No. 10-879

IN THE

Supreme Court of the United States

GLORIA GAIL KURNS, Executrix of the Estate of George M. Corson, Deceased, *et al.*,
Petitioners,

v.

RAILROAD FRICTION PRODUCTS CORP., *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals For the Third Circuit

BRIEF OF THE WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether the Locomotive Inspection Act, 49 U.S.C. § 20701, *et seq.*, preempts state-law tort claims involving the design, construction, and safety of railroad locomotive equipment.

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INTERESTS OF *AMICUS CURIAE*

The Washington Legal Foundation (WLF) is a non-profit public interest law and policy center with supporters in all 50 states.[1] WLF devotes a substantial portion of its resources to defending free-enterprise, individual rights, and a limited and accountable government.

To that end, WLF has appeared before this Court and other federal courts in numerous cases involving preemption issues to point out the economic inefficiencies often created when multiple layers of government seek simultaneously to regulate the same business activity. *See, e.g., Brusewitz v. Wyeth,* 131 S. Ct. 1068 (2011); *Riegel v. Medtronic, Inc.* , 522 U.S. 312 (2008); *Bates v. Dow AgroSciences LLC*, 544 U.S. 431 (2005). WLF is concerned that individual freedom and the American economy both suffer when state law, including state tort law, imposes upon industry an unnecessary layer of regulation that frustrates the objectives or operation of specific regulatory regimes, such as (in this case) federal regulation of railroad safety.

WLF is also concerned that courts not seek to displace Congress as the principal arbiter of the proper balance between federal and state regulation of specific industries. Congress adopted the Locomotive Inspection Act, 49 U.S.C. § 20701 *et seq.*, for the purpose of

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[1] Pursuant to Supreme Court Rule 37.6, WLF states that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than WLF and its counsel, made a monetary contribution intended to fund the preparation and submission of this brief. All parties have consented to this filing; blanket letters of consent have been lodged with the Court.

regulating the design, construction, and materials of locomotives and their parts and appurtenances. In a decision issued more than 85 years ago, this Court interpreted the LIA as an expression of Congress's desire to broadly preempt the field of locomotive safety, thereby preempting state efforts to regulate that same field. Congress implicitly ratified that interpretation in the ensuing decades by leaving intact the LIA's key features at the same time that it was addressing other issues related to railroad safety. The regulatory regime established by the LIA has worked well for a century. WLF believes that if the federal government is to alter that regulatory regime, the impetus for doing so should come from Congress, not from the courts.

STATEMENT OF THE CASE

Extensive federal regulation of railroad safety extends well back into the 19th century. Beginning in the early 20th century, Congress extended that regulation to include creation of a federal tort remedy for injured railroad workers. The Federal Employers' Liability Act (FELA), 45 U.S.C. § 51 *et seq*., was adopted in 1908 in response to concerns that state tort remedies were inadequate to provide compensation to the growing number of railroad employees injured while on the job. FELA created a "comprehensive scheme" for providing such compensation. *Norfolk S. Ry. Co. v. Sorrell*, 549 U.S. 158, 165 (2007). In order to avoid a patchwork of overlapping compensation schemes, FELA provided that the law should be the *exclusive* compensation scheme for covered railroad workers, thereby "preempting state tort remedies." *Id.* FELA provides a federal cause of action for an employee of the railroad who is injured on

the job due to employer negligence.

In 1911, Congress adopted the LIA to address safety concerns regarding locomotives. The LIA delegates to the federal government a general power to regulate the design, construction, and material of every part of the locomotive, tender, and of all appurtenances. Pet. App. 9a, *quoting Napier v. Atlantic Coast Line Railroad Co.*, 272 U.S. 605, 611 (1926). In adopting the LIA, Congress intended "to occupy the field" of locomotive safety, thereby precluding state regulation of that field. *Id*. at 613. The LIA did not, of course, preempt the federal compensation scheme established by FELA; employees could recover damages incurred as a result of a railroad's failure to comply with federal locomotive safety regulations established pursuant to the LIA.

In 1970, Congress passed a comprehensive railroad safety statute, the Federal Railroad Safety Act (FRSA), Pub. L. No. 91-458, 84 Stat. 971 (1970). The FRSA was enacted "to promote safety in every area of railroad operations and reduce railroad-related accidents and incidents." 49 U.S.C. § 20101. In doing so, Congress made clear that it was not displacing the LIA's regulation of locomotives, which Congress determined had been operating effectively and should be continued. Rather, the purpose of the FRSA was to expand federal authority to areas of railroad safety not already covered by existing laws.

Petitioners are representatives of the estate of George Corson, who worked for the Chicago, Milwaukee, St. Paul & Pacific Railroad (the "Soo Line") between

1947 and 1974. Pet. App. 3a. After retiring from the railroad, Corson was diagnosed with malignant mesothelioma. *Id.* Petitioners allege that he contracted the disease due to on-the-job exposure to asbestos, a material found in the insulation of locomotive boilers and brake shoes with which he worked as a railroad employee. *Id*. In 2007, he filed suit in Pennsylvania state court against 59 defendants, including his former employer, seeking damages under both FELA and state common law.

