No. 10-879

In The Supreme Court of the United States

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

Petitioners,

v.

RAILROAD FRICTION PRODUCTS
CORPORATION AND VIAD CORPORATION,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF AMICUS CURIAE OF THYSSENKRUPP BUDD COMPANY SUPPORTING THE RESPONDENTS

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QUESTION PRESENTED

The petitioners want to bring State law tort claims against locomotive manufacturers based on locomotive design, construction, and materials. In *Napier v. A. Coast Line R.R. Co.*, 272 U.S. 605 (1926), this Court ruled that Congress had preempted the field of design, construction and material used to build locomotives under the Locomotive Inspection Act. Are the petitioners' State law claims preempted?

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INTEREST OF AMICUS CURIAE

With the consent of the parties, ThyssenKrupp Budd Company (The Budd Company) submits this brief amicus curiae supporting the respondents. Letters of consent have been filed with the Clerk of the Court.[1]

The Budd Company manufactured railroad passenger cars for a number of railroads from the 1930s through the 1980s. It pioneered the concept of a self-propelled passenger railcar, which is simultaneously a locomotive and a passenger car capable of carrying 50-100 passengers. The dual nature of self-propelled railcars provides versatility to railroad carriers. Any railcar can be used as the engine car, with other railcars coupled as additional passenger cars. Thus, on any given day, a railcar crossing a State line could be used as a locomotive, a passenger car, or both. The Budd Company manufactured several versions of these self-propelled railcars from the 1930s into the 1980s. Some remain in service today.

Despite their versatility, federal regulations generally treat self-propelled railcars solely as locomotives.

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[1] Under Rule 37.6, The Budd Company states that no counsel for a party authored this brief or financially contributed to it in whole or in part. The Budd Company and its members, counsel, and the following insurers financially contributed to the preparation and submission of this brief: Allstate Ins. Co., American Empire Ins. Co., Arrowpoint Capital Corp., Hartford Ins. Co., Liberty Mutual Ins. Co., Nationwide Ins. Co., Resolute Management, Inc., Sentry Ins. Co., and Travelers Ins. Co.

See 49 C.F.R. § 229.5 at *Locomotive* (2). As a locomotive manufacturer, The Budd Company takes great interest in the preemptive effect of the Locomotive Inspection Act (LIA).

STATEMENT

Like our Nation's seaports and airports, the national rail system defines the essence of interstate and foreign commerce. On a daily basis, trains cross State and national borders to deliver passengers and freight to communities and hubs of commerce. The engine of this system – literally and figuratively – is the locomotive.

As this Court observed, it became evident more than a century ago that "a uniform regulatory scheme [was] necessary to the operation of the national rail system." *United Transp. Union v. Long Island R.R. Co.*, 455 U.S. 678, 688 (1982). After the Civil War, construction of interstate rail lines began in earnest. Charles W. McDonald, *The Federal Railroad Safety Program: 100 Years of Safer Railroads*, 1 (Fed. R.R. Admin. 1993). By the 1870s, the railroad industry had spanned the continent, having completed the first transcontinental railroad in 1869. *Id.* During these boom years, however, "safety took a back seat to profit and expansion." *Id.* Boilers frequently exploded because of poor maintenance, improper operation, and insufficient inspection. *Id.*

It was not until the mid-1880s that States began passing laws to regulate railroad safety. *Id.* at 6. By the early 1890s, it had become evident that State laws imposed conflicting safety standards that made it impossible for interstate railroads to comply with each State's requirements. *Id.* at 6-7. In 1893, Congress responded with the first Safety Appliance Act (SAA), requiring common carriers engaged in interstate commerce to install automatic couplers and power brakes. Act of Mar. 2, 1893, ch. 196, 27 Stat. 531. Between 1893 and 1910, Congress would amend the SAA twice more to enhance brake safety. During the same time, injuries and fatalities fell by more than 50%. McDonald, *supra* at 10-11.

Building on this success, Congress enacted the Boiler Inspection Act (BIA) in 1911 "to promote the safety of employees and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their locomotives with safe and suitable boilers and appurtenances thereto." Act of Apr. 14, 1910, ch. 160, 36 Stat. 913. The BIA made it unlawful for common carriers to engage in the interstate movement of goods unless "the boiler of [the] locomotive and appurtenances thereof are in proper condition and safe to operate." *Id.* at § 2. Newly minted federal boiler inspectors were appointed to ensure that boilers were fit for service – that is, they were to ensure that the design and maintenance of the boilers made them "safe to operate." *Id.* at §§ 3-6.

In 1915, Congress expanded the BIA to include inspection of the entire locomotive. Act of Mar. 4,

1915, ch. 169, 38 Stat. 1192. Thus, the BIA became the LIA. During the next 20 years, boiler-related accidents fell by more than 90%. McDonald, *supra*, at 19-20.

The enactment of the SAA, BIA, and LIA coincided with an important shift in Supremacy Clause jurisprudence. On January 9, 1912, just 39 days before Congress enacted the BIA, this Court decided *S. Ry. Co. v. Reid*, 222 U.S. 424 (1912), in which it held that "[i]t is well settled that if the State and Congress have concurrent power, that of the State is superseded when the power of Congress is exercised." *Id.* at 436. Although deemed "well settled" by the Court, a review of Supremacy Clause jurisprudence reveals that *Reid* was the first time that a majority of the Court adopted the principle of field preemption. Stephan A. Gardbaum, *The Nature of Preemption*, 79 Cornell L. Rev. 767, 803 (1994). In *Reid*, the Court held that Congress had "taken control of the field" of railroad rate regulation through the Interstate Commerce Commission (ICC), depriving the State of its concurrent power to regulate rates of common carriers operating in interstate commerce. *Reid*, 222 U.S. at 438. It is historically important that the Court first adopted field preemption in a railroad case. As of *Reid*, "the effect of congressional action [was] to end the concurrent power of the States and thereby to create exclusive power at the federal level from that time on." Gardbaum, *supra*, at 801.

