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

REPLY BRIEF FOR PETITIONERS

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October 28, 2011

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All agree that field preemption cannot extend beyond the scope of the regulated field. *See* Pet. Br. 20; Resp. Br. 30; U.S. Br. 13. Petitioners' claims are not within the field regulated by the Locomotive Inspection Act ("LIA"), and therefore are not preempted, for two separate reasons. First, the Act imposes requirements for locomotives in "use" on a "railroad line," 49 U.S.C. § 20701, whereas petitioners' claims seek recovery for injuries incurred in repairing and maintaining locomotives not in use on a line, *see* Pet. Br. 21-28; U.S. Br. 13-22. Second, respondents were not even subject to regulation under the Act at the relevant time period; indeed, Congress considered but did not pass a bill that would have applied to manufacturers. *See* Pet. Br. 28-31.

Notably, respondents have virtually nothing to say about petitioners' failure-to-warn claims. That is not surprising, considering Congress has not authorized the Federal Railroad Administration ("FRA") or its predecessor to issue regulations under the LIA concerning warnings about hazards to mechanics who repair and maintain locomotives.

Respondents offer essentially three arguments to support their sweeping assertion of implied field preemption. First, that the holding in *Napier v. Atlantic Coast Line Railroad Co.*, 272 U.S. 605 (1926), that states may not require particular safety equipment to be installed on locomotives for use on the line extends to state-law claims brought by mechanics injured while repairing locomotives not in use. Second, that uniformity interests override safety concerns under the LIA. And, third, that because a locomotive's design is the same whether it is on the line or in the shop, a state cannot provide remedies

for injuries caused by latent defects that harm only repair workers.

Those contentions have no merit. *Napier* concerned only regulatory requirements that locomotives must meet to be "fit[] for service" on the line, 272 U.S. at 612; it did not address state tort claims for latent hazards to workers injured repairing and maintaining locomotives that are out of service. To the extent *Napier* addressed uniformity, it rejected respondents' contention that the LIA demands uniform national standards for locomotive safety.

Respondents' attempt to rely on an asserted congressional goal of regulatory uniformity to expand the field regulated by the LIA lacks support in the Act's text. It also defies common sense: every other major means of interstate transportation – including cars, trucks, boats, and airplanes – is subject to state-law design-defect claims. Indeed, because the LIA applies only to locomotives, the rest of the train is indisputably subject to state-law claims under the savings clause of the Federal Railroad Safety Act of 1970 ("FRSA"). Respondents offer no reason why the locomotive must be treated differently from the caboose.

Finally, a locomotive designed for safe use on the line may expose mechanics to unreasonable risks during maintenance and repairs. Respondents' theory immunizes manufacturers of defective products in such circumstances: injured workers cannot bring claims based on violations of the LIA because the locomotive was not "in use," and preemption bars state-law claims. Respondents fail to square that result with Congress's prime purpose of promoting worker safety.

I. IMPLIED FIELD PREEMPTION DOES NOT BAR PETITIONERS' CLAIMS

A. The LIA Regulates Only Fitness For Service

Respondents concede (at 33 n.6, 37) both that "the LIA's regulatory concern (and hence [the FRA's] authority) is directed toward *operational locomotives*" and that "the LIA does not delegate [to the FRA] authority to generally regulate the repair and maintenance of locomotives." They assert (at 23-24), however, that petitioners' claims nevertheless fall within the field regulated by the LIA because that field supposedly extends to "all aspects of" the design, construction, and material of locomotives and locomotive parts. That theory lacks merit.

1. Design-defect claims

The FRA has authority under the LIA to regulate the design, construction, and material of locomotives to ensure "fitness for service," *Napier*, 272 U.S. at 612, but not to protect the safety of workers repairing and maintaining out-of-service locomotives. Respondents' contrary view disregards the statutory text, misunderstands this Court's precedent, and relies on unsupported notions of congressional purpose.

Statutory Text. Respondents identify no statutory language in the LIA that expressly preempts state law. *Cf. Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 616-17 (1997) (Thomas, J., dissenting) ("[F]ield pre-emption is itself suspect, at least as applied in the absence of a congressional command that a particular field be pre-empted."). Their expansive theory of the Act's regulated field likewise lacks textual support. The LIA requires a railroad to ensure that a locomotive is "in proper condition and safe to operate" before it may "use"

that locomotive "on its railroad line." 49 U.S.C. § 20701(1). That is the LIA's sole substantive standard; the remainder of the Act contains procedures for enforcing that standard. *See* Pet. Br. 21-23. Uniform precedents addressing claims by rail workers alleging LIA violations confirm that the Act's regulatory scope concerns only requirements for the safe use of locomotives; the LIA cannot be violated when a locomotive is not in use. *See* Pet. Br. 23-27; U.S. Br. 15 & n.5.

