inspectors: Provided, however, That all such rules and instructions shall be approved by the Interstate Commerce Commission before they take effect.

[3] The FRSA was originally codified at 45 U.S.C. § 421 *et seq*. In 1994, its provisions were recodified in Title 49, without substantive change. See Act of July 5, 1994, Pub.L. No. 103-

FRSA empowers the Secretary to "prescribe regulations and issue orders for every area of railroad safety supplementing laws and regulations in effect" at the time that the FRSA was enacted. 49 U.S.C. § 20103(a). The same chapter of the FRSA provides an express preemption provision, which authorizes states to regulate railroad safety until the Secretary has taken action to cover the same subject matter. 49 U.S.C. § 20106(a)(2). That express preemption provision provides:

> *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.

49 U.S.C. § 20106(a)(2) (emphasis added).[4] The Secretary

272, 108 Stat. 745. This brief cites the statutory provisions as recodified in Title 49, except to refer to citations to the FRSA made in court opinions.

[4] Prior to 1994, the provision provided in relevant part, "[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." 45 U.S.C. § 434 (1981).

has not promulgated a rule or taken other action covering the subject matter of asbestos content in products used on locomotives.

In 1994, Congress recodified laws regarding transportation as Subtitles II, III and V-X of Title 49 of the United States Code ("Code"). Pub.L. 103-272, 108 Stat. 745. The purpose was to restate the laws in comprehensive form, without substantive change, and eliminate obsolete laws. S. Rep. No. 103-265, page 1. Portions of the LIA were recodified at Chapter 207 of Title 49, where they encompass three provisions, 49 U.S.C. §§ 20701-20703.[5] In particular, Section 5 of the LIA, 45 U.S.C. § 28, was not recodified; and the remaining provisions from the LIA do not authorize the Secretary to promulgate rules regarding locomotives, railroad safety, or any other matter.

In 2007, Congress added 49 U.S.C. § 20106(b) and (c) in response to *Lundeen v. Canadian Pac. Ry. Co.,* 447 F.3d 606 (8th Cir. 2006) (*Lundeen I*). The effect of the amendment was to confirm that a state cause of action is not preempted where the defendant violates a federal regulation on the same subject matter as state law. *Lundeen v. Canadian Pac. Ry. Co.*, 532 F.3d 682, 690 (8th

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[5] Three sections of the LIA were repealed without replacement in 1994, specifically 45 U.S.C. § 22, setting forth definitions of terms in the LIA, § 31 providing for an annual report by the director of locomotive inspection, and § 34, providing for penalties. Even before those LIA provisions were rendered redundant with the enactment of the FRSA, much of the LIA had been redacted. 45 U.S.C. §§ 24-27 were omitted pursuant to the Reorganization Plan Number 3 of 1965. The Plan abolished the offices of locomotive inspection, which were established pursuant to the LIA, and transferred the responsibilities to the Interstate Commerce Commission. 30 Fed. Reg. 9351, 79 Stat. 1320 (1965).

Cir. 2008) (*Lundeen II*).[6] However, because the Secretary has never issued regulations covering the subject matter of asbestos on locomotives, § 20106(b) does not govern preemption in this suit.

[6] *Lundeen I* and *II* concerned a train derailment in Minot, North Dakota, alleged to have been caused by failure of the track. The issue was federal preemption of the state law claims based in part on negligent inspection of railroad track. In *Lundeen I*, the court found that there were federal regulations covering the subject matter of track inspections and thus preemption of the state law claims under 49 U.S.C. § 20106(a)(2). *Id.*, at 614, 615. After the 2007 amendment, the court which had decided *Lundeen I* found that the effect of the 2004 amendment was to clarify that a state cause of action is not preempted where the defendant violates both state law and a federal regulation on the same subject matter. *Lundeen II*, 532 F.3d at 690. The court explained that "§ 20106 had been interpreted in such a way that an injured person was denied the mere chance to hold a railroad accountable when its negligence not only violated state common law standards, but the very federal laws and regulations approved by Congress in an effort to further railroad safety. It was rational for Congress to 'clarify' this result was not an intended purpose of § 20106 prior to the amendment." *Ibid.*

SUMMARY OF ARGUMENT

The issue in this appeal arises out of the construction of two statutes, the Federal Railroad Safety Act ("FRSA") and Locomotive Inspection Act ("LIA"). This Court has interpreted each statute with regard to preemption and attributed a different preemption standard to each. *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993); *Napier v. Atlantic Coast Line R.R. Co.*, 272 U.S. 605, 613 (1926). In *Napier*, the Court based its finding of preemption on its construction of Section 5 of the LIA, and Congress has since repealed that section. As such, only the construction of the FRSA remains relevant; and the FRSA expressly authorizes the Petitioners' state law claims.