Because one defendant was a Pennsylvania corporation, the case was not at first eligible for removal to federal court. But following the dismissal of claims against that defendant in 2008, Respondents Railroad Friction Products Corporation (RFP) and Viad Corp. removed the case to federal court on the basis of diversity of citizenship. RFP and Viad were named as defendants based on allegations that they supplied the Soo Line with asbestos-laden locomotive parts to which Corson was exposed.

The federal district court granted summary judgment to RFP and Viad. Pet. App. 22a-39a. It cited *Napier* in support of its holding that the state law product liability claims asserted by Corson, now represented by his estate and widow following his death, were preempted by federal law.

The Third Circuit affirmed. *Id.* at 1a-22a. It unanimously held that "the plaintiffs claims are preempted by the LIA." *Id*. at 6a. Citing *Napier*, the Court held that "the LIA preempts a broad field relating to the health and safety of railroad workers, including

requirements governing the design and construction of locomotives, as well as equipment selection and installation." *Id.* at 11. Finding that Congress adopted the LIA in order to avoid a patchwork regulatory system that would require railroads either to adhere to the regulations of the State imposing the strictest safety standards or to change locomotive parts as their trains crossed state lines, the court concluded that Congress intended to preempt common law tort suits to avoid just such a patchwork system. *Id.* at 12a-14a. The court noted that its preemption decision was consistent with all but one of the appellate courts that had addressed the LIA's effect on common law tort suits. *Id*. at 14a-16a.

The Third Circuit rejected Petitioners' assertion that, in adopting the FRSA in 1970, Congress intended to narrow the scope of the LIA's preemption. Pet. App. 18a-21a. The court concluded that the purpose of the FRSA was to "maintain broad federal regulatory authority and ensure nationwide uniformity of locomotive standards." *Id*. at 19a. Citing the FRSA's statement that "[l]aws, regulations, and orders related to railroad safety . . . shall be nationally uniform to the extent practicable," 49 U.S.C. § 20103(a), the court concluded that in passing the FRSA, Congress did not intend to disturb the existing framework of federal preemption established by the LIA. *Id*. at 20a.

SUMMARY OF ARGUMENT

WLF agrees with RFP and Viad that the LIA occupies the field of locomotive equipment design and manufacture, and thus broadly preempts common law

tort claims that challenge the design and manufacture of locomotive equipment. WLF writes separately to address two claims raised by Petitioners.

First, Petitioners ask the Court, when interpreting the LIA, to place a thumb on the scale, creating a presumption against preemption of tort remedies when, as here, the result of preemption is to deprive claimants of the ability to seek recourse against *every one* of the entities that may have contributed to their injuries. Petitioners assert that Congress should be presumed not to intend such preemption, in the absence of clear statutory language to that effect. That assertion is without merit. There is no reason to depart from normal rules of statutory construction simply because those rules might lead to a conclusion that claims against *some* defendants are preempted. At most, the Court has on occasion suggested a reluctance to conclude that Congress has intended to deprive injured plaintiffs of *all* means of obtaining compensation for their injuries.

But the Court need not address that reluctance here because the Third Circuit decision does not ascribe to Congress such an intent, nor does the decision have the effect of denying claimants effective avenues of relief. The vast majority of those seeking compensation for railroad-related injuries are, like Corson, current or former railroad employees. FELA provides an extremely generous federal-law compensation scheme to all such individuals. While the LIA bars railroad employees from *also* seeking compensation from a small number of third parties involved in the design and manufacture of locomotive equipment, there is little

reason to think that FELA will not provide railroad workers with adequate compensation if they have suffered an on-the-job injury due to the negligence of others. In particular, it is difficult to imagine cases in which a railroad could be deemed non-negligent in failing to provide its employees with warnings regarding on-the-job dangers, and yet a third party not present at the job site could be faulted for failing to provide those same warnings.

Second, in addressing the preemption issue, the Court ought to bear in mind that it is up to Congress, not the courts, to determine when the need for a nationwide regulatory policy warrants preemption of federal law. It has been accepted law since 1926 that Congress, in adopting the LIA, intended to occupy the field of locomotive design and manufacture, thereby preempting state regulation of that field. The overwhelming majority of state and federal courts has determined over the course of decades that the LIA's preemptive effect extends to state common law tort actions.

Petitioners and their supporting *amici* argue that *Napier* is out of step with modern case law and urge the Court to overrule or modify *Napier*'s broad field preemption holding. WLF respectfully submits that any effort to modify *Napier* would be inappropriate at this late date. The rationale for adhering to principles of *stare decisis* is at its strongest when, as here, a court decision is based on construction of a federal statute and Congress has seen fit to leave that statute in place for many years thereafter. It is largely irrelevant whether current justices would have decided *Napier* the same

way had they been sitting on the Court in 1926. The salient fact is that *Napier*'s field preemption holding has been the law of the land for 85 years. If a change is to be made now, Congress – whose job it is to determine when to preempt state laws – is the appropriate body to make that change. It has had numerous opportunities to amend the LIA to eliminate its field preemption component. On each such occasion, Congress has chosen to leave the LIA in place. In particular, when Congress adopted the FRSA in 1970, it made clear that while it sought to increase regulatory oversight of other areas of railroad operations in order to increase safety, it left the LIA intact because it believed that the LIA was effectively regulating the design and manufacture of locomotives.