Respondents argue (at 32-33, 40-41) that the provisions granting the FRA authority to *inspect* locomotives, *see* 49 U.S.C. § 20702(a)-(b), broaden the field regulated by the Act. But the LIA's inspection provisions cannot be divorced from the substantive safety standard they are intended to implement. *See id.* § 20702(a)(3) (railroad must "repair[] every defect that is disclosed by an inspection before a defective locomotive, tender, part, or appurtenance is *used*"), (b)(3) (noncompliant locomotive equipment "may be *used*" only after it has been repaired and re-inspected) (emphases added). That does not mean that the FRA's authority under the LIA "cease[s] to exist merely because the locomotive enters a roundhouse for repairs." Resp. Br. 31. Regardless of the location at which an inspection occurs, the statutory purpose of it is to determine whether the locomotive is safe for use on the line. Nothing in the Act authorizes or requires inspectors to address risks that locomotive equipment poses for mechanics in repair shops.

Nor does the Act permit the FRA to require locomotive equipment to be designed in a certain way to reduce risks to repair and maintenance workers. *Cf. United States v. Baltimore & O.R.R. Co.*, 293 U.S. 454, 463-64 (1935) (invalidating Interstate Commerce

Commission ("ICC") order under LIA for failure to make required finding that "the *use* of locomotives" lacking the safety device at issue "causes unnecessary peril to life or limb") (internal quotations omitted; emphasis added). Likewise, for example, the LIA would not authorize the FRA to require that locomotives be built using only steel produced in the United States.

The FRA, which currently has authority to administer the LIA, *see* 49 U.S.C. § 103(g)(1), confirms that "[t]he LIA regulates only *the safe use on railroad lines* of locomotives or tenders and their parts and appurtenances." U.S. Br. 13 (emphasis added). The agency's authority under the Act is not "broader" than determining "whether the locomotive, tender, and parts and appurtenances, as designed and constructed, are safe to use or operate on a railroad line." *Id.* at 17.[1] Accordingly, "tort claims based on injuries arising while locomotives are not in use" are beyond the field regulated by the Act and therefore are not subject to field preemption. *Id.* at 13, 17.

Napier. *Napier* held that state legislation requiring railroads to install particular safety devices on their locomotives before "us[ing]" them on railroad lines was preempted because it fell "within the scope of the authority delegated to" the ICC "to prescribe the rules and regulations *by which fitness for service shall be determined*." 272 U.S. at 607, 611-12 (emphasis added). *Napier*'s preemption ruling thus

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[1] Respondents' attempt to bolster their mistaken understanding of the LIA's regulatory scope through citations (at 38-39 & n.8) to the FRA's 1978 policy statement fails because that document concerned the agency's exercise of its authority under the FRSA. *See* Policy Statement, Railroad Occupational Safety and Health Standards, 43 Fed. Reg. 10,583, 10,584 (Mar. 14, 1978).

rested on the view that the state statutes at issue there interfered with the ICC's authority to determine what equipment is necessary to ensure that a locomotive is "fit[] for service" and "'in proper condition' for operation" on rail lines. *Id.* at 612. Petitioners' state-law claims have nothing to do with the fitness of locomotives for use. They accordingly differ fundamentally from the state laws held preempted in *Napier*.[2]

Lacking support in *Napier*'s holding, respondents advocate for multiple sweeping extensions of *Napier*. They argue that *Napier* should be applied to preempt not only state requirements for locomotives used on railroad lines (such as the Georgia and Wisconsin statutes) but also common-law duties to avoid unnecessary hazards to repair and maintenance workers. According to respondents, because a locomotive's basic design is "the same whether the locomotive is in use or not," any state-law claim that relates in any way to the locomotive's design is preempted. Resp. Br. 33.

