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 CORPORATION, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

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QUESTION PRESENTED

Whether the Locomotive Inspection Act, 49 U.S.C. 20701 *et seq.*, preempts state-law tort claims based on an individual's exposure to asbestos-containing materials during the repair of locomotives at railroad maintenance facilities.

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INTEREST OF THE UNITED STATES

This case presents the question whether the Locomotive Inspection Act, 49 U.S.C. 20701 *et seq.*, preempts state-law tort claims based on an individual's exposure to asbestos-containing materials during the repair of locomotives at maintenance facilities. The United States has a substantial interest in the regulation of the railroad industry and the proper scope of preemption under federal railroad safety laws. In response to this Court's invitation, the United States filed a brief on May 6, 2011, urging this Court to grant the petition for writ of certiorari in *John Crane, Inc.* v. *Atwell,* No. 10-272, which presents the same question as this case presents.

STATEMENT

1. a. The federal government has long exercised a significant role in regulating the railroad industry. At the turn of the 20th century, recognizing "that a uniform regulatory scheme [was] necessary to the operation of the national rail system," *United Transp. Union* v. *Long Island R.R.*, 455 U.S. 678, 688 (1982), overruled in part on other grounds, *Garcia* v. *San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985), Congress enacted a series of laws regulating railroad operations. In 1887, for example, Congress enacted a law requiring, *inter alia*, that railroads charge "reasonable and just" fees for services rendered in relation to interstate commerce. See Interstate Commerce Act, ch. 104, 24 Stat. 379. Congress also enacted a series of laws—known collectively as the Safety Appliance Act (SAA)—imposing on railroads specific equipment-related safety requirements. See Act of Mar. 2, 1893, ch. 196, 27 Stat. 531 (requiring, *e.g.*, "common carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes and their locomotives with driving-wheel brakes"), as amended by Act of Mar. 2, 1903, ch. 976, 32 Stat. 943 (requiring, *e.g.*, that whenever "any train is operated with power or train brakes, not less than fifty per centum of the cars in such train shall have their brakes used and operated by the engineer of the locomotive drawing such train"), as supplemented by Act of Apr. 14, 1910, ch. 160, 36 Stat. 298 (requiring, *e.g.*, that all railroad cars subject to the Act "be equipped with secure sill steps and efficient hand brakes").

b. In 1911, Congress enacted the Boiler Inspection Act, ch. 103, 36 Stat. 913, which imposed a general requirement that locomotives be safe to operate. The Act made it unlawful for common carriers "to use any loco-

motive engine propelled by steam power in moving interstate or foreign traffic unless the boiler" and its appurtenances were "in proper condition and safe to operate" in "active service." § 2, 36 Stat. 913-914. Shortly thereafter, Congress amended the Boiler Inspection Act to apply the safety requirement to "the entire locomotive and tender and all parts and appurtenances thereof," Act of Mar. 4, 1915, ch. 169, § 1, 38 Stat. 1192. As amended, the statute became known as the Locomotive Inspection Act (LIA), codified at 49 U.S.C. 20701 *et seq*. In its current form, the LIA provides:

> 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;
>
> (2) have been inspected as required under this chapter and regulations prescribed by the Secretary of Transportation under this chapter; and
>
> (3) can withstand every test prescribed by the Secretary under this chapter.

49 U.S.C. 20701. The LIA's coverage of "parts and appurtenances" extends to "[w]hatever in fact is an integral or essential part of a completed locomotive, and all parts or attachments definitely prescribed by lawful order" under the LIA. *Southern Ry.* v. *Lunsford*, 297 U.S. 398, 402 (1936).[1]

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[1] A "locomotive" is "a piece of on-track equipment * * * (1) With one or more propelling motors designed for moving other equipment; (2) With one or more propelling motors designed to carry freight or passenger traffic or both; or (3) Without propelling motors but with one

