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 OF AMICUS CURIAE PUBLIC JUSTICE, P.C. IN SUPPORT OF PETITIONERS

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IDENTITY AND INTEREST OF AMICUS CURIAE

Public Justice, P.C., respectfully submits this brief as amicus curiae. Letters of blanket consent of the parties to the filing of amicus curiae briefs have been filed with the Court.[1]

Public Justice is a national public interest law firm dedicated to pursuing justice for the victims of corporate and government abuses. Through involvement in precedent-setting and socially significant litigation, Public Justice seeks to ensure that tort law fully serves its dual purposes of compensating those injured by wrongful conduct and deterring similar conduct in the future. Public Justice is gravely concerned that, if the tort system is limited excessively through an improper application of fundamental preemption principles, neither of these purposes will be served. Specifically, Public Justice files this brief (1) to expand on the argument, made in the Brief for Petitioners at 38-40, that while pervasive federal regulation of a field may preempt positive state law, it cannot serve as a basis for depriving tort victims of their state common-law remedies; and (2) to rebut the contention that an interest in national uniformity of

[1] Pursuant to Supreme Court Rule 37.6, amicus curiae Public Justice discloses that no counsel for a party authored any part of this brief, nor did any person or entity other than Public Justice, its members, or its counsel make a monetary contribution to the preparation or submission of this brief.

rules governing railroad safety supports the preemption of state tort claims.

SUMMARY OF ARGUMENT

The Third Circuit held that the by occupying the entire field of safety standards for railroad equipment, the Locomotive Inspection Act (LIA), 49 U.S.C. §§ 20701 *et seq.*, preempts all state law in the area, including state tort law. In so holding, the lower court misapprehended the distinction, repeatedly recognized by this Court, between state enactments of positive law, such as statutes and regulations, and state common-law tort rules. The two types of law differ in purpose as well as in form. The objective of positive law is to proscribe or mandate conduct on a prospective basis. State tort rules, on the other hand, are retrospective and remedial; their primary purpose is to compensate victims for personal harm. Although state tort rules may have an indirect regulatory effect by disincentivizing negligent or otherwise undesirable conduct, compliance with them is not affirmatively required; a prospective defendant in a tort case may choose to absorb the cost of liability rather than modifying its conduct to comply with the state common-law standard. Thus this Court has repeatedly held that a decision by Congress to occupy the entire field of safety regulation in a particular area by no means indicates an intent also to preempt state tort claims in the regulated field.

The Third Circuit also erred in ascribing excessive importance to the federal interest in uniformity of regulation of railroad equipment. There is no evidence or indication that application of state tort rules would impede the system of regulation intended by Congress and established in the LIA, and other federal laws governing the operation of railroads expressly contemplate supplemental state regulation. Moreover, as this Court stated in *Sprietsma v. Mercury Marine*, 537 U.S. 51, 71 (2002), "concern with uniformity does not justify the displacement of state common-law remedies that compensate accident victims and their families" and that serve the federal law's "more prominent objective" of promoting safety. The Third Circuit's expressed concern for uniformity does not support its finding that the LIA preempts the state tort rules applicable to petitioners' claims.

ARGUMENT

I. Even if the LIA Preempts Positive Provisions of State Law Such as Statutes or Regulations Governing the Safety of Locomotives and Locomotive Equipment, the LIA Does Not Preempt Tort Claims Based on General State Common Law.

The Third Circuit relied primarily on *Napier v. Atlantic Coast Line Railroad Co.*, 272 U.S. 605 (1926), for its conclusion that, by occupying the field of regulating locomotives and locomotive parts used in interstate commerce, the LIA preempts tort claims

concerning those products based on state common law. *Kurns v. A.W. Chesterton, Inc.*, 620 F.3d 392, 396-99 (3d Cir. 2010). *Napier* only held, however, that the LIA preempts "state legislation" in this field; it did not consider whether the LIA displaces general rules of state tort law. *Napier*, 272 U.S. at 207. Although this Court has recognized that the application of common-law tort rules can have an indirect regulatory effect, it has repeatedly recognized a distinction between positive law – statutes, regulations, or standards affirmatively adopted by states, which are enforced prospectively and are mandatory – and state common law, which is retrospective and serves a compensatory as well as a deterrent function.