At the outset, respondents' argument overlooks that some locomotives never qualify as "in use" under the LIA because they operate only in switch yards. *Cf. United States v. Northern Pac. Ry. Co.*, 254 U.S. 251, 254-55 (1920) (Safety Appliance Act ("SAA")

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[2] Because *Napier* dealt with state legislation imposing fitness requirements, not common-law duties to avoid unreasonable dangers to mechanics, manufacturers could not have relied "for more than eight decades," as respondents assert (at 29), on a supposed immunity from state-law claims like petitioners'. Indeed, the earliest case respondents cite holding that the LIA preempts state-law claims against a manufacturer (*Law v. General Motors Corp.*, 114 F.3d 908 (9th Cir. 1997)) was decided more than seven decades after *Napier*, and it involved injuries caused by locomotives in use on the line.

does not apply to locomotives used for "switching, classifying and assembling cars within railroad yards for the purpose of making up trains"). Respondents cite no evidence supporting their assertion (at 33 n.6) that Mr. Corson repaired only locomotives used on the line.

More fundamentally, respondents' argument contradicts the principle – which they concede (at 30) applies here – that field preemption does not reach beyond the regulated field. A state-law claim alleging that locomotive equipment was unreasonably dangerous for repair workers does not concern whether the equipment was "fit[] for service" or "'in proper condition' for operation." 272 U.S. at 612. Such a claim therefore lies outside the field regulated by the LIA, even if a jury verdict on that claim might motivate a manufacturer to avoid future injuries to such workers by altering the equipment's design.[3]

Respondents take out of context *Napier*'s statement that "the power delegated to the [ICC] by 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. The Court's point was that the ICC had authority to impose requirements with respect to design, construction, and material as necessary to regulate "fitness for service." *Id.* at 612. Nothing in *Napier* suggested that the ICC could promulgate a regulation requiring

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[3] *Cf. Bates v. Dow AgroSciences LLC*, 544 U.S. 431, 443 (2005) ("An occurrence that merely motivates an optional decision does not qualify as a requirement. The Court of Appeals was therefore quite wrong when it assumed that any event, such as a jury verdict, that might 'induce' a pesticide manufacturer to change its label should be viewed as a requirement.").

locomotives or locomotive parts to be designed in a particular way to reduce risks to repair workers.

The distinction between fitness requirements and common-law duties to avoid unreasonable hazards to repair and maintenance workers is not merely theoretical. For example, an air horn on a locomotive may function precisely as intended when it sounds at high volume as the locomotive travels on the line, but without a properly functioning means to prevent it from sounding unintentionally while the locomotive is undergoing repairs, the horn may be unreasonably hazardous to shop workers. Likewise, asbestos insulating a locomotive boiler or contained in a brake shoe might pose little threat to the safe use of the locomotive, even while causing fatal diseases in mechanics charged with maintaining and replacing such parts. *See* Pet. Br. 48-49. Because petitioners' claims concern only whether the locomotive equipment respondents manufactured was unreasonably dangerous when being disassembled for repairs, they do not "amount to a claim that the use of asbestos-containing products on locomotives would as a matter of law render such locomotives not 'safe *to operate* without unnecessary danger of personal injury.'" U.S. Br. 25 (quoting 49 U.S.C. § 20701(1)) (emphasis added).[4]

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[4] Respondents incorrectly assert (at 35-36) that recognizing differences between fitness requirements and state-law duties to avoid unreasonable risks to repair workers conflicts with *Napier*. Under *Napier*, a state law requiring the installation of equipment on a locomotive is preempted whether its purpose is to prevent "accidental injury" to crew members on the line or "sickness and disease" to those same workers. 272 U.S. at 612. But, here, the state-law duty differs not only in purpose, but in kind: it addresses unreasonable risks of harm faced by mechanics charged with dismantling and reassembling locomotive parts, not hazards to the safety of workers on operational locomotives.

Respondents also assert (at 44-45) that *Napier* should be extended to preempt not only state legislation but also common-law claims, even where injured persons would be left without a remedy. They cite cases in which this Court has recognized the incidental regulatory effect of state common law, but fail to address the Court's holdings that common-law claims – which have a compensatory function as well – differ from state positive law for purposes of field preemption. *See* Pet. Br. 38-39. Nor do respondents explain why Congress would have intended, in enacting legislation like the LIA and the Federal Employers' Liability Act ("FELA") to *improve* worker safety, the anomalous remedial gaps their position creates. *See id.* at 42-43.[5]

Respondents urge the Court to extend *Napier* even though its reasoning reflects an approach to preemption analysis long ago abandoned by this Court. *See* Pet. Br. 40-41; Scholars Br. 6-12. Respondents dispute that fact, relying on *Napier*'s statement that "[t]he intention of Congress to exclude states from exerting their police power must be clearly manifested." 272 U.S. at 611. But the inconsistency between *Napier*'s approach and this Court's post-