It was against this definition of field preemption that Congress enacted the BIA. The BIA gave federal

inspectors the power to declare boilers unfit for service. Act of Apr. 14, 1910, ch. 160, § 2, 36 Stat. 913. Fitness was judged by whether a boiler was safe to operate. *Id.* This necessarily, if impliedly, required federal inspectors to pass both on the design of the boiler (*i.e.*, that a boiler as designed could be safely operated) and on the maintenance of the boiler (*i.e.*, that the boiler had been maintained in good working condition such that it would safely operate as designed). Since the designs of boiler-powered locomotives changed as technology improved, this necessarily would be a moving target. Similarly, the LIA provided the ICC and its inspectors with the flexibility needed to address those changing technologies on the entire locomotive in a timely fashion instead of waiting for piecemeal legislation.

Rather than prescribe specific engine designs, the ICC focused its attention on ensuring that safety equipment was installed so that, whatever the design, the train would be safe to operate. In *Napier v. A. Coast Line R.R. Co.*, 272 U.S. 605 (1926), this Court recognized that the ICC's choice to proceed with safety regulations on a part-by-part basis, rather than to impose specific locomotive designs, was not the relevant inquiry under the Supremacy Clause. Rather, the question was whether the LIA "manifest[ed Congress's] intention to occupy the entire field of regulating locomotive equipment." *Id.* at 611. This Court found that it did: "[T]he power delegated to the [ICC] by the Boiler Inspection Act as amended is a general one. *It extends to the design, the construction*

and the material of every part of the locomotive . . . " *Id.* (emphasis added.)

For the next 44 years, Congress allowed the ICC, and later the Federal Railroad Administration (FRA), to oversee locomotive and passenger-car safety under the LIA and SAA. In 1970, Congress decided a nationally uniform regulatory scheme was required that covered not only for trains, but also for all aspects of railroad safety. It passed the Federal Railroad Safety Act (FRSA), 49 U.S.C. §§ 20102, *et seq.*, which broadened the FRA's jurisdiction to regulate all aspects of railroad safety. Congress recognized that with this expanded power came the risk that local safety conditions would be overlooked and unaccounted for, which in turn might actually increase local safety risks. So, Congress reserved to the States the ability to continue their regulations of local conditions, even in the face of direct federal regulation on point (as long as it was not incompatible with federal law and did not create an undue burden on interstate commerce). Act of Oct. 16, 1970, Pub. L. No. 91-458, § 205, 84 Stat. 972.

Importantly, however, Congress maintained the LIA and the SAA separately from the FRSA. Despite expanding the FRA's sphere of authority and giving States a role to play within that expanded sphere, Congress continued to occupy the field as to the design, construction, and material of locomotives travelling in interstate commerce. Stated differently, Congress continued to withhold from State control the locomotives that crossed State lines, while giving

to the States shared control over the local conditions that were uniquely and wholly within State boundaries.

The petitioners seek to change that dynamic. They argue Congress intended that the 50 jurisdictions through which locomotives travel should be allowed to impose 50 views of what constitutes safe locomotive design and be allowed to punish deviations from their respective views through their tort systems. In short, the petitioners seek to upset a century of exclusive federal authority over locomotive design, construction, and materials. The Court should reject this invitation and reaffirm Congress's determination that locomotive design, construction, and materials should be within the exclusive domain of federal regulators.

SUMMARY OF ARGUMENT

The petitioners and their amici stress that modern preemption analysis requires courts to determine and apply Congress's intent. While this is a fair statement of the law, a critical threshold question has been overlooked: Which Congress's intent governs here? The Budd Company submits that the intent of Congress enacting the LIA should control. The Congress enacting the FRSA specifically chose to keep the LIA as a separate law, and the core language of the LIA at issue has remained unchanged for 100 years.

This Court already ascertained Congress's intent in *Napier*, and it should decline the invitation to revisit that holding as a matter of *stare decisis*. The calls to reinterpret the LIA rest on a flawed belief that *Napier* is now an outlier in preemption jurisprudence because it did not apply the modern presumption against preemption. Importantly, however, the presumption was adopted as a counterweight to Congress's expanded role in traditionally local affairs after the Commerce Clause was given its modern, broader reading. Yet railroads have always fallen within Congress purview, even under the Court's narrower interpretation of the Commerce Clause before the New Deal. Indeed, the doctrine of field preemption was born out of the need for national uniformity in the only mechanized, land-based interstate transportation system existing at the turn of the 20th century. The Court's expansion of the Commerce Clause has not changed the need for national uniformity, and that expansion should not serve as the sole basis for upending a century of settled law.

Applying *Napier* is straightforward. There the Court ruled that Congress had preempted the field of locomotive design, construction, and materials. The petitioners incorrectly try to narrow the field to locomotives "in service" or "operating" on the railways. This is merely an artful way of arguing that only claims involving "locomotives in motion" are preempted. Yet *Napier* defined the field as design, construction, and materials – not movement. And this is the only rational way to define the field. A locomotive's design,

construction, and materials do not change depending on whether it is propelling itself along the rails or in a state of rest at the beginning or end of its journey.

With a properly defined field, the need to preempt State products-liability claims becomes self-evident. In fact, while such claims are of relatively recent vintage (being permitted only since the 1960s), this Court has already ruled that State tort claims alleging poor locomotive engine design are inappropriate under the LIA. *B&O R.R. Co. v. Groeger*, 266 U.S. 521 (1925). The Court found such claims could stifle innovation and that the "varying and uncertain opinions and verdict of juries" on the "comparative merits as to safety or utility" would not serve Congress's goal of having safe design and maintenance judged by expert federal inspectors. *Id.* at 530-531.