A review of this Court's recent preemption jurisprudence helps to illuminate this distinction. In *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984), this Court held that state tort law survived the federal occupation of the entire field of safety in the nuclear industry. The Court in that case upheld an award of punitive damages to the estate of a laboratory technician who had become contaminated with plutonium while working in a plant that manufactured plutonium rods for use in nuclear power plants. The Court noted that the plant was regulated by the Nuclear Regulatory Commission pursuant to the Atomic Energy Act, and that the Act prohibited "the states from regulating the safety aspects of nuclear development." *Id.* at 250. But the Court found no conflict between federal occupation of the field of

nuclear safety and the enforcement of an award of punitive damages based on a violation of state law. The Court acknowledged "tension between the conclusion that safety regulation is the exclusive concern of the federal law and the conclusion that a state may nevertheless award damages based on its own law of liability," but concluded that "Congress intended to stand by both concepts and to tolerate whatever tension there was between them." *Id.* at 256.

In *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174 (1988), the Court again recognized that federal occupation of a field does not necessarily prevent the enforcement of personal remedies authorized by state law. There, the Court allowed a worker in a federally owned nuclear plant to claim enhanced damages under a state worker's compensation statute for injuries the worker sustained as a result of the company's violation of a state safety standard. The Court acknowledged that the plant was "shielded from direct state regulation," but found that the federal law regulating nuclear plants did not bar the worker's pursuit of his state-authorized remedy. *Id.* at 180. Distinguishing positive state enactments from general remedial law, the Court reasoned that the "effects of direct regulation on the operation of federal projects are significantly more intrusive than the incidental regulatory effects" of a provision enhancing a worker's compensation award upon proof that breach of a safety regulation caused the injury. *Id.* at 185. Unlike a state regulation, the enhancement provision did not compel particular conduct; the

employer could "choose to disregard Ohio safety regulations and simply pay an additional workers' compensation award if an employee's injury is caused by a safety violation." *Id.* at 185-86. The Court concluded that "Congress may reasonably determine that incidental regulatory pressure is acceptable, whereas direct regulatory authority is not." *Id.* at 186.

Similarly, in *English v. General Electric Co.*, 496 U.S. 72 (1990), the Court permitted the assertion of a whistleblower's common law tort claim against her employer, a producer of nuclear fuel, arising from her discharge allegedly in retaliation for her complaints about unsafe practices, even though the federal government indisputably occupied the entire field of nuclear safety concerns. The Court noted that the tort claim might have an effect on safety practices, but found the possible effects "neither direct nor substantial enough to place petitioner's claim in the preempted field." *Id.* at 85.

It was not until the Court's decision in *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992), that the Court ruled that a federal law precluded the enforcement of state common-law remedies for a tortiously inflicted injury.[2] In its plurality opinion in *Cipollone*,

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[2] *See Bates v. Dow AgroSciences LLC*, 544 U.S. 431, 441 (2005) ("only after 1992" following the Court's decision in *Cipollone* did "a groundswell of federal and state decisions" emerge holding that federal law preempted state common law tort claims); *see also* Christina E. Wells, William E. Marcantel & Dave Winters, *Preemption of Tort Lawsuits: The Regulatory*

(Continued on following page)

the Court held that a federal provision prohibiting any local "regulation or prohibition" on cigarette advertising in addition to the federal standard barred tort claims as well as "positive enactments by states and localities." *Id.* at 521. But in so holding, the Court focused on the intent of Congress as evidenced by the "plain words" of the federal act. *Id.* Far from suggesting that preemption of state tort law accompanies preemption of local positive law as a matter of course, the Court emphasized that "there is no general, inherent conflict between federal preemption of state warning requirements and the continued vitality of state common-law damages actions." *Id.* at 518. Thus, the Court recognized that while state tort law can influence behavior prospectively, its primary function – compensation of tort victims by shifting of the cost of injury to the tortfeasors who could spread the cost among the beneficiaries of its conduct – might justify preservation of state-law tort claims even when state positive law is preempted.

The distinction between positive law and state tort claims persisted in the Court's jurisprudence after *Cipollone*. In *Medtronic, Inc. v. Lohr*, 518 U.S. 470 (1996), the manufacturer of a pacemaker that failed and caused injury claimed immunity from state tort liability under a provision of the Medical Device Amendments (MDA), 21 U.S.C. § 360k(a), that

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Paradigm in the Roberts Court, 40 STETSON L. REV. 793, 806 (2011).

prohibited states from establishing or continuing in effect any "requirement" different from that in the statute. The manufacturer argued that because its device had been approved for marketing by the Food and Drug Administration (FDA) pursuant to the MDA, the imposition of tort liability would improperly subject the manufacturer to a different state "requirement." A plurality of the Court characterized the manufacturer's claim of express statutory preemption as "not only unpersuasive" but "implausible." *Id.* at 487. The Court found it "difficult to believe that Congress would, without comment, remove all means of judicial recourse for those injured by illegal conduct, and it would take language much plainer than [that in the MDA] to convince us Congress intended that result." *Id.* at 487 (quoting *Silkwood*, 464 U.S. at 251). In a concurring opinion, Justice Breyer added that ordinary principles of field preemption led to the same result, finding no "indication that either Congress or the FDA intended the relevant FDA regulations to occupy entirely any relevant field." 518 U.S. at 508 (Breyer, J., concurring). Although *Medtronic* involves primarily express preemption and not field preemption, the Court's recognition that federal regulation could coexist with state tort law even while preempting state positive law indicates that the distinction between positive and common law remains viable.