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[5] Seeking to minimize those gaps, respondents represent that claims based on injuries caused by "component[s]" of locomotives that are not deemed "'an integral or essential part of a completed locomotive'" are not preempted. Resp. Br. 49 (quoting *Southern Ry. Co. v. Lunsford*, 297 U.S. 398, 402 (1936), and citing U.S. Br. at 18, *John Crane Inc. v. Atwell*, No. 10-272 (U.S. filed May 6, 2011)). But that concession only undercuts the uniformity rationale on which they rely so heavily: if claims involving some locomotive "components" are exempt from preemption, then preemption is unnecessary to avoid potentially differing liability standards as the locomotive crosses state lines. *See also infra* pp. 10-15.

New Deal preemption jurisprudence is not so easily dismissed: whereas *Napier* found field preemption based on the mere *existence* of federal regulatory authority, subsequent cases have demanded explicit statutory language, comprehensive statutory or regulatory provisions, or a special federal interest in the regulated subject matter, none of which was present in *Napier*. *See*, *e.g.*, *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 233 (1947) (basing preemption on statutory language providing that "'the power, jurisdiction, and authority' of the Secretary [of Agriculture] conferred under the Act 'shall be exclusive with respect to all persons' licensed under the Act"); *United States v. Locke*, 529 U.S. 89, 99-100 (2000) (basing field preemption on mandatory federal regulations in areas of longstanding, exclusive national concern); Pet. Br. 19 & n.17. Respondents offer no good reason to extend *Napier* to bar state-law claims in the very different circumstances presented here.

Uniformity. Citing lower-court cases decided decades after the LIA's enactment, respondents posit (at 36) that petitioners' claims must be within the preempted field because allowing them to proceed supposedly would impair "national uniformity in locomotive safety standards." But vague notions of congressional purpose cannot be relied on to extend the LIA's regulated field to cover petitioners' claims.

Respondents cite not one word of statutory text – or even legislative history – indicating that Congress viewed uniformity as its paramount objective in enacting the LIA. They assert (at 28-29, 45) that *Napier* recognized a uniformity goal, but that case mentioned the concept of uniformity only to *reject* it. The Court explained that, if the ICC were to promulgate regulations on fire doors or cab curtains, the

rules "*need not be uniform* throughout the United States, or at all seasons, or for all classes of service." 272 U.S. at 613 (emphasis added). The Act itself, and this Court's cases construing it, further undermine respondents' position, for they recognize a congressional purpose of promoting safety, not uniformity. *See* Preamble, 36 Stat. 913 (Act passed "[t]o promote the safety of employees and travelers upon railroads"); *Urie v. Thompson*, 337 U.S. 163, 191 (1949) ("the prime purpose of the Boiler Inspection Act was the protection of railroad employees and perhaps also of passengers and the public at large"); *Lilly v. Grand Trunk W.R.R. Co.*, 317 U.S. 481, 486 (1943).[6]

Moreover, the policy rationale underlying respondents' appeals to uniformity – namely, that design-defect claims must be barred, lest manufacturers be forced "to sell locomotives and cars whose equipment could be changed as they crossed state lines, or adhere to the standard set by the most stringent state," Resp. Br. 29 (internal quotations omitted) – is manifestly unpersuasive. Every other major means of interstate transportation – including automobiles, trucks, boats, and planes – is subject to state-law

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[6] The lower-court authority on which respondents rely (at 28-29) does not fill the void in their argument. *Swift & Co. v. Wickham*, 230 F. Supp. 398 (S.D.N.Y. 1964) (three-judge court), *aff'd*, 364 F.2d 241 (2d Cir. 1966), involved whether a federal statute regulating the labeling of poultry products impliedly preempted a New York law on the same subject. In *dicta*, the court speculated that *Napier* "must have been influenced" by concerns about state prescriptive rules. *Id.* at 407-08. But it cited no statutory support for that supposition; nor did it acknowledge *Napier*'s conclusion that safety devices "need not be uniform throughout the United States." 272 U.S. at 613. *Law* is unpersuasive for the same reasons.