Additionally, locomotives have long service lives of 20-30 years or more, and they come with large price tags ($1.5-$2.5 million each). Allowing 50 different States to impose (or coerce, under the petitioners' view) 50 different standards for design, construction, and materials risks grinding the national rail system to a halt. Each design and component would be subject to 50 different standards, in most cases decades after the locomotive was put in service. Without preemption, railroad companies would face a Morton's Fork – either go bankrupt by decommissioning the current fleet because a design or material meets with a jury's disapproval, or go bankrupt by paying out untold numbers of claims. Even if an affordable

redesign were possible, there is no guarantee another State's jury would find that redesign acceptable.

The Court should not be persuaded that Congress intended that kind of economic chaos to befall the railroad industry by enacting the FRSA and its preemption and savings clauses. Rather, the Court should conclude that the FRSA was meant to compliment the LIA and SAA by expanding safety efforts beyond the train itself to all other aspects of railroad operations. The preemption clause invites the States to regulate local safety and security hazards (*e.g.*, grade crossings, train station platforms, utility connections, etc.), while the savings clause permits State courts to compensate for injuries caused by breaches of federal standards and violations of State laws governing local hazards. None of these changes imply that Congress meant to cede the field of locomotive design, construction, and materials it occupied exclusively nearly 60 years earlier.

Even if the Court concludes that the FRSA preemption and savings clauses apply to the LIA, it should still reject the petitioners' State law claims. The 1970 versions of these clauses were not intended to preserve State tort actions based on State tort standards of liability. Similarly, there is no evidence that Congress intended to preserve products-liability actions alleging violations of State standards when it enacted the 2007 amendment to these clauses. Even assuming, however, that Congress intended to save such claims, it only saved actions arising from events or activities occurring on or after January 18, 2002.

Here, the petitioners assert that Mr. Corson was exposed to asbestos between 1949 and 1974. Since he was not exposed on or after January 18, 2002, the petitioners' claims are legislatively foreclosed.

ARGUMENT

A. The intent of the 61st Congress controls, and the 61st Congress intended to preempt the field.

The Court has repeatedly explained that the analysis in preemption cases centers on congressional intent. And so, the petitioners and their amici have (rightly) focused on Congress's intent. Yet, despite substantial briefing, no one has yet identified or answered the critical threshold question: Which Congress's intent governs?

The petitioners and their amici discuss at length the FRSA and the modifications made to the LIA over the years. They overlook, however, that the core of the LIA – that locomotives be designed and maintained for safe use – has remained untouched for a century. Even when the LIA was "repealed," it was simply re-codified in a different title of the United States Code. Although certain sections were deleted, the core language that a locomotive must be safely designed and in proper condition has remained unchanged since the BIA was enacted in 1911, amended to become the LIA in 1915, restated in 1924, and retained in 1970, 1994, and 2007:

1911

"[I]t shall be unlawful for any common carrier . . . to use any locomotive engine . . . *unless the boiler of said locomotive and appurtenances thereof are in proper condition and safe* to operate in the service to which the same are put . . . " Act of Feb. 17, 1911, ch. 103, 36 Stat. 913 (emphasis added).

1915

"[The BIA] shall apply to and include the entire locomotive and tender and all parts and appurtenances thereof." Act of Mar. 4, 1915, ch. 169, 38 Stat. 1192.

1924

"That it shall be unlawful for any carrier to use . . . any locomotive *unless said locomotive, its boiler, tender, and all parts and appurtenances thereof are in proper condition and safe* to operate in the service to which the same are put . . . " Act of Jun. 7, 1924, Pub. L. No. 68-277, 43 Stat. 659.

1994

"A railroad carrier may use or allow to be used a locomotive or tender on its railroad line *only when the locomotive or tender and its parts and appurtenances – (1) are in proper condition and safe* to operate without unnecessary danger of personal injury. . . ." 49 U.S.C. § 20701.

* * *

Congress's enactment of the FRSA in 1970 had no impact on the scope of the LIA. The LIA continued to read exactly as it had in 1924. In fact, the House Committee on Interstate and Foreign Commerce noted in 1970 that "[o]ver the years there have been several [laws] dealing with certain phases of railroad safety. These include, among others [the LIA] . . . These particular laws have served well. In fact, the committee chose to continue them *without change*." H.R. Rep. No. 91-114 (1970), *reprinted in* 1970 U.S.C.C.A.N. 4104, 4105 (emphasis added). It did so to maintain field preemption. The Committee noted that "where the Federal Government has authority [under the LIA] with respect to rail safety, it preempts the field." *Id.* at 4108. The Committee "intend[ed] that those existing statutes [like the LIA] will continue to be . . . administered and enforced *as if this legislation* [the FRSA] *had not been enacted.*" 1970 U.S.C.C.A.N at 4114 (emphasis added).

Accordingly, even though the FRSA included a preemption provision, maintaining the LIA as an independent law ensured that there would be no confusion that the States' role under the FRSA (as a co-regulator of intrastate conditions, like grade crossings) was distinct from the field that Congress continued to occupy exclusively under the LIA and SAA: the regulation of train design and maintenance.[2] The Committee "d[id] not believe that safety

[2] *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658 (1993) and *Norfolk S. Ry. Co. v. Shanklin*, 529 U.S. 344 (2000) are not to the

(Continued on following page)

in the Nation's railroads would be advanced sufficiently by subjecting the national rail system to a variety of enforcement in 50 different judicial and administrative systems." 1970 U.S.C.C.A.N. at 4109. The purpose was to "permit[ ] the States to regulate in *new* areas until preempted." *Id.* (emphasis added).