In *Napier*, the Court found that the LIA preempted state statutes that required particular safety equipment to be installed on locomotives in use on a railroad line. *Id.*, 272 U.S. at 613. The *Napier* decision was grounded on the construction of the LIA and particularly Section 5 of the Act, which gave the Commission the authority to set standards for the safety of locomotives in use. *U. S. v. Baltimore & O. R.R. Co.*, 293 U.S. at 460-461; *see also Napier*, 272 U.S. at 607. However, since the LIA's adoption in 1911, its provisions have been repealed; and only a few provisions were recodified. There is no direct replacement for Section 5 of the LIA. Prior to the repeal of Section 5 of the LIA, the FRSA gave the Secretary rule making authority with regard to all subjects of railroad safety; and Section 5 of the LIA had been rendered moot. Because Section 5 of the LIA has been repealed, the Court's interpretation of that section in *Napier* is not controlling in this case.

Congress declared that the FRSA's purpose was "to promote safety in every area of railroad operations" and

thus extended the Secretary's rule making authority to encompass "every area of railroad safety". 49 U.S.C. §§ 20101 and 20103(a). At the same time that Congress broadened the Secretary's authority, Congress included a preemption provision which expressly authorizes the states to regulate railroad safety matters unless the Secretary takes action with regard to the same subject matter. 49 U.S.C. § 20106(a)(2). According to its terms, the FRSA express preemption provision applies "with respect to railroad safety matters". 49 U.S.C. § 20106(a)(2). The express preemption standard applies to every railroad safety matter, and this Court rejected the argument that § 20106(a)(2) applies only with regard to possible preemption by the FRSA itself. *Easterwood*, 507 U.S. at 663, fn. 4. The FRSA's express preemption provision is the standard for whether federal law preempts the Petitioners' state-law claim.

The FRSA preemption provision expressly authorizes states to enforce their laws with regard to railroad safety until specifically preempted by federal regulatory action. The preemption clause is preceded by a savings clause, providing that a "State may adopt or continue in force a law, regulation, or order related to railroad safety". 49 U.S.C. § 20106(a)(2). Such state law remains in effect until the Secretary "prescribes a regulation or issues an order covering the subject matter of the State requirement." *Ibid.* Thus, state law is not preempted by congressional act (such as the LIA), but only by specific regulatory action. The Secretary has not issued orders or regulations covering the subject matter of asbestos, insulation content, or related warnings; and Petitioners' state law claims are preserved by the FRSA.

ARGUMENT

I. THE LOCOMOTIVE INSPECTION ACT WAS REPEALED, AND THE FEW RECODIFIED PROVISIONS CANNOT PROVIDE THE BASIS FOR PREEMPTION

This Court has explained that the basis of the decision in *Napier* was the "conclusion that the Commission possesses the authority to make rules on its own initiative, or upon complaint". *U.S. v. Baltimore & O. R.R. Co.*, 293 U.S. at 461. This determination was one of statutory construction of the LIA; and, as such, "the provisions of the act were necessarily examined." *Ibid.*; *see also Napier*, 272 U.S. at 607. Because it is "axiomatic, of course, that statutory construction must begin with the language of the statute itself", consideration of this appeal should begin with the language of the LIA. *Dawson Chem. Co. v. Rohm & Haas Co.*, 448 U.S. 176, 187 (1980). Since 1926 when *Napier* was decided, the LIA has been repealed and replaced with different language in a different title of the U.S. Code. The alteration of what was the LIA is therefore the starting point of this analysis.[7]

In *U.S. v. Baltimore & O. R.R. Co., supra*, the Court found that the LIA conferred quasi legislative functions under Section 5 (codified at 45 U.S.C. § 28) and quasi judicial functions under Section 6 of the act (codified at 45 U.S.C. § 29). *Id.*, 293 U.S. at 460. The Court's

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[7] NARVRE agrees with Petitioners that *Napier* applied only to the use of a locomotive and does not support preemption of Petitioners' state law claims. (Brief of Petitioners, at 36). Further, NARVRE takes the position stated herein, that Congress has repealed the provision interpreted by *Napier*, rendering that decision moot.

construction of Section 5 provided the basis for the conclusion that the LIA gave the Commission rule making authority over requirements for locomotives. In the decision from which this appeal is taken, the Third Circuit likewise found that Section 5 was the basis for the Secretary's regulatory authority. *Kurns v. A.W. Chesterton Inc.*, 620 F.3d 392, 397, fn. 4 (3d Cir. 2010) *cert. granted*, No. 10-879 (June 6, 2011) (citing 45 U.S.C. § 28).[8] In its 1916 Annual Report, the Commission recognized that its authority to establish new locomotive inspection rules was "provided in section 5 of the locomotive boiler inspection law". *Thirtieth Annual Report of the Interstate Commerce Commission*, December 1, 1916, page 56.