design-defect claims in certain circumstances, and neither respondents nor their *amici* offer any cogent reason why locomotives must be treated differently. For example, in *Williamson v. Mazda Motor of America, Inc.*, 131 S. Ct. 1131 (2011), the Court held that federal regulation of automobile design did not "pre-empt[] a state tort suit that, if successful, would . . . impos[e] tort liability upon those who choose to install a simple lap belt" for rear inner seats. *Id.* at 1134; *see Freightliner Corp. v. Myrick*, 514 U.S. 280, 289-90 (1995) (trucks). In *Sprietsma v. Mercury Marine*, 537 U.S. 51 (2002), the Court held that federal regulation did not preempt a design-defect claim against the manufacturer of a boat motor for failure to install a propeller guard. *See id.* at 55, 64-70. Lower courts likewise have held that certain design-defect claims against airplane manufacturers are not preempted by federal regulation. *See*, *e.g.*, *Martin ex rel. Heckman v. Midwest Exp. Holdings, Inc.*, 555 F.3d 806 (9th Cir. 2009). None of those cases accepted respondents' premise that design-defect liability is incompatible with movement in interstate commerce.[7] In fact, *Sprietsma* expressly rejected respondents' policy argument, holding that, absent a conflicting determination by a federal regulator, "the concern with uniformity does not justify the displacement of state common-law remedies." 537 U.S. at 70.

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[7] Those examples also reveal that respondents' field-preemption theory is functionally a disguised – and unfounded – dormant Commerce Clause argument. *See* Scholars Br. 16-17, 32; *Terminal R.R. Ass'n of St. Louis v. Brotherhood of R.R. Trainmen*, 318 U.S. 1, 7-9 (1943) (rejecting dormant Commerce Clause challenge to state regulation requiring cabooses).

Indeed, respondents' uniformity argument does not extend even to the entire train. The LIA applies only to locomotives, tenders, and their parts. Thus, for example, in *Brotherhood of Railroad Trainmen*, this Court held that the LIA did not preempt an Illinois regulation requiring cabooses to be used on trains. *See* 318 U.S. at 4. It also explained that, "[i]f lack of facilities at the state line requires as a practical matter that in order to provide cabooses in Illinois appellant must also provide them for some distance in Missouri, that fact does not preclude Illinois from regulating the operation to the limits of its territory." *Id.* at 8-9.

Today, the portions of the train other than the locomotive are indisputably governed by the FRSA. That statute provides both that railroad-safety laws "shall be nationally uniform to the extent practicable" and that state law is not preempted unless the Secretary of Transportation "prescribes a regulation or issues an order covering the subject matter of the State requirement" (and even then actions seeking damages for personal injuries may proceed based on violations of federal standards). 49 U.S.C. § 20106(a)-(b).[8] By providing in the same statutory section that laws should be nationally uniform, but that state law is not preempted unless there is a federal regulation on point, Congress necessarily determined that, where (as here) there is no applicable

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[8] *See also* FRSA § 101, 84 Stat. 971 (codified as amended at 49 U.S.C. § 20101) (FRSA's "purpose" is "to promote safety"); Rail Safety Improvement Act of 2008, Pub. L. No. 110-432, Div. A, § 101, 122 Stat. 4848, 4851 (codified at 49 U.S.C. § 103(c)) (providing that FRA "shall consider . . . safety as the highest priority").

federal rule, state-law claims do not impermissibly conflict with the national interest in uniformity.

Finally, respondents' assertion (at 22) that "allowing individual juries to regulate locomotive design or manufacture through liability awards would undermine the LIA's national-uniformity objective" ignores the long history of juries deciding whether a given locomotive's design complies with the LIA's general safety standard. For a century, juries have made those determinations in FELA cases, *see* Pet. Br. 24 n.21; Resp. Br. 40, as well as in cases involving state-created causes of action based on LIA violations.[9] For example, in *Baltimore & Ohio Railroad Co. v. Groeger*, 266 U.S. 521 (1925), a FELA case based on an alleged LIA violation, the Court held that, absent an applicable federal regulation, the jury should be instructed to decide whether the defendant complied with its duty "to put and keep the locomotive in proper condition and safe to operate." *Id.* at 527.