The same was true in 1994. According to the Senate Judiciary Committee, chaired by then-Senator Joseph R. Biden (D-Del.), the amendments to transportation laws affecting railroads "where to restate in comprehensive form, *without substantive changes*, certain general and permanent [transportation] laws and to enact those laws [as part of Title 49]." S. Rep. No. 103-265 (1994). The Committee further explained that:

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contrary. In those cases, the Court addressed FRSA preemption in the context of railroad safety topics captured in the FRSA – not the LIA or SAA. Train speed and local railroad grade-crossing conditions are the kind of local matters that Congress expanded federal authority to regulate, while leaving States to continue governing these matters either with plenary power (if the FRA had not issued a regulation covering that matter) or limited power (if a regulation had been issued). Neither case stands for the proposition that the FRSA gave the States the power to regulate locomotive design, construction, or materials. Nor should the Court rely on those cases to interpret the FRSA in that way. To do so would read the LIA and the SAA out of the Code. *See Marshall v. Burlington N., Inc.*, 720 F.2d 1149, 1153 (9th Cir. 1983) (Kennedy, J.) ("the language and structure of the [FRSA] indicate a congressional intent to leave the [LIA] intact, *including its preemptive effect*" (emphasis added)).

> As in other codification bills . . . , this bill makes no substantive change in the law. It is sometimes feared that mere changes in terminology and style will result in changes in substance *or impair the precedent value of earlier judicial decisions* and other interpretations. . . . In a codification law, however, the courts uphold the contrary presumption: the law is intended to remain substantively unchanged.

Id. (citing *Finley v. United States*, 490 U.S. 545, 554 (1989), and *Stewart v. Kahn*, 78 U.S. (11 Wall.) 493, 502 (1871)). *See also Theriat v. Hart*, 2 Hill. 380 (1842). The House Judiciary Committee expressed an identical intent. H.R. Rep. No. 103-180 (1993). This legislative history demonstrates that no change to the LIA was intended and, more importantly, that Congress intended to preserve earlier judicial interpretations of the LIA. By definition, that would include *Napier*.

Similarly, when Congress adopted the savings clause in 2007, it did not change 49 U.S.C. § 20701. And, as was demonstrated by the 1970 FRSA enactment and the 1994 codification, the LIA and the SAA were separately preserved, such that neither the preemption clause nor the savings clause affect locomotive design, construction, materials, or safety appliances.

Since Congress has left untouched the essence of the LIA for 100 years, any analysis of congressional

intent should focus on the intent of the 61st Congress, which enacted the BIA.[3]

In 1911, the House Committee on Interstate and Foreign Commerce indicated that boiler explosions were the main drive behind the BIA. Rep. James R. Mann (R-Ill.), who served as the committee chairman, stated that "[i]t is the belief of all people concerned, both the railroads and the employees, that the passage of this bill will materially result in the lessening of boiler explosions." 46 Cong. Rec. 2071 (1911). Rep. Joseph T. Robinson (D-Ark.) spoke of accidents caused by "defective boilers." *Id.* at 2072. There was also testimony taken by a Senate subcommittee on interstate commerce that inspections would also ensure proper maintenance of boilers to ensure proper operation as designed. S. Doc. No. 61-446 (1911). Thus, Congress was concerned with both boiler design and maintenance. The expansion of the BIA to the entire locomotive with little elaboration strongly suggests that Congress was similarly concerned with

[3] While it might strike one as analytically proper to consider the intent of the 63rd Congress, which extended the BIA to the entire locomotive, the only legislative history appears to be a one-page Senate report, which said only: "This measure provides for the inspection of the entire locomotive. Experience has shown it necessary [to safeguard] the lives of those who travel and [operate] locomotives." S. Rep. No. 63-1068 (1915). The 1924 House-sponsored restatement of the LIA noted accidents resulting from the failure of locomotive parts. H.R. Rep. No. 68-490 (1924). These statements suggest that the LIA was adopted for the same reasons supporting enactment of the BIA.

ensuring the safe design and maintenance of the entire locomotive.

This Court ruled as much in *Napier*. There, the "main question . . . is whether the [LIA] has occupied the field of regulating locomotive equipment used on a highway of interstate commerce, so as to preclude state legislation." *Napier*, 272 U.S. at 607. It noted that "Congress obviously has the power to do so." *Id.* Thus, the question presented was really whether Congress had clearly manifested its intent to exclude the States from regulating locomotives. The Court concluded that Congress so intended:

> Did the legislation of Congress manifest the intention to occupy the entire field of regulating locomotive equipment? Obviously it did *not* do so by the [SAA], since its requirements are specific. It did *not* do so by the original [BIA], since its provisions were limited to the boiler. But the power delegated to the [ICC] by the [LIA] is a general one. It extends to the design, the construction and material of every part of the locomotive. . . .

Id. at 611 (emphases added).

Napier's interpretation of congressional intent is informed by *A. Coast Line R.R. Co. v. Georgia*, 234 U.S. 280 (1914). There, the Court upheld a Georgia regulation requiring locomotives to operate with headlights at night. The Court explained that the SAA did not require headlights on locomotives, and the ICC lacked the authority to require them as a safety appliance in connection with the topics covered

under the SAA. So, the Court concluded that Congress did not intend to occupy the field of locomotive headlights under the SAA. But it noted that "Congress, when it pleases, may give the rule and make the standard to be observed on the interstate highway." *Id.* at 292. Congress enacted the LIA the year after *Coast Line*, with a simple statement that the BIA was to be extended to cover the entire locomotive. Simply put, Congress had taken the hint from *Coast Line* and supplied the rule – the ICC was to have the exclusive authority to regulate locomotive design, construction, and materials.

B. The presumption against preemption does not apply.

Nonetheless, it is argued that the Court should overrule *Napier* as an outlier in preemption jurisprudence because it did not apply the modern presumption against preemption. This argument fails to appreciate the historical justification for the presumption and why it does not apply here.