The LIA originally vested in the Interstate Commerce Commission (ICC) the "authority to prescribe by rule specific devices, or changes in the equipment" used on locomotives, "where these are required to remove 'unnecessary peril to life or limb.'" *United States* v. *Baltimore & Ohio R.R.*, 293 U.S. 454, 462-463 (1935); see § 6, 36 Stat. 915. In 1966, that authority was transferred to the Secretary of Transportation (Secretary) by the Department of Transportation Act, Pub. L. No. 89-670, § 5(e)(1)(E) and (F), 80 Stat. 939; see 49 U.S.C. 20701(2). The Secretary may impose civil penalties for violations of the LIA. 49 U.S.C. 21302(a) (2006 & Supp. III 2009). The LIA also provides, as a result of amendments made in 1988, see Rail Safety Improvement Act of 1988, Pub. L. No. 100-342, § 14(7)(B), 102 Stat. 633, that "[a]n act by an individual that causes a railroad carrier to be in violation is a violation." 49 U.S.C. 21302(a)(1). Thus, a manufacturer violates the LIA if its products cause a railroad carrier to violate the LIA.[2]

c. Although regulation of railroads under the LIA and other early laws was extensive, it was not comprehensive, and Congress eventually deemed additional federal regulation necessary. In 1970, Congress enacted

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or more control stands [*i.e.*, panels of controls used by an engineer to control the locomotive]." 49 C.F.R. 229.5. A "tender" is "[a] car attached to a locomotive, for carrying a supply of fuel and water." *Webster's New International Dictionary of the English Language* 2126 (1917).

[2] In a regulation adopted after the events at issue in this case, the Federal Railroad Administration made explicit that manufacturers of railroad parts are covered by the LIA. See 49 C.F.R. 229.7(b) (noting that "[a]ny person," including a "manufacturer * * * of railroad equipment, track, or facilities," who causes a violation of the LIA is subject to civil penalties), first promulgated at 53 Fed. Reg. 28,601 (1988).

the Federal Railroad Safety Act (FRSA), 49 U.S.C. 20102 *et seq.*, to "promote safety in every area of railroad operations and reduce railroad-related accidents." 49 U.S.C. 20101. The FRSA directs the Secretary, "as necessary," to "prescribe regulations and issue orders for every area of railroad safety supplementing laws and regulations in effect" when the FRSA was enacted. 49 U.S.C. 20103(a). Under authority delegated by the Secretary, the Federal Railroad Administration (FRA) has promulgated extensive safety standards. See 49 C.F.R. Pts. 227, 229, 230, 232 and 238.

The FRA also regulates working conditions connected to railroad operations, pursuant to the LIA and other federal railroad statutes. The FRA does not, however, exercise statutory authority over working conditions in railroad maintenance facilities; in such facilities, railroads must comply with the Occupational Safety and Health Act of 1970 (OSH Act), 29 U.S.C. 651 *et seq.* The OSH Act authorizes the Secretary of Labor to promulgate standards for safe and healthful employment and workplaces. 29 U.S.C. 652(8), 653(b)(1), 655. The OSH Act also specifies that it does not "enlarge or diminish or affect in any other manner the common law or statutory rights, duties, or liabilities of employers and employees under any law." 29 U.S.C. 653(b)(4).

d. Congress has also enacted laws to promote safety and provide remedies for railroad employees specifically. In 1908, Congress enacted the Federal Employers' Liability Act (FELA), 45 U.S.C. 51 *et seq.*, which provides a federal cause of action for injured railroad employees against their employers. Under FELA, a railroad employer is liable to its employees for injuries resulting from its negligence. 45 U.S.C. 51. If an employee is injured because his railroad employer has vio-

lated the LIA or another federal safety statute, the railroad's negligence is established as a matter of law under FELA, and the defenses of contributory negligence and assumption of risk do not apply. 45 U.S.C. 53, 54; *Urie* v. *Thompson*, 337 U.S. 163, 188-189 (1949).