ARGUMENT

I. THERE IS NO REASON TO PLACE A THUMB ON THE SCALE BY PRESUMING THAT CONGRESS WOULD NOT HAVE INTENDED TO DEPRIVE PETITIONERS OF THE RIGHT TO SUE EVERY CONCEIVABLE DEFENDANT

Petitioners claim that preemption of state tort suits by the LIA would deprive some plaintiffs of the opportunity to sue every possible defendant. They insist that this Court's precedent urges a presumption against preemption when doing so would deny all meaningful relief to an injured worker. To the extent that such a presumption exists at all, this Court has deemed it applicable when, as here, the federal regulatory scheme leaves injured workers with ample avenues for relief.

A. When Construing the LIA, We Look to the Language and Statutory Framework in Order to Discern Congress's Intent, Which is The Ultimate Touchstone. Petitioners' Presumption Argument Runs Directly Counter to That Rule of Statutory Construction

In determining a preemption issue, the question of whether a state law or rule is preempted by federal law turns on the intent of Congress, which is the "ultimate touchstone." *Cipollone v. Liggett Group*, 505 U.S. 504, 516 (1992). The intent of Congress can be determined if it is "explicitly stated in the statute's language or implicitly contained in its structure and purpose." *Id. quoting Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977).

Petitioners' presumption that Congress would have intended for injured workers to be able to sue every conceivable defendant requires the Court to place a thumb on the scale in interpreting the statutory scheme. This runs counter to the rules of statutory construction. There is no presumption that Congress, when passing the federal railroad safety statutes, intended injured workers to be able to sue every possible defendant. Petitioners confuse a reluctance to deny all meaningful relief to injured workers with the unsupported belief that Congress would, without saying so, permit injured workers to sue every defendant. The statutory context in which the LIA must be read reveals no congressional intent to permit every conceivable means of recovery.

B. To the Extent That There is Any Presumption of the Sort Asserted by Petitioner, It Is Limited to a Presumption That Congress Would Be Reluctant to Deny an Injured Party *All* Meaningful Relief - *i.e.*, to Deny an Injured Party a Right to Sue Anyone

Petitioners assert that Congress would never have intended to deprive injured workers of all remedies without expressly saying so. *See* Pet. Br. 43. The Government's brief also asserts, without citing any case law on point, that it would be unjust to deny suits against all defendants. U.S. Br. 20. Rather than refusing to find preemption when some means of judicial recourse are unavailable, the Court has been suspicious of preemption only when "all means of judicial recourse" would be cut off. *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 251 (1984). The Court has "expressed doubt that Congress would quietly preempt product-liability claims without providing a federal substitute." *Brusewitz v. Wyeth*, 131 S. Ct. 1068, 1080 (2011). But these doubts do not come into play when, as here, other adequate avenues for relief are available.

In *Silkwood*, federal law provided no cause of action, whether implied or explicit, for an injured nuclear worker. While Congress intended federal safety regulations to preempt state regulation, it did not intend to preempt state tort claims when doing so would deprive a worker of *all* means of judicial recourse. *Silkwood*, 464 U.S. at 251. Likewise, in *Medtronic, Inc., v. Lohr*, the Court expressed a reluctance to interpret the MDA as preempting state tort claims because doing

so would have prevented most, if not all, plaintiffs from suing an industry that the MDA intended to regulate out of concern for consumer safety. 518 U.S. 470, 487 (1996). The Court stated that Congress would have been unlikely to preempt all state tort claims under these circumstances. But the Court has never suggested that Congress should be presumed to have intended to permit plaintiffs to sue *all* possible defendants.

C. The *Silkwood*/*Medtronic* Presumption (to the Extent It Exists) Is Inappalicable Here Because Petitioner (and Every Railroad Worker) Has an Effective Cause of Action Under FELA Against His Employer

Mr. Corson – like every railroad employee – had a cause of action under FELA. An injured railroad worker has a remedy when he is injured on the job. FELA provides an *exclusive* remedy for injured railroad workers. 45 U.S.C. § 51. FELA provides a federal cause of action for employees of railroads against their employers, displacing all state causes of action for employment related-injuries. *Norfolk S. Ry v. Sorrell*, 549 U.S. 158, 165 (2007) ("In response to mounting concern about the number and severity of railroad employees' injuries, Congress in 1908 enacted FELA to provide a compensation scheme for railroad workplace injuries, pre-empting state tort remedies.") FELA took the limited remedies available against the railroads and third-parties in state court and adopted a federal remedial scheme that is extremely generous to railroad workers.