The presumption was adopted as a counterweight to the post-New Deal expansion of the Commerce Clause. Stephen A. Gardbaum, *The Nature of Preemption*, 79 Cornell L. Rev. 767, 806 (1994). "This new requirement of intent was . . . a logical result of the restructuring of American federalism that began with the New Deal in 1933 and that was judicially affirmed in 1937." *Id.* With Congress free to invade the States' previously exclusive power over intrastate

commerce, "the consequence of the preexisting preemption doctrine (established while there were still significant areas of exclusive state jurisdiction) would have been to threaten vast areas of state regulation of seemingly local matters with extinction." *Id.* Thus, the presumption against preemption in the absence of clear congressional intent became necessary. *Id.* As Congress began to act in areas that were not historically within the scope of the Commerce Clause, the presumption would help preserve the States' role in our federal system. *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658 (1993).

The presumption has no application in this case for two reasons. First, the presumption is "not triggered when the State regulates in an area where there has been a history of significant federal presence." *United States v. Locke*, 529 U.S. 89, 108 (2000) (explaining that maritime commerce is within Congress's original field of authority: "Congress has legislated in the field from the earliest days of the Republic"); *see also Ray v. A. Richfield Co.*, 435 U.S. 151 (1978). As the Court has previously observed, "[r]ailroads have been subject to comprehensive federal regulation for [now well over] a century." *United Transp. Union v. Long Island R.R. Co.*, 455 U.S. 678, 687 (1982) (citing examples dating back to 1887). And that timing coincides with the rise of railroads as the dominant form of the interstate transportation of goods and people. *Compare* McDonald, *supra*, at 1 (noting rapid growth in interstate railroad lines occurred during the 1860s and 1870s) *with* Herbert

Hovenkamp, *Regulatory Conflict in the Gilded Age: Federalism and the Railroad Problem*, 97 Yale L.J. 1017 (1988) (discussing the rise of federal railroad rate regulation in 1866). *See also* Act of Feb. 4, 1887, ch. 104, 24 Stat. 379 (an Act to regulate railroads rates) and the SAA enacted in 1893 (27 Stat. 531), which was amended in 1903 (32 Stat. 943) and again in 1910 (36 Stat. 298). From the beginning, then, Congress has determined that national uniformity "is necessary to the operation of the national rail system." *United Transp. Union*, 455 U.S. at 688. "A disruption of service [caused by a break in that uniformity] can cause serious problems throughout the system." *Id.*

Second, Congress enacted, and the *Napier* Court interpreted, the LIA against the strict division of interstate and intrastate commerce historically ascribed to the Commerce Clause. In 1915, regulating the national rail system's vehicles of transportation (locomotives) was within the traditional interstate sphere of Congress, much like regulating vessels engaging in interstate navigation was found to be within that sphere in *Gibbons v. Ogden*, 22 U.S. 1 (1824). The LIA is not an example of Congress using its expanded Commerce Clause powers to reach an area of intrastate commerce historically reserved to the States. Rather, the LIA exemplifies Congress acting in its traditional sphere of control. Even under modern preemption jurisprudence, exerting federal control to achieve national uniformity over the national rail system's vehicles of transportation does not "affect[the] basic State prerogatives [so as] to hamper

the State[s'] ability to fulfill [their] role in the Union and endanger [their] separate and independent existence." *United Transp. Union*, 455 U.S. at 687. "There is no comparable history of longstanding state regulation . . . of the railroad industry." *Id.* at 688.

C. The nature of the preempted field requires preemption of State tort actions based on locomotive design, construction, and materials.

This Court has already ruled that State juries should not be allowed to opine on locomotive design, construction, and materials. In fact, the Court did so before *Napier*. In *B&O R.R. Co. v. Groeger*, 266 U.S. 521 (1925), the widow of a locomotive engineer sued the railroad company under the FELA for what amounted to a defective-design claim when her husband was killed by an exploding boiler. She argued that the explosion was caused by an unsafe or insufficient condition in the boiler, which stemmed from the failure to install a fusible plug in the boiler's crown sheet. The Court agreed that the widow could pursue a negligent-operation claim under State tort law, but it barred any argument tying that claim to the boiler's design. *Id.* at 530-531. The Court explained that neither State courts nor State juries should be permitted to lay down rules restricting design and maintenance:

> There is a multitude of mechanical questions [regarding] the proper construction, maintenance and use of the boilers [and] other parts

> of locomotives . . . *all of which are covered by the [LIA]*. Inventions are occurring frequently . . . Comparative merits as to safety or utility are most difficult to determine. It is not for the courts to lay down rules which will operate to restrict the carriers in their choice of mechanical means by which their locomotives . . . are to be kept in proper condition. Nor are such matters to be left to the varying and uncertain opinions and verdicts of juries.

Id. (emphasis added). Yet, that is exactly what the petitioners want to do here. They want State court juries to pass on the comparative merits of safety and utility, which in turn will cause State courts to lay down rules concerning locomotive design, construction, and materials.

It may be argued that products-liability claims did not exist in the 1920s when *Groeger* was decided, and that when combined with the Court's modern inclination to preserve State tort-law claims (even when State positive law is preempted), the Court should conclude that Congress could not have manifested clear intent to preempt products-liability claims. (*See* Pet. Merits Br. 38-42, citing *Sprietsma v. Mercury Marine*, 537 U.S. 51 (2002); *English v. Gen. Elec. Co.*, 496 U.S. 72 (1990); and *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984). That argument is flawed for two reasons.

First, it proves too much. Whereas it is true that Congress could not have manifested clear intent to

preempt common-law claims that did not exist, it equally follows that Congress could not have intended to preserve that which did not exist in 1911. *Scheiding v. Gen. Motors Corp.*, 993 P.2d 996, 1001 (Ca. 2000). Congressional intent must be judged as of the time Congress acted. *Touche Ross & Co. v. Redington*, 422 U.S. 560 (1979) (noting that the Court must ascertain the intent of the 73rd Congress which passed the Securities Exchange Act in 1934). That is, would Congress *in 1911 and 1915* have intended to allow State juries to pass on locomotive equipment when it did not intend to let State legislatures and State railroad commissions do so? *Groeger* suggests not, as does the fact that such claims would conflict with Congress's desire for national uniformity. This highlights the second flaw in the petitioners' analysis.