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[9] Respondents incorrectly deny (at 9, 54) the latter cases exist. They admit (at 9) that several of this Court's cases have allowed state-created actions based on SAA violations. And, in *Tipton v. Atchison, Topeka & Sante Fe Railway Co.*, 298 U.S. 141 (1936), this Court squarely recognized that a California appellate court was "[c]orrect[]" in "holding" that "the same principles apply in an action under the Boiler Inspection Act as in one under the [SAA]." *Id.* at 151 (citing *Walton v. Southern Pac. Co.*, 48 P.2d 108, 115 (Cal. Dist. Ct. App. 1935)); *see Engvall v. Soo Line R.R. Co.*, 632 N.W.2d 560, 569 (Minn. 2001) (rejecting manufacturer's argument that "a violation of the LIA . . . cannot be used as the basis for a private negligence action brought under the common law"); *Herold v. Burlington N., Inc.*, 761 F.2d 1241, 1245-47 (8th Cir. 1985); *Scott v. Chicago, R.I. & P.R.R. Co.*, 197 F.2d 259, 261 (8th Cir. 1952); *see also* AAR Br. 26 ("[S]ince manufacturers have an obligation to comply with the LIA . . . , they too may be liable for breaching that obligation through a common law action utilizing federal substantive law as the standard of liability.").

Therefore, "lay juries are in no sense anathema to [the LIA]'s scheme." *Bates*, 544 U.S. at 452.

2. Failure-to-warn claims

Respondents' entire field-preemption argument focuses on the "design" of locomotives and essentially ignores petitioners' failure-to-warn claims. *See* Resp. Br. 25-51. Respondents briefly assert (at 39 n.9) that those claims "fall within the LIA's field pre-emptive scope" because they supposedly "challenge the design or manufacture of locomotive equipment." But respondents later admit (at 55) that "failure-to-warn claims may not themselves literally mandate physical alteration of the locomotive's design or construction." Despite that concession, respondents unpersuasively attempt (at 55-58) to bring failure-to-warn claims within their (exceedingly broad) view of the LIA's regulatory scope.

First, the LIA contains no provision addressing warnings regarding dangers involved in repairing and maintaining locomotives.[10] A statute cannot preempt a "field" by omission. Respondents reason (at 55-56) that, if the FRA's "authority to regulate locomotive design and manufacture is exclusive, the same must be true for its subordinate authority to

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[10] Respondents argue (at 55) that the FRA has promulgated warning requirements pursuant to the LIA. But neither warning regulation cited by respondents addresses hazards particular to the repair process; those regulations thus do not suggest that the LIA empowers the FRA to prescribe warnings regarding those dangers. Moreover, the FRA has explained that those regulations cannot be relied on to broaden the field regulated by the LIA because the agency relied at least in part on its authority under the FRSA in adopting them. *See* U.S. Br. 18 n.6 (citing 49 C.F.R. Pt. 229, p. 441 (2010)); *see also* 49 C.F.R. § 1.49(m) (delegating to FRA authority to carry out functions vested in Secretary of Transportation by FRSA).

prescribe warnings for locomotive designs." But that does not follow; any FRA authority over locomotive design does not confer exclusive agency authority over warnings. The same flaw pervades respondents' argument (at 56) that allowing failure-to-warn claims "would defeat the LIA's core objective" of uniformity. Respondents cite nothing in the Act supporting the notion that Congress required uniform warnings for repair-related hazards.

Second, respondents assert (at 55) that failure-to-warn claims "impose liabilities under differing state-law standards for lawful locomotive design and manufacture." The basis of liability for failure to warn, however, is not the "design" or "manufacture" of a product; it is the failure to provide adequate warnings regarding the product's risks. *See generally Wyeth v. Levine*, 129 S. Ct. 1187, 1194 (2009). A product may be designed and manufactured in an entirely reasonable manner, but the manufacturer is nevertheless generally liable under state common law for injuries resulting from the failure to furnish proper warnings and instructions. *See*, *e.g.*, *Greiner v. Volkswagenwerk Aktiengeselleschaft*, 540 F.2d 85, 92-93 (3d Cir. 1976) (failure to warn is "an independent basis of liability, not requiring the jury to find a design defect"); *Hollister v. Dayton Hudson Corp.*, 201 F.3d 731, 740 (6th Cir. 2000) ("For example, without a warning as to its weight restrictions, a highway bridge might be legally 'defective' even if it was designed safely and was in perfect working order."); *cf. Bates*, 544 U.S. at 444-46.

Third, respondents argue (at 57) that requiring a manufacturer to warn repair workers does not "make[] sense." Concerns about the feasibility of providing particular warnings pertain to the merits

of petitioners' claims, however, not whether they are preempted. In any event, locomotive and equipment manufacturers, such as respondents' corporate predecessors, have provided warnings through service manuals used by repair and maintenance workers.[11] Manufacturers also have placed warnings directly on locomotive parts.[12] And respondents offer no reason why packages for replacement parts containing asbestos could not have been labeled with warnings and instructions regarding the hazards and safe installation of those products. Although respondents raise (at 56-58) the specter of different states "requir-[ing]" different warnings, they ignore the fact that a jury verdict on a failure-to-warn claim "establishe[s] only that" the warning (or lack thereof) "was insufficient" and does "not mandate a particular . . . warning." *Wyeth*, 129 S. Ct. at 1194; *see also* U.S. Br. 27 (warning "requirements are a cost of doing interstate business in many industries").