The Secretary's authority to make rules on its own initiative was not set forth expressly in the LIA's Section 5, 45 U.S.C. § 28. The statute gave the director of locomotive inspection the express authority to approve rules filed by individual railroads and prepare rules for railroads that fail to do so. The director of locomotive inspection was also given authority to "make all needful rules for the conduct of his office and for the government of the district inspectors". LIA, *supra*, Section 5. The Court found that the Commission's authority to make rules on its own initiative was implied. *U.S. v. Baltimore & O. R. Co.*, 293 U.S. at 461. The Court explained that "the responsibility for rules adequate to insure safety was imposed by Congress upon the Commission; and, to discharge that duty, it was essential that the Commission also should possess the initiative in rule making. To this end, it was granted the power, not only of disapproving proposed rules, but also of requiring modifications of those in force." *Ibid.*

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[8] The Third Circuit cited 45 U.S.C. § 28 but did not address its repeal.

The rule making authority which the Court inferred from 45 U.S.C. § 28 was later made express by Congress within a broader grant of authority in the FRSA. In 1970, Congress enacted the FRSA with the declared purpose to "promote safety in every area of railroad operations". 49 U.S.C. § 20101. The FRSA granted rule making authority over every area of railroad safety to the Department of Transportation, providing that its Secretary shall "as necessary, prescribe regulations and issue orders for every area of railroad safety supplementing laws and regulations in effect" on the date of the FRSA's enactment. 49 U.S.C. § 20103(a). The grant of authority to promulgate railroad safety rules included authority to supplement provisions of the LIA that remained in effect at the time; and under § 20103(a), "the Secretary of Transportation has the authority to issue appropriate regulations relating to safety appliances and equipment on railroad engines and cars." *Eckert v. Aliquippa & Southern R. Co.,* 828 F.2d 183, 186 (3d Cir. 1987) (citing 45 U.S.C. § 431, the predecessor to 49 U.S.C. § 20103(a)).

The FRSA also subsumed the role of the LIA in extending the protections of the Federal Employers' Liability Act ("FELA"), 45 U.S.C § 51, *et seq*. Unlike the state common-law under which the Petitioners have brought this suit, the LIA does not create a cause of action. However, *per se* liability is established under the FELA where there is a violation of the LIA or Safety Appliance Act ("SAA"). Under the FRSA, *per se* liability under the FELA was extended to violation of regulations authorized by the FRSA. 45 U.S.C. § 54a; *see also Eckert, supra*, at 186.[9]

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[9] 45 U.S.C. § 54a was codified at 45 U.S.C. § 437(c) with the adoption of the FRSA in 1970. In 1994, it was recodified at 45 U.S.C. § 54a as part of Public Law 103-272, 108 Stat. 1365.

In light of these new provisions, the Secretary recommended repeal of the LIA in connection with adoption of the FRSA. S. Rep. No. 91-619, page 16. The Senate Report includes a letter written by the Secretary to the chairman of the Senate committee, focusing on the relationship between state and federal regulation.[10] The Secretary observed that the bill preserved what remained of the LIA and a portion of the SAA, and he commented "I do not see the need for preservation of these particular statutes." *Ibid.*

Notwithstanding the Secretary's recognition that the FRSA would render existing provisions of the LIA unnecessary, Section 5 of the LIA (45 U.S.C. § 28) remained in the Code following the adoption of the broader grant of authority under the FRSA. 49 U.S.C. § 20103(a). The narrower LIA provision was finally repealed in 1994 by Public Law 103-272, which was enacted to consolidate laws related to railroad safety "without substantive change" and make "other technical improvements in the Code". S. Rep. No. 103-265, page 1. Among the technical improvements, the recodification eliminated obsolete laws. *Ibid.* The authority to promulgate rules regarding locomotives, granted by 45 U.S.C. § 28, had been rendered obsolete in 1970, when Congress gave the Secretary broad authority to promulgate regulations regarding all areas of railroad safety in the FRSA. When 45 U.S.C. § 28 was repealed, only a portion was recodified at 49 U.S.C. § 20702(d),

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[10] The letter notes that action on the bill was delayed "so that (the Department of Transportation) could study the provisions of the committee print, particularly those dealing with Federal/State relations, and discuss them with representatives of the National Association of Regulatory Utility Commissioners (NARUC)." S. Rep. No. 91-619, at 13.

allowing that a "railroad carrier may change a rule or instruction of the carrier governing inspection by the carrier of locomotives and tenders" when the request is approved by the Secretary. There is nothing in the portion carried over from the original LIA provision to suggest that it might serve as the source of the Secretary's authority to make rules on his or her own initiative. In contrast, the authority granted in the FRSA, originally at 45 U.S.C. § 431(a)(1), was carried over in full by 45 U.S.C. § 20103(a); and that statute continues to grant the Secretary rule making authority for all areas of railroad safety, including the safety of locomotives.