The Court's continuing distinction in preemption cases between positive law and state common law is most visible in its unanimous opinion in *Sprietsma v.*

Mercury Marine, 537 U.S. 51 (2002). In *Sprietsma*, the plaintiff's decedent died when she fell out of a recreational boat and was struck by the boat's propeller. The plaintiff sued the boat manufacturer, claiming that the absence of a propeller guard rendered the boat defective under state law. The manufacturer argued that Federal Boat Safety Act (FBSA), 46 U.S.C. §§ 4301 *et seq.*, preempted the plaintiff's tort claim, pointing out that the United States Coast Guard had affirmatively decided not to require propeller guards. The Court rejected the argument and allowed the tort claim. Conceding that the FBSA "might be interpreted as expressly occupying the field with respect to *state positive laws and regulations*," the Court found that the FBSA's "structure and framework do not convey a clear and manifest intent to go even further and implicitly pre-empt all state common law relating to boat manufacture." *Id.* at 69 (emphasis added; internal quotation marks and citation omitted). The Court acknowledged that Congress enacted the FBSA to establish "national construction and performance standards for boats and associated equipment," *id.* at 57, but found that "the concern with uniformity does not justify the displacement of state common-law remedies that compensate accident victims and their families. . . ." *Id.* at 70.

Most recently, the Court noted the difference between a federal statute's preemptive effect on positive law and its effect on common law in *Bates v. Dow AgroSciences LLC*, 544 U.S. 431 (2005). In *Bates*,

the Court considered whether peanut farmers whose crops had been damaged by a herbicide could bring tort claims against the herbicide's manufacturer based on common law theories of failure to warn and defective design, among others, notwithstanding the preemption provision in the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. §§ 136 *et seq*. The statute provided that a state "shall not impose or continue in effect any requirements for labeling or packaging in addition to or different from those required under this subchapter." *Id.* at 439 (quoting 7 U.S.C. § 136v(b)). The Court observed that the prohibitions in the statute "apply only to 'requirements,'" and reasoned that the deterrent effect achieved by the application of tort law is not a "requirement." 544 U.S. at 443. A requirement, the Court continued, "is a rule of law that must be obeyed; an event, such as a jury verdict, that merely motivates an optional decision is not a requirement." *Id.* at 446. None of the common-law rules invoked by the plaintiffs, the Court noted, "requires that manufacturers label or package their products in any particular way." *Id.* at 444. Although the statute prohibits application of "any statutory or common-law rule that would impose a labeling requirement that diverges from those set out in FIFRA and its implementing regulations," the provision does not "preempt any state rules that are fully consistent with federal requirements." *Id.* at 452.

The Court's distinction between the preemptive effect of federal law on state positive law on the one

hand and general common law on the other makes perfect sense. As one commentator has noted, "[p]ositive enactments, such as statutes or regulations, involve general and prospective rules establishing standards of conduct." Christina E. Wells, William E. Marcantel & Dave Winters, *Preemption of Tort Lawsuits: The Regulatory Paradigm in the Roberts Court*, 40 STETSON L. REV. 793, 802 (2011). In contrast, "tort law derives from adjudication involving individuals in retrospective and personal dispute resolution processes," and thus does not establish any generalized standards for future conduct. *Id.* And, unlike state statutes or regulations, tort law serves a compensatory as well as a deterrent function. When the application of state law would directly conflict with a federal standard or objective, the state interest in providing compensation to injury victims must yield. But when application of state tort law would not conflict with any federal rule or interest, and would merely operate in a field subject to extensive federal regulation, there is no basis for overriding the state's interest in applying its own common-law tort system to compensate injury victims and deter misconduct. As one commentator has written, "[o]ur system of federalism demands that interference with states' policy decisions to give their citizens tort remedies should be the product of judgment and careful balancing, rather than an unintended result of congressional inaction or imprecision." Betsy J. Grey, *Make Congress Speak Clearly: Federal Preemption of State Tort Remedies*, 77 B.U.L. REV. 559, 627 (1997).

In short, this Court has repeatedly recognized – and for good reason – that state court claims do not have the same regulatory effect as state positive law. This Court has also recognized that tort claims further the states' strong interest in compensating injury victims through the tort system. For these reasons, a decision by Congress to occupy the entire field of state positive law by no means indicates an intention to also preempt state tort claims in the regulated field. Especially in a case like this one, where the relevant statutory language is so sparse and nonspecific, there is no reason to infer a congressional intent to immunize defendants from liability under state tort rules that do not conflict with any federal regulation.