At common law, remedies for railroad workers

were limited, and often it was very difficult to prevail in state court. Congress knew just how difficult it was for railroad workers to prevail, and "it came to be recognized that, whatever the rights and duties among persons generally, the industrial employer had a special responsibility toward his workers, who were daily exposed to the risks of the business and who were largely helpless to provide adequately for their own safety." *Kernan v. American Dredging Co.*, 355 U.S. 426, 431 (1958). For most employees in the workforce, workers' compensation was the method for recovery against their employer. *Id*. For railroads, "FELA … provides the framework for determining liability for industrial accidents." *Id*. It is intended to be a broad framework, providing a liberal recovery to injured workers that can be "developed and enlarged to meet changing conditions and changing concepts of industry's duty toward its workers." *Id*. at 432.

The Court has acknowledged that FELA was created to shift the burden of injury from the employee, who otherwise had trouble recovering anything for injuries sustained in such a dangerous profession, to the carrier, who is in the unique position – with "special responsibility" – to protect their own employee. When passed, it was "the conception of this legislation that the railroad was a unitary enterprise, its economic resources obligated to bear the burden of all injuries befalling those engaged in the enterprise arising out of the fault of any other member engaged in the common endeavor." *Sinkler v. Missouri Pac. R.R. Co.*, 356 U.S. 326, 330 (1958). This expense of railroad injury was recognized by Congress to be the burden of the railroad and "FELA seeks to adjust that expense equitably between the

worker and the carrier." *Norfolk & Western Railway Co. v. Ayers*, 538 U.S. 135, 165 (2003), *quoting Sinkler*, 356 U.S. at 329. Before adoption of FELA, the "'harsh and technical' rules of state common law had "made recovery difficult or even impossible" for injured workers." *CSX Transportation Inc., v. McBride*, 131 S. Ct. 2630, 2638 (2011).

As the Court recently reaffirmed in *McBride*, the "inquiry in these cases today rarely presents more than the single question whether negligence of the employer played any part, however small, in the injury or death which is the subject of the suit." *Rogers v. Missouri Pacific R. Co*, 352 U.S. 500, 508 (1957). This is an extraordinarily easy standard to meet. As Dean Prosser wrote, FELA "reduces the extent of the negligence required, as well as the quantum of proof necessary to establish it, to the 'vanishing point.'" William Lloyd Prosser, *The Law of Torts* 80, at 536 (4th Ed. 1971). Even the slightest bit of circumstantial evidence will suffice. *Rogers*, 352 U.S. at 508 ("The burden of the employee is met, and the obligation of the employer to pay damages arises, when there is proof, even though entirely circumstantial, from which the jury may with reason make that inference.").

Petitioners admit that Mr. Corson and other railroad workers have a cause of action available to them against the railroad that employed them for failure to warn regarding the dangers of asbestos. Pet. Br. 42. While the claim was dismissed in the state court on summary judgment grounds, there was an effective cause of action for Mr. Corson and his estate under the FELA. JA99.

The question in *Medtronic* and *Silkwood* was whether *any remedy* existed at all if preemption of state tort suits were found. Because some means of judicial recourse exists for the Petitioners under FELA (a broad remedy with the slightest burden), the unfairness of which the United States and Petitioners complain results from a failure to prevail under an available remedy against the railroad rather than an inability to sue anyone, anywhere.

D. There Is No Merit to Petitioners' Claim That An "Effective Remedy" Requires That Railroad Workers Be Permitted to Sue Both Their Employer and Locomotive Manufacturers

Petitioners also claim that there will be instances in which a railroad worker is unable to sue anyone but the manufacturer because the railroad is not negligent whatsoever. This is simply an implausible claim. There is nothing in the record to suggest that the manufacturer had superior knowledge that would have allowed it to warn Mr. Corson while the railroad would have been unable to do the same.

1. A "failure to warn" claim will almost always be easier to prove against an employer than against a product manufacturer, and thus a regime allowing only the former type of suit is a more than adequate remedy

The Government's brief observes what is patently

obvious: the railroad could provide a warning in the workplace to the workers regarding the dangers of using products with asbestos. U.S. Br. 27. It is absurd to say that the employer – who Congress recognized is in the best position to provide safety for their employee, shifting the burden of damages to the railroad – was less well-positioned than distant, off-site manufacturers to provide warnings.

Indeed, "[i]n the workplace setting, the product manufacturer often cannot communicate the necessary safety information to product users in a manner that will result in reduction of risk. Only the employer is in a position to ensure workplace safety by training, supervision and use of proper safety equipment." Victor E. Schwartz, *Warnings in the Workplace: The Need for a Synthesis of Law and Communication Theory*, 52 U. Cin. L. Rev. 38, 43 (1983). Because the employer is on the scene and knows how their own shop is run, they are "often more knowledgeable than the manufacturer about the particular use to which the product is being put." *Id*.

The employer, in other words, is in the best position to provide for their worker - as the Congress recognized when creating an exclusive remedy under FELA for railroad workers. *See also* Victor E. Schwartz, *Effective Communication of Warnings in the Workplace: Avoiding Injuries in Working with Industrial Materials*, 73 Mo. L. Rev. 1, 13 (2008) ("Product liability law seeks to place liability with the entity in the best position to prevent the harm, and, in the workplace, the sender in the best position to effectively communicate a warning that prevents harm is the direct employer.")