The finding of field preemption in *Napier* was based upon the Commission's authority to set requirements for locomotives in use. *Napier*, 272 U.S. at 613. The state statutes at issue in *Napier* required that particular equipment be included on locomotives used in the state, and the Court held that the state requirements were precluded so that the "standard set by the Commission" under the authority granted by the LIA would prevail. *Ibid.* The LIA no longer provides that authority. Rather, the standards are now set by the Secretary pursuant to rule making authority granted by the FRSA. Section 5 of the LIA has been repealed by Congress and its role is subsumed within the authority granted by the FRSA, which was matched with an express preemption provision within the same act.

Congress's treatment of the LIA does not support continued adherence to a preemption standard that was implied by a provision that has since been repealed, particularly in light of Congress's express standard in the FRSA. What remain from the provisions of the LIA are three provisions in Title 49. 49 U.S.C. §§ 20701-20703. None of the three provisions authorizes the Secretary to make rules regarding locomotives or railroad safety. The

foundation for *Napier* has been completely eroded; and now the test for preemption with respect to railroad safety is provided by the FRSA, as discussed below.

II. LEGISLATIVE HISTORY OF THE FRSA, FOUND IN THE SENATE REPORT AND HOUSE REPORT, REVEALS CONGRESS'S INTENT TO REPLACE FIELD PREEMPTION ATTRIBUTED TO THE LIA IN THE PAST AND PRESERVE STATE LAW

The FRSA was enacted following a long period of weak regulation of the railroad industry, as documented in the legislative history of the FRSA reported at Senate Report 91-619 and House Report 91-1194. S. Rep. No. 91-619 (1969); H. Rep. No. 91-1194 (1970), *as reprinted in* 1970 U.S.C.C.A.N. 4104. The Committee on Commerce, which prepared the Senate Report, "recognized that the railroad industry is the only mode of transportation in the United States which presently is not subject to comprehensive Federal safety regulations." S. Rep. No. 91-619, page 1. Federal law did not keep up with changes in the industry and its equipment. The Committee reported that the rail safety statutes each applied to "some very specific safety hazard." *Id.*, at 4. The Committee added that the "majority of these statutes are from 50 to 75 years old and were written when technology was quite different" from what it had become at the time of the report. *Ibid.*

Both the Senate Report and House Report include in their appendices the *Report of the Task Force on Railroad Safety*, submitted to the Secretary of Transportation on June 30, 1969. S. Rep. No. 91-619, App. A, at 29; H. Rep. No. 91-1194, App. F, 1970 U.S.C.C.A.N. at 4125. The Joint Task Force included the Chairman of the Federal

Railroad Administration ("FRA") and representatives from the American Association of Railroads, individual railroads, labor, and state regulators. S. Rep. No. 91-619, page 34. The Joint Task Force described railroad safety as "a problem, national in scope, *of concern* to Federal and *State* Governments". *Id.*, at 32 (emphasis added). The Joint Task Force recommended that railroad safety be administered through a "federal-state partnership" and that "[e]xisting state rail safety statutes and regulations remain in force until and unless preempted by federal regulation." *Id.*, at 33.

The House Committee on Interstate and Foreign Commerce acknowledged that the LIA and other existing railroad statutes "served well" and would be "continued without change", but the committee reported in the same paragraph that the LIA and other same statutes would be supplemented by state law:

> These particular laws have served well. In fact the committee chose to continue them without change. It is recognized, however, that they meet only certain and special types of railroad safety hazards. ... Consequently, there is a strong consensus which makes it appear clearly that the time is now here for broadscale federal legislation with provisions for state participation to assure a much higher degree of railroad safety in the years ahead.

H. Rep. No. 91-1194, 1970 U.S.C.C.A.N. at 4105. The language "the time is now" and "in the years ahead" indicate that the law would be changed, even without a change in the language of the LIA. *Ibid.* The House committee determined that a change authorizing state regulation would "assure a much higher degree of railroad safety in the years ahead." *Ibid.*

The House committee gave greater deference to state

law by replacing preemption where there is federal "authority" to preemption where there is federal "action":

> At the present time where the federal government has authority, with respect to rail safety, it preempts the field. With respect to the reported bill, the task force recommended that existing state requirements remain in effect until preempted by federal action.

Id. at 4108. Each of the two sentences in the passage above refers to a different time frame. The first sentence containing the phrase "[a]t the present time" refers to the period of time before passage of the bill and describes the condition of the law before the bill was passed; whereas, the phrase in the second sentence, "[w]ith respect to the reported bill", refers to the law as intended with passage of the bill. Thus, reference in the first sentence to "preempts the field" merely reflects the understanding of the law before passage of the bill; and the second sentence describes a new standard to replace the field preemption standard. The second sentence reflects a change from preemption by "authority," which had been attributed the LIA and SAA in the past, to preemption by actual "federal action," which refers to regulation or order of the Secretary through the FRA.