2. Under the Supremacy Clause, state laws that "interfere with, or are contrary to," federal law are invalid and preempted. *Gibbons* v. *Ogden*, 22 U.S. (9 Wheat.) 1, 211 (1824). Federal law may preempt state law expressly, or preempt it implicitly when the state law conflicts with the federal law or when Congress intends the federal law to "occup[y] the field." *Crosby* v. *National Foreign Trade Council*, 530 U.S. 363, 372 (2000). Under field preemption, state law is preempted "where it regulates conduct in a field that Congress intended the Federal Government to occupy exclusively." *English* v. *General Elec. Co.*, 496 U.S. 72, 79 (1990). Field preemption may be found when a "scheme of federal regulation [is] so pervasive as to make reasonable the inference that Congress left no room * * * to supplement it," or when "the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject." *Pacific Gas & Elec. Co.* v. *State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 204 (1983) (citation omitted). Finally, conflict preemption occurs "where compliance with both federal and state regulations is a physical impossibility," *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U.S. 132, 142-143 (1963), or where "[state] law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941).

a. Although the LIA does not expressly address its effect on state laws, this Court long ago held that the

LIA "was intended to occupy the field" of "regulating locomotive equipment used on a highway of interstate commerce, so as to preclude state legislation." *Napier* v. *Atlantic Coast Line R.R.*, 272 U.S. 605, 607, 613 (1926). In *Napier*, railroads challenged Georgia and Wisconsin statutes that "prohibit[ed] use within the State of locomotives not equipped with" certain devices —in Georgia, an automatic door to the engine's firebox, and in Wisconsin, a curtain enclosing the engine cab. *Id.* at 607, 609-610. The ICC had not required railroads to install either device. *Id.* at 609.

This Court held in *Napier* that the LIA preempted these state laws because it "was intended to occupy the field" of "regulating locomotive equipment." 272 U.S. at 607, 613. The Court reasoned that "the power delegated to the Commission by the [LIA] [was] a general one" and "extend[ed] to the design, the construction and the material of every part of the locomotive and tender and of all appurtenances." *Id.* at 611. The Commission's power, the Court explained, included the authority "not merely to inspect" but also "to prescribe the rules and regulations by which fitness for service shall be determined." *Id.* at 612; see *ibid.* (noting that "the Commission sets the standard" for whether a locomotive is "'in proper condition' for operation"). Thus, although the Commission had issued no specific regulations regarding firebox doors or cab curtains, "[t]he broad scope of [its] authority" precluded the state requirements. *Id.* at 613.

Although the LIA thus displaces any state-law standard of care governing the fitness for use of locomotives, tenders, and their parts and appurtenances, it does not displace any state-law cause of action for a party injured by a violation of the LIA. Rather, an injured party may bring a state common-law tort action (to the extent such

action is not precluded by some other federal law, such as FELA with respect to suits by railroad employees), and the substantive standard applied in such case is the safety standard the LIA prescribes. See *Tipton* v. *Atchison, Topeka & Santa Fe Ry.*, 298 U.S. 141, 150-151 (1936); see also *Moore* v. *Chesapeake & Ohio Ry.*, 291 U.S. 205, 215 (1934) (SAA); cf. *Silkwood* v. *Kerr-McGee Corp.*, 464 U.S. 238, 249-256 (1984) (Congress's preemption of the field of nuclear safety concerns does not preclude state tort remedies for those injured by nuclear incidents).

b. The FRSA expressly addresses the preemptive effect of regulations issued under its provisions. After stating that "[l]aws, regulations, and orders related to railroad safety * * * shall be nationally uniform to the extent practicable," 49 U.S.C. 20106(a)(1) (Supp. III 2009), the FRSA provides:

> A State may adopt or continue in force a law, regulation, or order related to railroad safety * * * until the Secretary * * * prescribes a regulation or issues an order covering the subject matter of the State requirement. A State may adopt or continue in force an additional or more stringent law, regulation, or order related to railroad safety * * * when the law, regulation, or order—
>
> (A) is necessary to eliminate or reduce an essentially local safety * * * hazard;
>
> (B) is not incompatible with a law, regulation, or order of the United States Government; and
>
> (C) does not unreasonably burden interstate commerce.