Doctors and railroad workers knew as early as the 1920's – before Mr. Corson began working for the railroad – that asbestos caused cancer or was posing a danger to workers. Barry I. Castleman, *Asbestos: Medical and Legal Aspects* 1, 6-10 (4th ed. 1996). In 1935 - before Mr. Corson began working - an industry meeting of the Association of American Railroads concluded that because dust posed a health risk, railroads should "have frequent analyses made of the dust content of the air at different times during the work hours." *Proceedings of the Fifteenth Annual Meeting of the Medical and Surgical Section* 90 (Association of American Railroads, Atlantic City, NJ 1935), *cited by Sanders v. CSX Transp.* , 2000 U.S. Dist. LEXIS 22707, *20 (S. Dist. of Geo. 2000). There were other AAR reports from 1932, 1933, 1937, 1939, 1940, 1941, 1951, 1952, 1953, 1957, and 1958 showing it is well-established that industry knew that the threat from asbestos was real and had been counseled by experts on safety measures that should be taken. *Fulmore v. CSX Transp.*, *Inc.*, 252 Ga. App. 884, 897, 557 S.E.. 2d 64, 75 (2001) (overruled by *Ayers*, 538 U.S. 135 (2003) on unrelated grounds). This Court has even held that the railroad industry can be liable in damages under FELA for using asbestos, specifically for emotional distress damages. *Ayers*, 538 U.S. at 157. There is no reason to believe that manufacturers were in any better position than railroads to prevent harm from asbestos.

2. FELA's "slightest negligence" standard means that railroads will almost always be liable for workplace injuries suffered by railroad workers, while workers will

have a more difficult time prevailing against a manufacturer

In the specific context of railroads, the Court has affirmed the common law "broad proposition that a railroad has the nondelegable duty to provide its employees with a safe place to work…" *Shenker v. Baltimore & Ohio Railroad Co.*, 374 U.S. 1, 7 (1964). "A railroad has a duty to use reasonable care in furnishing its employees with a safe place to work. That duty was recognized at common law [and] is given force through the Federal Employers' Liability Act…" *Atchison, T. & S., F.R. Co. v. Buell*, 480 U.S. 557, 558 (1997). If a manufacturer's failure to provide a warning in a place under the complete control of the employer caused an injury to the worker, then how did a railroad not engage in the slightest negligence by not providing a safe place to work?

Without the railroad's knowledge or permission, the manufacturer could not have "post[ed] warnings in repair shops themselves." *Id*. To insist that a railroad may not be negligent for failing to train or warn its employees under FELA's slightest negligence standard - the "vanishing point" as Dean Prosser put it - but the manufacturer's warning on a box or part would have protected workers is inaccurate. A cause of action under FELA against the railroad is more than adequate in light of the far more difficult standards of proof under state common law against manufacturers, who also would be able to raise defenses not available under FELA.

E. LIA Preemption Would Not Leave Those

Other Than Railroad Employees Without an "Effective Remedy"

1. The Court does not need to decide whether non-employees' tort claims are preempted, but many such workers would have an adequate remedy under workers' compensation

The Court simply does not need to decide the full extent of LIA preemption outside the context of railroad employees because this case is brought solely on behalf of an injured railroad worker. Even still, the vast majority of workers outside of the railroad industry are covered by workers' compensation, and there is no indication that the LIA was intended to preempt workers' compensation claims for such non-employees. For all such workers, including workers employed by independent contractors doing work on a railroad, there is no reason to believe that Congress would have deemed the workers' compensation remedy not to be an "effective remedy," especially given that it is considered to be an effective remedy for other types of workers.

FELA is presumed to provide adequate protection for railroad workers such that states have excluded railroad workers from their own workers' compensation laws. *Hilton v. South Carolina Public Railways Comm'n*, 502 U.S. 197, 202 (1991). In *Hilton*, the Court was concerned that in the absence of a remedy such as FELA, an injured worker who worked for a state-owned railroad would be unable to recover anything because workers' compensation did not apply. *Id*. at 202. States

had excluded railroad workers from such claims because FELA was considered adequate for them. *Id*. But conversely, if workers' compensation had applied to railroad workers, the Court may not have seen the necessity in expanding FELA's coverage to state-owned railroad workers, as it too would have been considered an adequate remedy for them, as it is for the rest of the labor force. Workers' compensation for non-employees would be adequate.

2. Railroads may privately contract for contribution in their purchase contracts with product manufacturers

If railroads themselves are held liable under FELA and wish to retain the right to sue product manufacturers for contribution, there is no reason that they cannot do so by including a contribution or indemnity provision in their purchase contracts. The LIA preempts state "regulation" of locomotives, but a state does not engage in regulation when it simply permits private contracting parties to sue under state contract law to enforce a mutually-agreed-upon contribution provision.

Railroads are in privity of contract with manufacturers and thus are in a position to protect themselves by entering into contracts that provide them with a right of contribution. Contractual common law claims are not "state regulation" of locomotives. To the extent that the LIA preempts state tort claims, no assertion is made by any party that it preempts private contractual claims between the railroad and

manufacturers. For instance, they could sue for breach of warranty, whether an express warranty made or implied warranties of merchantability or fitness for a particular purpose. These are remedies commonly found in all state commercial codes, modeled after the Uniform Commercial Code's Article 2.