B. The LIA Did Not Apply To Respondents At The Relevant Time

Field preemption cannot apply here for the additional reason that the LIA did not regulate respondents until years after the events giving rise to this case. Respondents assert (at 42) that the government "explains the flaws" in petitioners' argument, but the government simply did not address it. *See* U.S. Br. 28 ("there is no need to address that ques-

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[11] *See*, *e.g.*, Baldwin-Lima-Hamilton Corp., *Engine Manual for 600 Series Diesel Engines* 23, 101 (1951) (providing warnings and instructions for safe maintenance of locomotive engine), *available at* http://www.rr-fallenflags.org/manual/blh-6em.html.

[12] *See*, *e.g.*, http://spec.lib.vt.edu/imagebase/norfolksouthern/full/ns770.jpeg (picture of interior of steam locomotive with engraved warning on locomotive part).

tion here"). The government contends that *conflict* preemption can occur even where a defendant is not subject to regulation under the statute, *see id.*, which we acknowledge is possible (but not the case here, where no actual conflict exists). *See* Pet. Br. 31 n.26.

Respondents erroneously rely (at 43-44) on *Engine Manufacturers Ass'n v. South Coast Air Quality Management District*, 541 U.S. 246 (2004). That case involved *express* preemption – not implied field preemption – through a statute providing that no state could adopt "'any standard relating to the control of emissions from new motor vehicles.'" *Id.* at 252 (quoting 42 U.S.C. § 7543(a)). This Court held that Congress intended the statute's express preemption of emissions standards to apply not only to restrictions on what vehicle manufacturers could build but also to restrictions on what vehicle purchasers could buy. *See id.* at 253-54. Here, by contrast, respondents argue that preemption should be implied *beyond* the extent of the regulated field. Because the regulated field did not reach respondents, there is no basis to imply preemption of petitioners' claims against them; nothing in *Engine Manufacturers* is to the contrary.

II. CONFLICT PREEMPTION PROVIDES NO BASIS FOR AFFIRMING THE JUDGMENT

A. Conflict Preemption Is Not Properly Presented

Respondents do not dispute that conflict preemption was neither raised nor decided below. *See* Pet. Br. 44; Resp. Br. 58. When an issue has not been raised or decided in the lower courts, this Court does not consider the issue to be properly before it – even if the question presented might be interpreted to encompass that issue, as respondents assert (at 58) is

the case here. *See* Pet. Br. 44-45; *Travelers Cas. & Sur. Co. of Am. v. Pacific Gas & Elec. Co.*, 549 U.S. 443, 455 (2007).[13] Here, moreover, the necessary "inquiry into whether the ordinary meanings of state and federal law conflict," *Wyeth*, 129 S. Ct. at 1208 (Thomas, J., concurring in the judgment) (internal quotations omitted), would be best performed, if at all, on remand, *see* Pet. Br. 45 & n.35; U.S. Br. 22.

B. Conflict Preemption Does Not Apply

State-law claims based on injuries resulting from exposure to asbestos in rail-repair facilities pose no actual conflict with the LIA. *See* Pet. Br. 46-52. Respondents do not deny that "it is []possible for a private party to comply with both state and federal requirements" here. *PLIVA, Inc. v. Mensing*, 131 S. Ct. 2567, 2577 (2011) (internal quotations omitted). They instead base their conflict-preemption argument on the theory that state-law claims "create an obstacle to the accomplishment of the full purposes and objectives of Congress." Resp. Br. 52 (internal quotations omitted).

Respondents remarkably concede (at 58) that their obstacle-preemption theory "is substantively identical to" their claim of implied field preemption and thus depends on the premise that petitioners' claims would impair congressionally mandated uniformity. Therefore, like their implied-field-preemption theory, respondents' obstacle-preemption argument collapses with respondents' failure to show that the LIA embodies a uniformity requirement that would exclude state-law claims involving hazards outside the LIA's

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[13] In *United States v. Tinklenberg*, 131 S. Ct. 2007, 2017 (2011), the only case that respondents cite on this point, the alternative ground for affirmance was decided by the court of appeals.

regulated field. *See supra* Part I.A.1. No alternative basis exists for finding obstacle preemption here.