In their summary, the House committee connected preservation of state law with the purpose of the FRSA, which was "to promote safety in all areas of railroad operations, to reduce railroad related accidents, and to reduce deaths and injuries to persons and damage to property caused by accidents involving any carrier of hazardous materials." *Id.*, at 4112. For this purpose, the House committee included a section that "authorizes states to regulate in any area of railroad safety until the Secretary acts with respect to the particular subject matter." *Ibid.*

The preemption statute which was adopted reflects this distinction between preemption by federal legislation and preemption by regulatory action. It provides that the state has the authority to regulate railroad safety until the Secretary "prescribes a regulation or issues an order covering the subject matter of the State requirement." 49 U.S.C. § 20106(a)(2). The Secretary has the authority to regulate in every area of railroad safety (49 U.S.C. § 20103(a)), but that authority does not preempt state law until exercised as to a particular subject matter.

III. THE FRSA EXPRESSLY AUTHORIZES PETITIONERS' COMMON LAW CLAIMS FOR INJURY

A. The FRSA Preemption Provision Establishes A Presumption Of State Authority With Regard To Railroad Safety, And Exceptions To State Authority Are Not Satisfied So As To Preempt Petitioners' Claims

The Petitioners' state law claims are expressly authorized by the FRSA preemption provision, which provides that a "State may adopt or continue in force a law, regulation or order related to railroad safety". 49 U.S.C. § 20106(a)(2). State law remains in force until such time that the Secretary "prescribes a regulation or issues an order covering the subject matter of the State requirement." *Ibid.* The statute is unlike most preemption provisions in that it does not state that a limited field of state law is preempted, implying by the principle of *expressio unius est exclusio alterius* that matters beyond its reach are not preempted. It does more.

The terms of the statute directly authorize state law in the field of railroad safety, unless there is regulation by the Secretary covering the same subject matter. It might therefore be described more accurately as a savings clause.

The effect of § 20106(a)(2) is that a grant of federal authority alone does not preempt state law regarding railroad safety. Rather, the authority of the state is presumed; and preemption requires specific federal rules, regulations, or orders. Further, by limiting preemption to those federal actions that "cover[]" the subject matter of state law, Congress confined preemption to those subjects where the federal regulations "substantially subsume the subject matter of the relevant state law." *Easterwood*, 507 U.S. at 664. It is not enough to show that the federal regulations "touch upon or relate to" the same matters as state law. *Ibid.* The federal rule must substantially occupy the place of state law.

Petitioners' claims for injury from asbestos dust fall within the scope of state law "related to railroad safety." 49 U.S.C. § 20106(a)(2). In *Urie v. Thompson*, 337 U.S. 163 (1949), the Court established that railroad safety laws include within their protection the health of a railroad worker and risks from exposure to airborne dust on locomotives in use. *Id.*, at 193. By its express language, the FRSA preemption provision governs the question of whether federal law preempts state law claims arising out of exposure to health risks, such as airborne asbestos.

It is anticipated that Respondents will take the position that a state may not adopt or continue in force a law related to rail safety on locomotives. That position would violate the express will of Congress, that a "state may adopt or continue in force a law, regulation or order related to railroad safety", unless Respondents can satisfy

the requirements of the exemption by demonstrating that the Secretary, through regulatory action, has "cover[ed] the subject matter" the Petitioners' claims. 49 U.S.C. § 20106(a)(2).[11]

State law claims for personal injury compensation are not a subject matter covered by the Secretary's regulations. The Secretary has issued no regulation covering compensation for injury from a product at a railroad. In *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984), the Court recognized that an award in a personal injury suit brought under state common law was not within the preempted field, even though the federal government had occupied the entire field of nuclear safety concerns. *Id.,* at 249. There is nothing in the language or legislative history of the FRSA to suggest that Congress intended to preempt claims for personal injury brought pursuant to common law. Moreover, the Secretary's regulations do not cover the field of asbestos on locomotives, composition of insulation on locomotives, composition of railroad brake shoes, or the warnings that are reasonably required by the asbestos hazards on locomotives.

This Court has held that, with regard to either express or implied preemption, "the absence of a federal standard cannot implicitly extinguish state common law." *Freightliner Corp. v. Myrick*, 514 U.S. 280, 282 and 289 (1995). Regardless of the reason for the absence of federal

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[11] As demonstrated by Petitioners, Respondents will have the additional burden of demonstrating that states may not enforce their laws with regard to equipment being repaired in shops, where the LIA never actually regulated the equipment. (Brief for Petitioners, at 20). In addition, Congress expressly authorized the states to enforce their laws related to railroad safety when the FRSA became law in 1970.

regulation of asbestos on locomotives and related warnings, the Petitioners' state common law claims are authorized by Congress in the absence of such regulation.