While FELA prohibits employer-employee contracts for indemnity, it does not prohibit other such contracts. *See* 45 U.S.C. § 55. The right to contract for contribution or indemnity can be found in quasi-contract for unjust enrichment or, more applicable here, as a contractual right. Andrew Kull, *The Source of Liability in Indemnity and Contribution*, 36 Loy. L.A. Rev. 927, 927 (2003) ("Except when it is based on a contract, express or implied-in-fact, liability for indemnity or contribution is usually described as a species of restitution based on unjust enrichment.").

No party has suggested that "state regulation" of locomotive safety – specifically state tort suits under the question presented – includes private contractual agreements or state statutory remedies. The railroads have an adequate means of protecting themselves after an adverse FELA decision, if they so choose.

II. THE FEDERAL RAILROAD SAFETY ACT DID NOT CHANGE THE PREEMPTIVE EFFECT OF THE LOCOMOTIVE INSPECTION ACT AS DECIDED BY THIS COURT IN *NAPIER*

Petitioners urge this Court to hold that *Napier* should be read in such a way that would permit state

tort suits despite the clear command of the Court that, through the LIA, "Congress has... occupied the entire field" of locomotive safety and that it did not "intend that there might still be state regulation of locomotives." *Napier v. Atlantic Coast Line Railroad Co.*, 272 U.S. 605 (1926). While assertions of policy reasons and general historical changes in preemption doctrine are well-intentioned, they cannot be used to meet the heavy burden of reversing the Court's prior statutory construction decisions or the weight of consistent application of that construction by nearly every court that has addressed it.

Moreover, the Court should not be persuaded by the claim that the Federal Railroad Safety Act intended to change the relationship between state and federal regulation of locomotives. Contrary to the reading of the legislative history by *amici*, the Congress never intended the FRSA to change anything in the law relating to the Locomotive Inspection Act, and even later recodified the law without substantive change, including the key provision of the LIA at issue in this case.

The legislative history and intent of the FRSA, if anything, reaffirmed the holding in *Napier* and the broad field preemption of locomotive safety regulations for which it stands. Congress has had eighty-five years to alter the decision through legislation, yet time and again they have chosen to move lever in favor of a national regulation of the railroad industry. This leaves no room for state tort suits relating to locomotive safety in light of *Napier* and the actions of Congress.

A. The Principles of *Stare Decisis* Should Guide the Court in Rejecting a Challenge to a Decision That Is 85 Years Old

In 1926, this Court handed down a broad field preemption decision in *Napier v. Atlantic Coast Line Railroad Co.*, 272 U.S. 605 (1926). For eighty-five-years, this decision has stood the test of time. It has been cited by the Court as precedent numerous times for a variety of reasons throughout those many years. Yet Petitioners seek to have this Court narrow that precedent in a way that contradicts more than three-quarters of a century of understanding of the federal government's broad powers over locomotive safety. Given the principles of *stare decisis*, overruling or altering *Napier* for policy reasons is not tenable.

The doctrine of *stare decisis* is "of fundamental importance to the rule of law." *Welch v. Texas Dep't of Highways & Public Transp.*, 483 U.S. 468, 494 (1987). Unlike questions of constitutional law, decisions relating to construction of a statute are to be given much greater deference because "the legislative power is implicated." *Patterson v. McLean Credit Union*, 491 U.S. 164, 172 (1989). The party seeking to overturn a prior decision of statutory construction bears "the heavy burden of persuading the Court that changes in society or in the law dictate" an overruling of the precedent. *Vasquez v. Hillery*, 474 U.S. 254, 266 (1986). This is the wise policy because, regardless of the soundness of the rule of law, "it is more important that the applicable rule of law be settled than that it be settled right," even when it is a "matter of serious concern, provided that a correction can be had by legislation." *Burnet v.*

Coronado Oil & Gas Co., 285 U.S. 393 , 406-07 (1932) (Brandeis, J., dissenting).

Petitioners have simply not met that "heavy burden" of showing that Napier should be overruled or looked upon in a different light. With the exception of the Pennsylvania Supreme Court, not a single federal court of appeals or state supreme court has held that the LIA does not preempt state tort suits. *See Norfolk & Western Ry. Co. V. Pa. Pub. Util. Comm'n*, 413 A.2d 1037 (Pa. 1980). Even that decision was impliedly overruled by a summary affirmance of a lower district court decision holding that *Norfolk & Western* was incorrect in light of *Napier*. *Consolidated Rail Corp. V. Pa. Pub. Util. Comm'n*, 536 F. Supp. 653 (E.D. Pa. 1982), *aff'd mem.*, 696 F.2d 981 (3d Cir. 1982), *aff'd mem.*, 461 U.S. 912 (1983). At least six federal courts of appeals and five state courts of last resort have held, consistently, that the LIA preempts state tort suits. RFPC Reply Br. to Pet. 9. To say that the law of the LIA's field preemption has changed or been called into question by anyone other than one state court is incorrect.