Permitting products-liability claims would eviscerate national uniformity in the preempted field, which would be contrary to Congress's intent. This Court has ruled that common-law actions will not be preserved if they are inconsistent with the statute – "[i]n other words, the act cannot be held to destroy itself." *AT&T v. C. Office Tel., Inc.*, 524 U.S. 214, 227-28 (1998). Notably, the case that the *AT&T* Court cited for that proposition, *Tex. & Pac. R.R. Co. v. Abilene Cotton Oil Co.*, 204 U.S. 426 (1907), involved a railroad rate case that hinged upon an express savings clause, which provided that the Act did not abridge or alter common-law remedies. Instead, it only added a federal remedy to them. *Id.* at 446. Nonetheless, the Court concluded that the type of

common-law claim being asserted would render the federal law pointless. It decided that the savings clause could only save those State law claims that were consistent with the Act.

Abilene Cotton is also important for another reason. It highlights that, under the nature of field preemption prevailing in the 1910s and 1920s, Congress understood that it needed to expressly preserve common-law claims. Stated differently, Congress knew that field preemption applied to State tort law, and took express steps to save State tort law when it wanted to do so. *See* Act of Feb. 4, 1887, ch. 104, § 22, 24 Stat. 379. The absence of any similar language in the BIA, the 1915 LIA amendment, and the 1924 LIA restatement further supports that Congress did not intend to preserve State tort actions.

The petitioners cite *Industrial Accident Comm'n v. Payne*, 259 U.S. 182 (1922), as an example of the Court permitting State remedies for repair shop injuries. There, a repairman was injured while working on a train in the repair shop. The Court concluded that the FELA did not apply because the train was "nearly stripped and dismantled" at the time of the accident. *Id.* at 188. Since the FELA did not apply, the Court allowed the California Industrial Accident Commission to provide relief under the State's workers' compensation act. Importantly, however, *Payne* neither involved State tort law, nor did it involve any allegations of liability due to locomotive design, construction, or materials. *Id.* at 184. Likewise, the workers' compensation act did not purport to regulate

the design, construction, or materials of the locomotive. *California Workers' Compensation Insurance and Safety Act of 1913*, 1913 Cal. 176.

The petitioners cite *New York C. R.R. Co. v. White*, 243 U.S. 188 (1917) for the same proposition. A review of that case, however, shows that the railroad company tried to plead the FELA as a bar to the State workers' compensation law and lost because the employee was not working in interstate commerce. This was not a case involving a common-law claim, and it never involved locomotive design, construction, or materials. The LIA is never referenced.

The petitioners also mistakenly rely on, *Shanks v. DL&W R.R. Co.*, 239 U.S. 556 (1916), in which a repairman was injured while moving an overhead counter-shaft in a repair shop. He sued under the FELA only. Contrary to the petitioners' argument, this case did not discuss whether the repairman could recover under State tort law – it only addressed whether the FELA applied. The Court decided that the repairman was not engaged in interstate commerce, and he could not maintain his claim. This case, too, did not involve the LIA.

Gilvary v. Cuyahoga Valley Ry. Co., 292 U.S. 57 (1934), does not support the petitioners' position, either. There, the Court decided whether a railroad company and its employee could agree in advance of an injury that any injury claims would be pursued through the State workers' compensation program. The Court found that employees could contract away

their right to sue under FELA. Although *Gilvary* involved an allegation that a railcar lacked an automatic coupler (as required under the SAA), the employee did not argue that he was entitled to relief under a *State* standard of care.

Undeterred, the petitioners argue that this Court has previously authorized non-employees to sue under State tort-law theories to recover for violations of the LIA and SAA. This is true, but the petitioners overlook a crucial fact: none of the plaintiffs in those cases argued that State law governed the design, construction, or material of the locomotive or railcar. Instead, they argued that *federal* law supplied the standard and that the railroad company breached that standard. Such claims are not inconsistent with the federal government occupying the field of design, construction, and material for trains.

For example, in *Crane v. Cedar Rapids & I.C. Ry. Co.*, 395 U.S. 164 (1969), a non-employee was injured by the railroad's failure to maintain its freight cars with the automatic couplers required by federal law. The Court explained that the SAA provided no cause of action for injuries from non-conforming parts, and that the FELA did not apply because the person was not an employee. The Court suggested he had to recover through a State tort action for a breach of a duty imposed under *federal* law to install and maintain automatic couplers. *Id.* at 166-167 (citing *Moore v. Chesapeake & Ohio R.R. Co.*, 291 U.S. 205 (1934)). The Court never suggested that the person could pursue a State tort claim on a theory that the duty of

care regarding the part's design was governed under *State* tort-law standards.

Likewise, the Court found that States were free to give any remedy they so chose for a violation of the SAA in *Tipton v. Atchinson T&SF Ry. Co.*, 298 U.S. 141 (1936). There, the Court found there was no federal question of a State giving relief under State tort law for violation of the *federal* standards set forth in the SAA and the rules promulgated thereunder.

This brings the matter full circle. The SAA and the LIA preempt the field as to safety appliances and locomotive design, construction, and materials. State tort actions giving injured persons (not covered under FELA) the right to recover for a railroad's failure to comply with the *federal* rules governing the preempted field do not destroy Congress's goal of national uniformity. In fact, such actions serve to *enforce* national uniformity. But permitting State tort law to invade and rewrite the preempted areas of design, construction and materials through State jury verdicts would *infringe* upon national uniformity, taking such matters away from the Secretary of Transportation's exclusive regulatory authority. *Gen. Motors Corp. v. Kilgore*, 853 So. 2d 171, 178 (Ala. 2002).