49 U.S.C. 20106(a)(2) (Supp. III 2009); see *CSX Transp., Inc.* v. *Easterwood,* 507 U.S. 658 (1993) (discussing predecessor version of FRSA preemption provision that is substantantively the same as the current provision). Section 20106(b), enacted in 2007 as an amendment to Section 20106, clarifies that "[n]othing in this section shall be construed to preempt" actions under state law seeking damages based on a party's failure to comply with a federal standard of care established by a federal regulation; with a party's own plan, rule, or standard created pursuant to a federal regulation; or with a state law, regulation, or order permitted by Section 20106(a)(2). 49 U.S.C. 20106(b)(1) (Supp. III 2009).

3. a. From 1947 to 1974, George Corson worked as a welder and machinist repairing locomotives in railroad maintenance facilities. Pet. App. 23a n.1; J.A. 120. Much of his work required him to remove insulation from locomotive boilers and to replace brake shoes on locomotives. *Id.* at 3a. After he retired, Corson was diagnosed with malignant mesothelioma, the only known cause of which is exposure to asbestos. *Ibid.* Before his death in 2008, Corson and his wife filed suit in Pennsylvania state court against various entities, including respondents, seeking damages for injuries allegedly caused by Corson's exposure to asbestos contained in the insulation and brake shoes he handled, as well as in other locomotive parts with which he worked. *Id.* at 2a-3a, 23a. Petitioners are Corson's widow and the executor of his estate. *Id.* at 3a. Respondent Railroad Friction Products Corporation (RFPC) sold and distributed the brake pads that petitioners allege contained asbestos; respondent Viad Corporation is an alleged successor in interest to the company that manufactured other parts petitioners allege contained asbestos. *Ibid.* Viad

moved for summary judgment on the ground that the asserted claims were preempted by federal law, but the state court denied that motion. *Ibid.*

b. After the state court granted summary judgment in favor of most of the original defendants on non-preemption grounds, including a defendant whose presence in the case had defeated diversity jurisdiction, respondents removed the case to federal district court. Pet. App. 3a-4a. Respondents then filed motions seeking summary judgment on preemption grounds. *Id.* at 4a. The district court granted the motions, concluding that the LIA preempted petitioners' state-law claims for products liability and negligence. *Ibid.*; *id.* at 22a-39a. Relying on this Court's decision in *Napier*, the district court held that the LIA occupies the field of regulating locomotives and locomotive parts used in interstate commerce. *Id.* at 4a, 26a-29a. The court rejected petitioners' argument that the LIA preempts only state regulation of locomotives that are "in use," and therefore does not preempt claims involving the installation, repair, and removal of locomotive parts in a repair shop. *Id.* at 5a, 30a-31a.

c. The court of appeals affirmed. Pet. App. 6a-21a. The court concluded that this Court's decision in *Napier* dictated 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 11a. The court reasoned that "Congress's goal of uniform railroad equipment regulation would clearly be impeded by state product liability suits against manufacturers, the purpose of which is, in part, to persuade defendants to comply with a standard of care established by the state." *Id.* at 14a. The court

agreed with petitioners that liability under the LIA "only exists if the locomotive was in use at the time of the accident," but concluded that that limitation "has no impact on the scope of preemption." *Id.* at 10a n.5.

SUMMARY OF ARGUMENT

The Locomotive Inspection Act imposes a uniform nationwide standard of care governing the safety of locomotives, tenders, and their parts and appurtenances for use on railroad lines. This Court held long ago that, in enacting the LIA, Congress intended to occupy the field of regulating the safety of locomotive equipment used on highways of interstate commerce, and that state regulation of that subject is therefore preempted. The LIA's substantive safety standard thus governs liability in any state common-law negligence action regarding whether a locomotive is safe to operate.