II. The Application of State Common-Law Tort Rules to Claims Based on Defects in Products Used in the Repair and Maintenance of Railroads Does Not Impair Any Federal Interest in Uniformity Served by the LIA.

Nor could it be reasonably argued that allowing state tort claims in the particular "field" at issue would impair any congressional interest in uniformity. The lower court suggested that allowance of state common-law tort claims against suppliers of railroad equipment would impede "Congress's goal of uniform railroad equipment regulation" served by the LIA. *Kurns*, 620 F.3d at 398. But the Third Circuit cited nothing to indicate that Congress intended to restrict tort remedies, as well as affirmative state requirements, in the interest of uniformity. The Third Circuit

also expressed concern that were states allowed to apply their own common law to claims for injuries caused by railroad equipment, "equipment would have to be designed so that it could be changed to fit these standards as the trains crossed state lines, or adhere to the standard of the most restrictive states." *Id.* Based in part on these concerns, the lower court reasoned that Congress must have intended to preempt state tort claims, even though it did not say so.

This reasoning was in error. First, as petitioners explain throughout their brief, the LIA applies only to locomotives in operation on railroad lines. Pet. Br. 21-28, 34-35. The hypothetical posited by the Third Circuit, that state tort claims such as petitioners' would inflict a patchwork of differing common-law standards of care on suppliers of railroad equipment used in interstate commerce, would never actually occur, because such a train would be "in use" and covered by the LIA. It is only when the train is under repair, in a single location, that local tort rules govern the safety of railroad parts.

Second, the possibility of differing standards applying to product design is common to all nationally marketed products, and is inherent in our system of federalism. Surely the interest in maintaining coherent standards for the safety of equipment used to repair railroads is no more compelling than those for the safety of commercial trucks (whose use also inevitably involves crossing state lines), pharmaceuticals, pesticides, nuclear fuel, or any other product

subject to federal regulation. Yet this Court has not preempted claims based on defects in these products under appropriate circumstances. *See, e.g.*, *Freightliner Corp. v. Myrick*, 514 U.S. 280, 290 (1995) (commercial trucks); *Wyeth v. Levine*, 129 S. Ct. 1187, 1203 (2009) (prescription drugs); *Bates*, 544 U.S. at 452-53 (pesticides); *Silkwood*, 464 U.S. at 258 (nuclear power).

In *Bates*, as in this case, the pesticide manufacturer argued that allowing tort suits based on defects covered by federal labeling regulations would undermine the uniformity that the regulations were designed to promote. The Court found the concerns about the prospect of inconsistent results under state law to be greatly overstated. 544 U.S. at 451. The Court acknowledged that "properly instructed juries might on occasion reach contrary conclusions on a similar issue of misbranding," but noted that "there is no reason to think such occurrences would be frequent or that they would result in difficulties beyond those regularly experienced by manufacturers of other products that every day bear the risk of conflicting jury verdicts." *Id.* at 452.

Moreover, as the Court explained in *Sprietsma v. Mercury Marine*, even when Congress expressly identifies "uniformity" as a goal of a federal law, "this interest is not unyielding." 537 U.S. at 70. Absent an express prohibition of state tort claims, "concern with uniformity does not justify the displacement of state common-law remedies," when those remedies serve

the law's "more prominent objective" of promoting safety. *Id.* at 71.

Finally, other federal statutes governing railroad operations belie the contention that there is an unyielding federal need for uniform, nationwide standards applicable to all aspects of railroad safety. The Federal Railroad Safety Act, for example, provides that laws, regulations, and orders related to railroad security "shall be nationally uniform *to the extent practicable*." 49 U.S.C. § 20106(a)(2) (emphasis added). It further provides that a state "may adopt or continue in force an additional or more stringent law, regulation, or order related to railroad safety or security" when such a law is necessary to eliminate a hazard, does not conflict with federal law, and does not unreasonably burden interstate commerce. *Id.* Thus in the exact area at issue here, Congress has expressly tolerated the sort of "nonuniformity" that the lower court saw as a reason to find petitioners' tort claims preempted.

In short, the risk of nonuniform standards of care posed by state tort law does not provide any justification for implying field preemption of state tort claims via the LIA. This is not to say, of course, that Congress cannot expressly preempt state tort law relating to the safety of railroad equipment should it choose to do so. It merely belies the argument that in the absence of such an express preemption provision, Congress's intent to preempt state law claims can be

implied based on a compelling need for uniformity in laws governing railroad safety.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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