1. Failure-to-warn claims

Respondents do not dispute that nothing in the LIA or any regulation promulgated under it has *ever* required or prohibited any warning regarding asbestos in locomotive equipment, let alone a warning of the risks to repair workers. They assert (at 55), however, that the FRA has authority under the LIA to prescribe warnings for locomotive equipment. *But cf. supra* note 10. The bare *existence* of regulatory authority, however, does not establish conflict preemption. Conflict preemption occurs only when the agency has *exercised* that authority in a manner that actually conflicts with state law. Thus, in *Wyeth*, the Food and Drug Administration certainly had authority over warnings for prescription drugs, *see* 129 S. Ct. at 1196, but the plaintiff's failure-to-warn claim was not preempted because the agency had not exercised that authority to prohibit a stronger warning, *see id.* at 1203 n.14.

The same is true here. Absent any FRA regulation prohibiting warnings regarding the dangers asbestos in locomotive equipment poses to mechanics, there is no basis for conflict preemption.

2. Design-defect claims

Respondents do not dispute that no "contrary federal standard" conflicts with petitioners' design-defect claims. Resp. Br. 53. They therefore wrongly accuse petitioners of arguing that "a state can overrule" the FRA "and mandate a different design." *Id.* at 38. No federal agency has ever required locomotive-equipment manufacturers to insulate their products with asbestos, so this case raises no issue

of state law attempting to "overrule" any federal judgment.

In suggesting (at 25) that petitioners' design-defect claims could conflict with *Groeger*'s instruction that juries cannot "restrict the carriers in their choice of mechanical means by which their locomotives . . . are to be kept in proper condition," 266 U.S. at 530-31, the government misunderstands both *Groeger* and petitioners' claims. The problem in *Groeger* (which involved a worker killed while operating a locomotive on the line) was that the jury instruction specifically and impermissibly "authorized [the jury] to find that the [LIA] required defendant to have a fusible plug." *Id*. at 529. Here, the jury would not be asked to find that federal or state law required (or prohibited) any particular equipment, but rather that the equipment respondents voluntarily chose to use had latent defects that posed unreasonable risks of harm to mechanics who repaired and maintained it. *See* Pet. Br. 47 & n.36. A finding of liability on such a claim would not deprive railroads or manufacturers of "the choice of means to be employed" to make locomotive equipment reasonably safe for repair workers. *Groeger*, 266 U.S. at 530; *see also Great N. Ry. Co. v. Donaldson*, 246 U.S. 121, 128 (1918) (jury can find equipment unsafe under LIA even though agency has not "disapproved" its use); *cf. Wyeth*, 129 S. Ct. at 1194.

Further, even a state-law claim (unlike petitioners') based on an injury suffered by a crew member of a locomotive being operated on a rail line would not conflict with the LIA so long as it paralleled the federal standard. *See* Pet. Br. 49-50. Respondents err in disputing (at 54) that an injured person can bring a state cause of action based on a violation

of the LIA. *See supra* note 9. Their response also misses the point: so long as the state duty does not conflict with the federal duty, there is no conflict preemption. *Cf. Bates*, 544 U.S. at 447-48; 49 U.S.C. § 20106(b). And a state-law design-defect claim that is equivalent to an LIA violation would be particularly unlikely to pose an obstacle to any congressional purpose because of the well-settled distinction between failure-to-install and defective-condition cases under the LIA. *See* Pet. Br. 50-52. A state-law design-defect claim alleging that locomotive equipment was not "in proper condition and safe to operate," 49 U.S.C. § 20701(1), therefore, would not be subject to conflict preemption absent a contrary federal rule.[14]

CONCLUSION

The court of appeals' judgment should be reversed.

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[14] Respondents incorrectly assert (at 54) that petitioners have "admit[ted] that the use of asbestos in locomotive equipment" complies with "the LIA's generic duty-of-care standard." Petitioners' claims involve risks incurred in repairing and maintaining locomotives and locomotive parts insulated with asbestos. Whether asbestos in boilers and brake shoes also poses risks to the locomotive's safe use on the line is simply not at issue here. Respondents' claim (at 1) that this case involves locomotive equipment "concededly designed and manufactured in compliance with federal regulatory standards" is thus incorrect.

Respectfully submitted,

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October 28, 2011

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