In determining that the LIA occupies the field of locomotive safety, this Court has made clear—as the statute itself makes clear—that the standard of care imposed by the LIA governs only locomotives that are in use. *Napier* v. *Atlantic Coast Line R.R.*, 272 U.S. 605, 607, 613 (1926). It does not apply to locomotives that are non-operational, such as locomotives undergoing repairs at a maintenance facility. The Secretary's authority to issue regulations pursuant to the LIA is similarly limited to the promulgation of regulations governing whether locomotives, tenders, and their parts and appurtenances are safe to operate. Because the scope of the regulation under the LIA is coextensive with the scope of the field preempted by the statute, the preempted field does not include claims related to whether a locomotive or locomotive part was safe to repair in a railroad maintenance shop. The court of ap-

peals therefore erred in concluding that petitioners' claims are within the field preempted by the LIA.

Some of petitioners' claims may nevertheless be preempted under principles of conflict preemption because they would stand as an obstacle to the LIA's objective of uniform nationwide standards governing the safety of locomotives for use. Petitioners allege that locomotive parts containing asbestos are unreasonably dangerous in all of their uses. Such a claim is likely to be preempted because it amounts to a claim that a locomotive containing such parts is not safe to operate, which could result in different States' imposition of different rules governing when a locomotive is safe to use. Such a claim would stand as an obstacle to achievement of the LIA's uniformity purpose. Petitioners also allege, however, that respondents were negligent in failing to warn the decedent about how to protect himself when working with asbestos-containing products in repair shops. Such a claim likely would not be preempted because it does not speak to the safety for use of locomotives, tenders, or their parts and appurtenances.

ARGUMENT

This Court held in *Napier* v. *Atlantic Coast Line R.R.*, 272 U.S. 605, 607, 613 (1926), that the LIA was "intended to occupy the field" of "regulating locomotive equipment used on a highway of interstate commerce, so as to preclude state legislation."[3] The text of the statute and this Court's early cases construing both the statute

[3] Although petitioners suggested in their petition for a writ of certiorari (Pet. 36-40) that this Court should overrule *Napier* and "abandon[] the doctrine of implied federal field preemption" more generally, they do not appear to renew that claim in their merits brief, see Pet. Br. 20-31.

and the federal government's authority to promulgate regulations to implement it make clear that the standard of care imposed by the LIA applies only to locomotives and tenders that are in use. Because the scope of the preempted field cannot be broader than the scope of the regulated field, see *United States* v. *Locke*, 529 U.S. 89, 111 (2000), claims concerning injuries sustained while a locomotive was not operative are outside the scope of the field preempted by the LIA. But claims that fall outside the preempted field might nevertheless be precluded under principles of conflict preemption if they stand as an obstacle to any purpose or objective of the LIA.

A. Petitioners' Claims Are Not Within The Field Preempted By The Locomotive Inspection Act

The court of appeals erred in holding (Pet. App. 12a-16a) that the field occupied by the LIA encompasses claims that do not concern whether a locomotive was safe to operate. The LIA regulates only the safe use on railroad lines of locomotives or tenders and their parts and appurtenances. The field the statute preempts is coextensive with the field the statute regulates. The preempted field thus does not include tort claims based on injuries arising while locomotives are not in use.

1. The LIA applies only to the use on railroad lines of a locomotive or tender and its parts and appurtenances

The LIA provides that "[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 * * * are in proper condition and safe to operate without unnecessary danger of personal in-

jury." 49 U.S.C. 20701.[4] The text of the statute thus makes clear that its safety requirements apply only to the "use" of a locomotive or tender "on [a] railroad line." *Ibid.* The specified standard of care—that locomotives or tenders and their parts and appurtenances be "in proper condition and safe *to operate*"—similarly indicates that the LIA governs safety only during use or operation. *Ibid.* (emphasis added).