The Court has previously observed this distinction in *Geier v. American Honda Motor Co.*, 529 U.S. 861, 881 (2000). There, the Court noted that if State tort law imposes a duty to install airbags on all vehicles, then it effectively becomes a mandatory State law requirement, despite the federal decision to phase in airbags during the relevant time period.

This is because tort law seeks to accomplish more than just compensation:

> "Apart from compensating victims . . . , the purpose of tort liability is to induce defendants *to conform their conduct* to a standard of care established *by the State*. A railroad equipment manufacturer found to have negligently designed a braking system, for example, is expected to modify that system to reduce the risk of injury. If the manufacturer fails to mend its ways, its negligence may be adjudged willful in the next case, prompting a substantial punitive damages award. If each State were to adopt different liability-triggering standards, manufacturers would have to sell locomotives [with] equipment [that] could be changed as they crossed state lines, or adhere to the standard set by the most stringent state. Either way, Congress's goal of uniform, federal railroad regulation would be undermined.

Scheiding v. Gen. Motors Corp., 993 P.2d 996, 1001 (Ca. 2000), *cert. denied*, 531 U.S. 958 (2000) (citations omitted) (emphases added). This is precisely the patchwork quilt the States will knit, despite contrary assurances from petitioners' amici.[4] (AAJ Br. at 14,

[4] Similarly, it is of little comfort that "there is general agreement on the standard for an unreasonably dangerous product." (AAJ Br. at 14, n. 4.). Even assuming that to be true, there are as many ways to apply a standard as there are juries. The railroads and manufacturers will be forced to comply with whatever is required by any given jury's application of the

(Continued on following page)

n. 4.) And patches to the quilt will be continuously added to cover every unique locomotive design, construction, and material in service. National uniformity could not survive in the face of such an onslaught.

This is also true as to the petitioner's failure-to-warn claim. "[S]tates could promulgate otherwise preempted safety regulations in the guise of instructional labels and then create causes of action for injured works if railroads failed to post them." *Oglesby v. Delaware & Hudson Ry. Co.*, 180 F.3d 458, 461 (2d Cir. 1999). Indeed, products-liability actions do not impose liability simply for failures to warn; *inadequate* warnings are also generally compensable. *See*, *e.g.*, *Restatement (Third) of Torts: Products Liability* § 2 ("A product is defective . . . because of inadequate instructions or warnings"). A railroad company or a manufacturer could be found liable for not providing a warning and then, after crafting and giving a warning, be found liable because a second plaintiff believes that the warning did not sufficiently warn him of the danger. This could easily lead to 50 different determinations of what kind of warning is sufficient. Some States may require pictures. Some States may require specific wording. Other States,

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standard. As sure as the United States Courts of Appeals split in how they apply rules established by this Court, juries are sure to apply the same standard in different ways. The problem is exacerbated when substituting States into the analysis; there are four times as many State jurisdictions as there are federal circuits.

like border States with bilingual populations, may require the warning to be written in two languages. Other States may require certain colors and fonts. Size and shape may also be dictated.

And, the problem does not end there. Dozens of locomotive designs exist, each with unique part configurations. Where must the warning(s) be placed? Some States may require the warnings to be posted in the roundhouse. Each roundhouse would be plastered with warnings for all sorts of locomotives and their individually tort-regulated parts (which, ironically, in the aggregate may subject a railroad company to yet another claim of inadequate warnings because the relevant warning will be lost in the sea of warnings). Other States might require the warnings to be on the locomotive. This raises yet another location question: should the warning be in the cab, on the exterior of the locomotive, or on the interior near the tort-regulated part? This in turn raises size and legibility issues because there may be different warnings mandated by the States requiring the warning to be placed on the part. How can all these warnings be squeezed into a finite area on the locomotive? Presumably, these issues, too, would be a matter of State tort law under the petitioners' theory. The answers to these questions would destroy national uniformity.

D. Even if the FRSA savings clause applies, the petitioners' claims remain preempted.

Should the Court determine that the LIA must be read as part of the FRSA, it may accept the argument

advanced by some amici that the savings provision under 49 U.S.C. § 20106(a)(2) applies. It is argued that because this section expressly permits States to adopt railroad safety laws, regulations, or orders (i.e., requirements), Congress intended to preserve State tort actions. Supporters appear to rely on *Riegel v. Medtronic, Inc.*, 552 U.S. 312 (2008), which explained that, "Congress is entitled to know what meaning this Court will assign to terms regularly used in its enactments. Absent other indication, reference to a State's 'requirements' includes its common-law duties." *Id.* at 324. This argument suffers from several flaws.

As an initial matter, *Medtronic* was decided a year after Congress amended the FRSA in 2007 to include § 20106(b)-(c). Congress could not have relied on a Court decision that had not been rendered at the time (much less back in 1970). *Medtronic* cannot be used to infer that Congress intended to include common-law claims.

It is also important that the 2007 amendment expressly saves common-law claims that had been ruled preempted by a federal district court. In fairness, this can be read in one of two ways. First, it could be construed that Congress was correcting what it believed to be an erroneous interpretation of the savings clause in § 20106(a)(2). Second, it could be construed that the 110th Congress (2007) wanted to change the 91st Congress's (1970) intent that common-law claims be preempted.

Unfortunately, the legislative history is vague. What little exists supports the idea that Congress did not intend to save State actions based on State tort standards of liability. Notably, the current § 20106(b) is different than what was originally introduced. Representative Bennie Thompson (D-Miss.) offered a broader-than-enacted version of the savings clause as an amendment to an omnibus transportation-security bill designed to implement recommendations from the 9/11 Commission less than four hours before a vote on the bill:

> Sec. 3 NO PREEMPTION OF STATE LAW
>
> (a) No Preemption of State Law. – Nothing in Section 20106 . . . preempts a State cause of action, or any damages recoverable in such an action, including negligence, recklessness, and intentional misconduct claims, unless compliance with State law would make compliance with Federal requirements impossible. Noting in section 20106 . . . confers Federal jurisdiction for such a cause of action.
>
> (b) Secretarial Power. – Section 20106 . . . preempts only positive laws, regulations or orders by executive or legislative branch officials that expressly address railroad safety or security. The Secretary [has] the power to preempt such positive enactments by [regulation].