The Petitioners' common law claims for failure to warn, defective design, and implied warranties are not preempted unless the Secretary has prescribed regulations or issued orders covering the same subject matters. The Secretary has not, and there is no preemption of the Petitioners' claims.

B. The Preamble To The Preemption Provision And The Provision's Requirements For State Laws That Are More Stringent Than Federal Standards Do Not Affect Petitioners' State Law Claims

The savings clause at 49 U.S.C. § 20106(a)(2) is preceded by a preamble, which provides that "[l]aws, regulations, and orders related to railroad safety…shall be nationally uniform to the extent practicable." 49 U.S.C. § 20106(a)(1). The preamble recognizes variation among states by limiting uniformity to the extent it is "practicable." There is no provision for establishing uniformity other than the express preemption provision at § 20106(a)(2). The statute serves the expressed interest in uniformity by providing for preemption within those subject matters covered by federal action, and the Secretary is free to preempt state law as to any subject matter by simply regulating that subject matter to the extent authorized by § 20103. Moreover, the Petitioners' claim presents no threat to national uniformity. There has been no suggestion on the record that any state's law would require the use of asbestos on a locomotive or prohibit a reasonable warning about the danger of

exposure to airborne asbestos. In *Altria Group, Inc. v. Good*, 555 U.S. 70 (2008), the Court undercut the fiction that states may not enforce similar common law standards because doing so would frustrate the purpose of providing an industry with a uniform national standard. *Id.*, at 79, 80.

In addition to preserving state law where federal action does not cover the same subject matter, the savings clause preserves state law under limited circumstances where state law and federal action do cover the same subject matter, set forth at § 20106(a)(2)(A)-(C). The additional requirements at § 20106(a)(2)(A)-(C) are relevant only where there is federal regulation covering the same subject matter as the state law and the state law is more burdensome. Because there is no federal regulation by the Secretary covering the subject matter of Petitioners' claims, the additional requirements at § 20106(a)(2)(A)-(C) are not relevant. A plaintiff bringing a claim arising out of exposure to asbestos on a locomotive need not satisfy the requirements at § 20106(a)(2)(A)-(C).

IV. THE FRSA PREEMPTION PROVISION IS APPLICABLE TO PETITIONERS' CLAIMS, AS CONFIRMED BY ITS LOCATION IN THE FEDERAL CODE AND THIS COURT'S INTERPRETATION OF THE PROVISION

A. Given Their Relative Locations Within The Federal Code, The FRSA Preemption Provision Governs Preemption For The LIA Provisions

The preemption provision was adopted in 1970 at 45 U.S.C. § 434. The section was recodified at 49 U.S.C. §

20106 on July 5, 1994, when all statutes governing Rail Programs were consolidated in Subtitle V of Title 49. Pub.L. 103-272, 108 Stat. 745. This reorganization of the Federal Code affected provisions originally adopted as the FRSA and LIA, and the new organization confirms that the express preemption provision is to be read in *pari materia* with the remaining provisions of the LIA. The preemption provision is now part of an organized and consolidated set of provisions that govern rail safety (PART A of Subtitle V of Title 49), which also includes the current version of the remaining LIA provisions.

Railroad legislation is organized comprehensively within Subtitle V of Title 49, titled "Rail Programs". 49 U.S.C. §§ 20101 – 28505. PART A of Subtitle V is titled "Safety", and its chapters are as follows:

Ch. 201—GENERAL (§§ 20101-20167)
Ch. 203—SAFETY APPLIANCES (§§ 20301-20306)
Ch. 205—SIGNAL SYSTEMS (§§ 20501-20505)
Ch. 207—LOCOMOTIVES (§§ 20701-20703)
Ch. 209—ACCIDENTS AND INCIDENTS (§§ 20901-20903)
Ch. 211—HOURS OF SERVICE (§§ 21101-21109)
Ch. 213—PENALTIES (§§ 21301-21311)

The three provisions which recodify the surviving provisions of the LIA are found within PART A, Chapter 207, titled "LOCOMOTIVES". Chapter 207 is part of the framework of PART A, which is generally governed by the provisions set forth in Chapter 201, titled "GENERAL". For example, Chapter 201 sets forth definitions for the whole of PART A (49 U.S.C. § 20102), the scope of the regulatory authority of the Secretary over rail safety (49 U.S.C. § 20103), the Secretary's authority to carry out rail-safety inspections and investigations (49 U.S.C. § 20107), and the states' authority to conduct rail-safety inspections and investigations (49 U.S.C. § 20105). Likewise, Chapter

201 includes the FRSA express preemption provisions, which is to be applied throughout PART A (49 U.S.C. § 20106(a)(2)).