Given the Court's own reliance on *Napier* and its broad preemptive effect,[2] revisiting the question would be inconsistent with concepts of the rule of law, which require "continuity over time" such that "a respect for precedent is, by definition, indispensable." *Planned*

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[2] *See, e.g., Southern Ry. Co. v. Lunsford*, 297 U.S. 298, 402 (1936); *California v. Taylor*, 353 U.S. 553, 560 n.8 (1957); *Bethlehem Steel Co. v. New York State Labor Relations Bd.*, 330 U.S. 767, 772 (1947); *Guss v. Utah Labor Relations Bd.*, 353 U.S. 1, 10 (1950); *Ray v. Atl. Richfield Co.*, 435 U.S. 151, 157 (1978).

Parenthood v. Casey, 505 U.S. 833, 854 (1992). Moreover, given the possible reliance interests that manufacturers of locomotives and their parts have in releasing one product for the entire nation based on uniform standards, overturning eighty-five years of precedent and consistent decisions would have the effect of subjecting these manufacturers to many more state tort suits for a variety of claims simply because the Secretary of Transportation has not issued a specific regulation in that area relating to locomotive safety. If the Petitioners are correct, then future state tort suits will be permissible against manufacturers who designed, manufactured, or sold products that are used in locomotives under the assumption that it was the federal government, not state juries, that determined the safety of locomotive parts.

Opening up these manufacturers to such suits when every federal court of appeals and nearly every state court has said that such claims are preempted would violate one of the principles of *stare decisis*. *Id*. One of the questions involved in stare decisis analysis is "whether the rule is subject to a kind of reliance that would lend a special hardship to the consequences of overruling and add inequity to the cost of repudiation." *Id*. *See also United States v. Title Ins. & Trust Co.*, 265 U.S. 472, 48 (1924) (discussing the effect of overruling rules relating to statutory construction having a retrospective effect compared to legislatures changing the law only for the future). As the Court noted in one of its early *stare decisis* opinions:

> Judicial decisions affecting the business interests of the country should not be disturbed except for

> the most cogent reasons, certainly not because of subsequent doubts as to their soundness. The prosperity of a commercial community depends, in a great degree, upon the stability of the rules by which its transactions are governed. If there should be a change, the legislature can make it with infinitely less derangement of those interests than would follow a new ruling of the court, for statutory regulations would operate only in the future.

National Bank v. Whitney 103 U.S. 99, 102 (1881). There is little reason for the Court to overturn its precedent on the basis of a new and novel interpretation of the LIA or on the basis of policy rationales. *Stare decisis* and respect for consistency in the rule of law are too important to so easily toss aside the overwhelming weight of authority by this Court and others. If a change is to be made, it should come from the Congress.

B. The FRSA Did Not Alter The Preemptive Effect of the Locomotive Inspection Act as Decided in *Napier*

The Petitioners make several arguments for why *Napier* is no longer good law, but WLF will only focus on one of these arguments. Namely, the idea that the passage of the Federal Railroad Safety Act of 1970 altered the preemptive scope of the Locomotive Inspection Act is simply untrue and a poor reading of the legislative history. In fact, the FRSA only further shows the Congress' commitment to the LIA as existing and consistent federal regulation of locomotive safety.

While the Court and the Congress have trended in favor of conflict preemption over the last few decades, there is no need to assume that field preemption is not applicable, especially when prior decisions of the Court have held that a statute does, in fact, preempt a field. The FRSA did not change the preemptive effects of the LIA, contrary to what certain *amici* have contended; the FRSA was enacted to maintain existing law and expand the regulation of the railroad in order to create national uniformity of the laws. Existing law that preempted state regulation of the railroads was deemed to be sufficient, and the FRSA was viewed as only supplementing that existing regulation with additional federal action in other areas or state regulation in its absence. The so-called "savings clause" of the FRSA is at issue:

> A State may adopt or continue in force a law, regulation, or order related to railroad safety or security until the Secretary...prescribes a regulation or issues an order covering the subject matter of the State requirement.

49 U.S.C. § 20106. What the savings clause does not mention, but the legislative history does, is that the savings clause applies to future areas of rail safety, not those that had already been regulated.

One brief contends that the legislative history implies that the FRSA was intended to supplement existing law by allowing more room for state regulation of the railroad *at the expense of existing federal law*. *See* NARVE Br. 15. This is a misreading of the legislative history. The text from the committee report

directly contradicts this claim. As the committee stated, the LIA and existing federal law had "served well" and would be "continued without change." H. Rep. No. 91-1194, 1970 U.S.C.C.A.N. at 4105.

Continuing the law without change would have, at the time, meant that Congress was not only aware of the broad field preemption over locomotive safety, but also considered it to be acceptable. After all, it had served the nation well. The legislative history and the text of the statute itself indicate that the goal of the FRSA was to create an even broader, national comprehensive regulatory scheme while preserving a role for state participation *where the federal government had not already regulated*. Ever since the passage of the LIA and the decision in *Napier*, the federal government had regulated the field of locomotive safety. *See* Viad Supp. Br. 19, n.7. The FRSA did not change this.