H.R. Rep. No. 110-1401, § 3(a)-(b) (2007). Given the short notice, only three congressmen appear to have had a chance to debate its merits, two of which supported it as a way to stop "an expansive application of preemption to deprive accident victims' access to state remedies," 153 Cong. Rec. H3128 (2007), and one opposed it as departing from national uniformity: "States will be free to pass 50 different sets of safety regulations, and trains are going to have to stop at the border and comply with this, that, or the other thing . . . It is going to undo the fabric of our Nation's rail system. . . ." *Id.*

The Thompson Amendment was never enacted into law. Although passed by the House, it never cleared the Senate. Since the two chambers passed non-identical security bills, a reconciliation conference was held, and the savings clause was rewritten into its current, much narrower form. H.R. Conf. Rep. 110-259 (2007). This is important because 49 U.S.C. § 20106 as enacted does not save *all* State tort actions. It only saves those actions alleging a violation of federal standards, of private standards adopted under a federal regulation, and of a State law, regulation, or order. § 20106(b)(1)(A)-(C). Moreover, the enacted version appears to have been a compromise between Rep. Thompson's proposal and a proposal offered by the American Association of Railroads, which would have only been limited to positive federal law:

> Nothing in this section shall be construed to preclude an action under State law seeking damages for personal injury or property

> damage alleging that a party has violated a specific requirement set forth in a regulation or order issued by the Secretary. This provision shall apply to all causes of action which accrue on or after the effective date of this Act. Nothing in this provision shall otherwise affect the scope of application of this section as interpreted by the U.S. Supreme Court in *CSX Transportation, Inc. v. Easterwood* and *Norfolk Southern Railroad v. Shanklin*.

Frank J. Mastro, *Congress Clarifies the Preemptive Effect of the Federal Railroad Safety Act*, The Transp. Lawyer 40, 42 (Oct. 2007). This further suggests that Congress consciously chose to save State actions based on State and federal positive law, but not State actions based on State *tort* law. Indeed, this would give a symmetrical reading to each enacted subsection as allowing State actions to remedy violations of positive law – federal (positive) law, private rules (positively) adopted by railroad companies, and State (positive) law. Adopting the petitioners view would render § 20106(b)(1) asymmetrical, saving State actions based on federal (positive) law, private rules (positively) adopted by railroad companies, and State (positive *and common*) law. Considering that it would be another year before *Medtronic*, an asymmetrical construction is unwarranted.

But even if the Court were to construe § 20106(b)(1)(C) as saving State tort law, it does not necessarily follow that *products-liability* actions should be saved. The 2007 Amendment was passed in response to the Minot train derailment in North

Dakota, which was caused by a faulty "plug rail" in the railroad track. Frank J. Mastro, *Preemption Is Not Dead*, 37 The Transp. L.J. 1, 9 (2010). *The accident had nothing to do with locomotive design, construction, or materials. Id.* at 9, n. 56. Those injured by the derailment brought State law claims alleging that the railroad track had been negligently inspected under FRA regulations. The Eighth Circuit preempted the claims, finding that the FRA had set the standard for track inspection and compliance with those standards precluded liability. *Lundeen v. Canadian P. Ry. Co.*, 447 F.3d 606, 613-15 (8th Cir. 2006). The 2007 Amendment legislatively overruled *Lundeen* so as to afford injured parties an opportunity to argue that the *federally* required inspections were not performed competently. It does not necessarily follow that Congress intended for State tort law to supplant federal standards at the expense of national uniformity. After all, the amendment did not repeal § 20106(a), which provides that railroad safety laws "shall be nationally uniform to the extent practicable."

Nonetheless, even if one assumes that Congress intended to act more broadly to correct both an erroneous court decision *and* to broaden the types of claims injured parties could bring (including those based on State tort law), the savings clause would still not save the petitioners' claim. The statute saved only "State law causes of action arising from events or activities occurring on or after January 18, 2002."

49 U.S.C. § 20106(b)(2).[5] Here, the petitioners allege that Mr. Corson was exposed to asbestos between 1949 and 1974. (Pet. Cert. Br. at 13.) Accordingly, this action falls outside the savings clause, even affording it the broadest interpretation possible.

CONCLUSION

The Nation needs national uniformity in the regulation of locomotive design, construction, and materials. Congress recognized as much when it enacted the LIA, and so did this Court when it decided *Napier*. The Court should affirm *Napier*'s continuing vitality and affirm the Third Circuit's decision to preempt State tort actions based on locomotive design, construction, and materials.

Even if the Court is persuaded that the FRSA modified the LIA and decides to apply the FRSA's

[5] This is further evidence that a legislative compromise reconciled the railroad industry's desire to limit liability exposure to 2007 with Rep. Thompson's desire to leave liability to State law limitations periods (as presumed from his proposal's lack of an effective date). The compromise provided a five-year liability window tied to the Minot accident prompting the amendment. Combined with the internal symmetry that a "positive law only" reading yields and with the rejection of Rep. Thompson's proposal to preempt only State positive law, the short liability window makes an even stronger case that Congress believed, both before and after 2007, that allowing the States to apply their own common-law standards would thwart its goal of national uniformity.

preemption and savings clauses, it should hold that those clauses do not save State products-liability actions from preemption. The clauses save State tort actions based upon the failure to adhere to federal and State positive law, not breaches of State common law. Finally, even if the Court is persuaded otherwise, the petitioners' claims fall squarely outside the January 18, 2002 liability commencement date.

Respectfully submitted,

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