In § 20105, which is codified within Chapter 201 along with § 20106, Congress gives the states the opportunity to participate in the enforcement of regulations concerning rail safety, specifically including "rolling stock". 49 U.S.C. § 20105(a). The definition of "rolling stock" includes locomotives. 49 C.F.R. § 224.5. If certified, the states' enforcement authority under the FRSA thus extends to locomotives, which are the subject of the LIA and its successor, Chapter 207. 49 U.S.C. § 20105(d). This section demonstrates that the authority over railroad safety granted in Chapter 201 extends to regulation of "railroad equipment" and "rolling stock" in Chapter 207.

It is recognized that the Secretary's rule making authority granted in Chapter 201 includes regulation of locomotives. *Eckert*, 828 F.2d at 186. As such, authorization of state law found within Chapter 201, at § 20106, likewise extends to regulation of locomotives in Chapter 207, which is the successor to the LIA. In 1970, Congress granted the Secretary one standard for rule making authority for all issues of railroad safety, now at § 20103, and simultaneously provided one standard for preemption in § 20106 applicable to all railroad safety issues. The 1994 repeal of Section 5 of the LIA and organization of the code clarified that point.

B. This Court Has Already Given The FRSA Preemption Provision Broad Application To All Matters Of Railroad Safety In *CSX Transp., Inc. v. Easterwood* And Found That The Provision Grants Deference To State Law

Even before the reorganization of railroad safety statutes on July 5, 1994, this Court found that the preemption provision (then 45 U.S.C. § 434, now 49 U.S.C. § 20106(a)(2)) applies beyond the scope of the FRSA. *Easterwood*, 507 U.S. at 663.[12] *Easterwood* was a grade crossing case. The plaintiff's decedent was killed when his truck collided with a CSX train at a crossing. The plaintiff alleged that CSX was negligent in operating the train at an excessive speed and failing to maintain adequate warning devices at the crossing. The defendant CSX argued that each of the plaintiff's negligence claims was preempted by railroad safety regulations promulgated by the Secretary of Transportation, through the FRA and the Federal Highway Administration ("FHWA"). The Court applied the preemption provision from the FRSA, both with respect to the FRA and FHWA regulations, and found preemption for the excessive speed theory but not for the claim based upon inadequate warning devices. *Id.*, 507 U.S. at 667, 675.

At footnote 4, the Court addressed the erroneous

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[12] The Court applied its holding in *Easterwood* to another rail crossing case after the 1994 recodification. *Norfolk S. Ry. Co. v. Shanklin,* 529 U.S. 344 (2000). The Court's method of analysis was the same; and again the Court applied § 20106(a)(2) to evaluate preemption of state common law by a regulation authorized by to a statute other than the FRSA, specifically the Federal Railway-Highway Crossings Program. *Id.*, at 352.

finding of the Court of Appeals, that the preemption provision (then § 434) did not govern preemptive effect of regulations unless promulgated pursuant to the FRSA. *Easterwood*, 507 U.S. at 663. The Court stated that the "plain terms of § 434 do not limit the application of its express preemption clause to regulations adopted pursuant to the FRSA. Instead, they state that any regulation 'adopted' by the Secretary may have preemptive effect, regardless of the enabling legislation." *Id.*, fn 4. The preemption provision applies by its own terms, not in accordance with the bounds of enabling legislation.

The Court found that the railroad's common law duties under state law are within the field of law addressed by the FRSA preemption provision:

> According to § 434, applicable federal regulations may preempt any state "law, rule, regulation, order, or standard relating to railroad safety." Legal duties imposed on railroads by the common law fall within the scope of these broad phrases. … Thus, the issue before the Court is whether the Secretary of Transportation has issued regulations covering the same subject matter as Georgia negligence law pertaining to the maintenance of, and the operation of trains at, grade crossings.

Easterwood, 507 U.S. at 664; *citing Cipollone v. Liggett Group, Inc.,* 505 U.S. 504, 522 (1992). In the passage above, the Court explained that common law negligence claims may be preempted by federal action under the FRSA; however, the scope of state law that may be preempted is coterminous with the scope of state law that is preserved by the FRSA until preempted by federal action. The Court observed that the state common law negligence claim is a state "law, rule, regulation order or

standard relating to railroad safety", as that language is used in the FRSA preemption provision. *Ibid.* Within § 20106(a)(2), that expression follows the language authorizing state law, providing that "[a] State may adopt or continue in force any" such law. In other words, a state common law negligence claim is authorized by the FRSA provision; and the scope of the savings clause includes the Petitioners' claims.

Easterwood provides the appropriate interpretation of § 20106(a)(2), rather than the earlier opinion of the Ninth Circuit in *Marshall v. Burlington N., Inc.*, 720 F.2d 1149 (9th Cir. 1983). In *Marshall*, the court found that § 20106(a)(2) applies only to "new areas of federal railroad regulatory jurisdiction"; but this Court subsequently rejected that approach in *Easterwood*, finding that "the plain terms of (§ 20106(a)(2)) do not limit the application of its express preemption clause to regulations adopted by the Secretary pursuant to FRSA." *Marshall*, at 1153; *Easterwood*, at 663.[13] Cases which followed *Marshall* rather than *Easterwood* were thus decided in error.[14]

Marshall is factually distinguishable from this matter because the state-law claim in *Marshall* was based upon a

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[13] The reasons for applying § 20106(a)(2) have become clearer since *Marshall* was decided. As noted above, the 1994 act that finally removed Section 5 of the LIA from the code, along with other provisions deemed by Congress to be obsolete, confirmed that § 20103 and § 20106 apply to all areas of railroad safety.