Given that the legislative history indicates that the LIA would continue unchanged and a further statement from the committee as to what existing law holds, ("[a]t the present time where the federal government has authority, with respect to rail safety, it preempts the field"), it is certain that the Congress did not intend the law to change as it was currently formulated: where the government had been granted authority, it preempted the field. *Amici* for Petitioners read this portion of the legislative history as though Congress intended to take away field preemption from the LIA and change it into conflict preemption, in all areas of federal railroad safety. But this is not so. It is a poor reading of the legislative history and ignores the simple, logical nature of the FRSA itself, which intended

to expand federal regulation of the railroad industry, not contract it.

Noting a distinction between "federal authority" and "federal action" actually proves that the Congress did not intend to change anything as to existing law. NARVE Br. 16. Where there was current federal authority, the law would continue to preempt state regulation. Where there was *not* an existing grant of federal *authority* through existing federal law – which had served well and would continue unchanged – then federal *action* would conflict preempt state action. The FRSA cannot be read to have taken the field preemption of the LIA, a law that was to continue unchanged, and turned it into conflict preemption. Only future, currently unregulated areas of rail safety would be analyzed under the conflict preemption regime. The goal was to "promote safety in every area of railroad operations," 49 U.S.C. § 20101, with a mixture of current and future federal regulation and with "provisions for state participation to assure a much higher degree of railroad safety in the years ahead." H. Rep. No. 91-1194, 1970 U.S.C.C.A.N. at 4105. Examples of such state participation would be regulation in areas where the government had not already regulated, and namely, the provision of the act entitled "State participation" relating to investigative and surveillance activities. 49 U.S.C. § 20105.

Additionally, Petitioners themselves acknowledge that there were specific laws, such as the LIA, that permitted the federal government to regulate in an area prior to 1970, before the FRSA was enacted. Pet. Br. 7-8. These laws had limited oversight in certain areas,

such as locomotives, but they nonetheless granted broad authority to the federal government in those areas. The FRSA did not change the scope of those laws, including the LIA. As the Ninth Circuit found in *Marshall v. Burlington N., Inc.*, "the language and structure of the [FRSA] indicate a congressional intent to leave the [LIA] intact, including its preemptive effect." 720 F.2d 1149, 1153 (9th Cir. 1983). As then-Judge Kennedy wrote, "[t]he logical inference from this structure is that Congress intended to leave unchanged the force and effect of existing federal regulatory statutes." *Id.*

While the Government disagrees with Respondents regarding the scope of the LIA's preemption with respect to certain tort claims, the Government does agree that *Napier* field preemption encompasses some tort claims. U.S. Br. 12. The Government also agrees that when Congress adopted the FRSA, it did not intend to change federal law with respect to locomotive safety. Noting that the operative language of the FRSA "expressly states that it "supplement[s]" existing laws and regulations, instead of replacing or modifying them," the Government correctly argues that the "legislative history confirms that Congress did not intend the FRSA to alter the preemptive effect of existing federal safety statutes." Br. for the United States as *Amicus Curiae* at 19-20, *John Crane Inc., v. Atwell*, No. 10-272 (U.S. filed May 6, 2011). The brief also cites legislative history that the Petitioners and *amici* do not: the House report expressed the intent "that the existing statutes continue to be administered and enforced as if this legislation had not been enacted." HR Rep. No. 1194, 91st Cong., 2d Sess. 8 (1970).

The FRSA was recodified in 1994, eliminating certain portions of the LIA that were no longer needed, while retaining the basic provision on lomocotive safety that was at issue in *Napier* and in this case. 49 U.S.C. § 20701. Contrary to what the brief for NARVE argues, these recodifications were not intended to change existing law or the preemptive effect of the LIA's remaining provisions. NARVE Br. 22. In fact, they state earlier on in their brief that the purpose of the recodification was to simply restate the laws "in comprehensive form" and to do so "without substantive change." NARVE Br. 5, (*quoting* S. Rep. No. 103-265, 1).

Allowing states to regulate in an area where they could not regulate prior to the 1970 enactment of the FRSA, such as the design and manufacture of locomotives and their safety, would not serve the express purpose of the FRSA to provide a uniform, national system. 49 U.S.C. § 20106(a) ("Laws, regulations, and orders related to railroad safety and laws, regulations, and orders related to railroad security shall be nationally uniform to the extent practicable."). As the legislative history indicates, the "savings clause" was not intended to displace the broad field preemption of existing federal law, such as the LIA.

With the Congress finding that laws such as the LIA had served well and would not change, it is impossible to argue that any "savings clause" saved something that had not even existed as a realm for state regulation. The savings clause clearly applies to additional areas of rail safety that had not already been regulated prior to 1970 and were not subsequently

regulated through future federal action. The Congress did not intend to eliminate field preemption of existing federal law *sub silentio*, especially given protestations from those who enacted the law otherwise.

CONCLUSION

Amicus curiae Washington Legal Foundation requests that the Court affirm the the judgment below.

Respectfully submitted,

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