[14] See e.g., *Law v. Gen. Motors Corp.*, 114 F.3d 908, 910 (9th Cir. 1997)(wherein the court cited *Easterwood* on other grounds but ignored this Court's holding that § 20106 applies beyond the FRSA); *Springston v. Consol. Rail Corp.*, 130 F.3d 241, 245 (6th Cir. 1997)(wherein the court declined to follow the FRSA without discussing *Easterwood*); *Oglesby v. Delaware & Hudson Ry. Co.*, 180 F.3d 458, 462 (2d Cir. 1999) (same).

standard that was covered by the Secretary's regulations. The suit arose out of a fatal collision between the decedent's truck and a locomotive that "was equipped with a bell, a whistle, two front white headlights, one right above the other, and a revolving amber light behind and above the headlights." *Id.*, at 1151. The plaintiff's state law claim was "premised largely on the alleged inadequacy of these devices as warning equipment." *Ibid.* At the time of the collision, the Secretary had in place regulations covering the subject matter of whistles and headlights, requiring that the locomotives have a "suitable whistle" and a headlight meeting specific performance requirements. 49 C.F.R. §§ 230.231(a), 230.234 (1978). The *Marshall* court found that the "Burlington freight train met these requirements." *Ibid.* The preemption provision at § 20106(a)(2) would have authorized the plaintiff's suit in *Marshall* only "until the Secretary … prescribe[d] a regulation or issue[d] an order covering the subject matter of the State requirement." 49 U.S.C. § 20106(a)(2).

Consol. Rail Corp. v. Pennsylvania Pub. Util. Comm'n, 536 F. Supp. 653 (E.D. Pa. 1982), *aff'd mem.*, 696 F.2d 981 (3d Cir. 1982), *aff'd mem. sub nom.*, 461 U.S. 912 (1983), is also not to the contrary. The district court there found that the LIA preempted a state statute requiring particular equipment to be installed on locomotives used in the state. This Court and the court of appeals summarily affirmed the decision of the district court. *Pennsylvania Pub. Util. Comm'n v. Consol. Rail Corp.*, 461 U.S. 912 (1983). But there were multiple bases for affirming the district court in *Consolidated Rail*. The district court found that the Secretary of Transportation had promulgated a regulation covering the same subject matter as the state

statute. The court accordingly held that the FRSA independently preempted the state requirement, regardless of the preemptive effect of the LIA. *Consol. Rail Corp.*, 536 F. Supp. at 658. A summary affirmance is not precedent where two different possible explanations for affirmance exist. *City of Akron v. Akron Center for Reproductive Rights*, 462 U.S. 416 (1983); *overruled on other grounds in Gonzalez v. Carhart*, 550 U.S. 124 (2007).

Consolidated Rail is thus different from this case, both because it involved state *legislation*, rather than common law claims, and because, here, the Secretary has issued no regulation covering the subject matter of Petitioners' claims. Here, § 20106(a)(2) authorizes the common law relied upon by Respondents because federal regulations do not occupy the same subject matter; and there could be no implied preemption under the LIA without violating the express authorization of Congress.

In *Easterwood*, the Court described § 20106(a)(2) as "a provision that displays considerable solicitude for state law in that its express preemption clause is both prefaced and succeeded by express saving clauses." *Easterwood*, 507 U.S. at 665 (citation omitted). The Court found that Congress's use of the word "covering" within the first savings clause in § 20106(a)(2) has the effect of narrowing the scope of preemption. *Easterwood*, 507 U.S. at 664. The party claiming that railroad regulations preempt state law for a subject matter "must establish more than that they 'touch upon' or 'relate to' that subject matter, for 'covering' is a more restrictive term which indicates that preemption will lie only if the federal regulations substantially subsume the subject matter of the relevant state law." *Ibid.* (internal citation omitted).

The Secretary has not promulgated a rule or taken

action covering the subject matter of Petitioners' claim for compensation. Nor has the Secretary promulgated a rule or taken action covering the subject matter of the use of asbestos on locomotives, composition of insulation on locomotives, composition of railroad brake shoes, or the warnings that are reasonably required by the asbestos hazard. The word "asbestos" does not even appear in the FRA regulations, 49 C.F.R. §§ 200 through 268. Consistent with the Court's findings in *Easterwood*, Petitioners' claim under state common law is authorized by Congress in the FRSA.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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