This Court has interpreted the reach of the statute, and the scope of the ICC's authority under the statute, in precisely this manner. In *Baltimore & Ohio Railroad* v. *Groeger*, the Court stated that the LIA "made unlawful" the "*use* of boilers unless safe *to operate* as specified." 266 U.S. 521, 529 (1925) (emphasis added); see *id.* at 527 (noting that carrier's "duty to have the boiler in a safe condition to operate so that it could be used without unnecessary peril to its employees was absolute and continuing" under LIA); *id.* at 529 (LIA requires that "boiler [be] in proper condition and safe to operate"). And in *Napier*, the Court stated that the ICC had authority "to prescribe the rules and regulations by which fitness *for service* shall be determined," and that those rules and regulations established whether a locomotive

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[4] Corson's alleged injuries arose between 1947 and 1974, during which time the LIA's substantive provision stated: "It shall be unlawful for any carrier to use or permit to be used on its line 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, that the same may be employed in the active service of such carrier without unnecessary peril to life or limb, and unless said locomotive, its boiler, tender, and all parts and appurtenances thereof have been inspected from time to time in accordance with the provisions of [specified sections] and are able to withstand such test or tests as may be prescribed in the rules and regulations hereinafter provided for." 45 U.S.C. 23 (1946).

was "'in proper condition' *for operation*." *Napier*, 272 U.S. at 612 (emphasis added); see *United States* v. *Baltimore & Ohio R.R.*, 293 U.S. 454, 462-463 (1935). The conclusion that the LIA applies only when a locomotive or tender is in use also accords with this Court's interpretation of the SAA, which similarly regulates the "use" of vehicles on "railroad lines," 49 U.S.C. 20302. See *Brady* v. *Terminal R.R.*, 303 U.S. 10, 13 (1938) (holding that the SAA applied because the railroad car that injured the plaintiff was "in use").[5]

The ICC's own interpretation of the LIA also confirms the in-use limitation on the scope of the LIA's substantive safety provisions. In response to a 1922 order from the Senate, the ICC filed a report stating that "it is the 'use' of a locomotive not found to be in proper condition and safe to operate, and not the condition itself, which is a violation of the law." ICC, *Inspection of Locomotive Boilers: Report of the Commission to the Senate*, 73 I.C.C. 761, 763 (Aug. 29, 1922). That interpretation by the agency authorized (at the time) to enforce

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[5] The federal courts of appeals have also uniformly held, in FELA cases alleging negligence based on violations of the LIA, that "[w]hether the LIA applies turns on whether the locomotive was 'in use.'" *Wright* v. *Arkansas & Mo. R.R.*, 574 F.3d 612, 620 (8th Cir. 2009). Based on the "in use" limitation, the courts have consistently ruled that the LIA does not govern "injuries directly resulting from the inspection, repair, or servicing of railroad equipment located at a maintenance facility." *Angell* v. *Chesapeake & Ohio Ry.*, 618 F.2d 260, 262 (4th Cir. 1980); *e.g., McGrath* v. *Consolidated Rail Corp.*, 136 F.3d 838, 842 (1st Cir. 1998); *Crockett* v. *Long Island R.R.*, 65 F.3d 274, 277 (2d Cir. 1995); *Steer* v. *Burlington N., Inc.*, 720 F.2d 975, 976-977 (8th Cir. 1983); *Estes* v. *Southern Pac. Transp. Co.*, 598 F.2d 1195, 1198-1199 (10th Cir. 1979); *Tisneros* v. *Chicago & N.W. Ry.*, 197 F.2d 466, 467-468 (7th Cir.), cert. denied, 344 U.S. 885 (1952). See also *Brady*, 303 U.S. at 13 (suggesting that a railroad car is not "in use" when it "has reached a place of repair").

the statute and to promulgate regulations implementing its mandate is entitled to deference. See *Illinois Cent. R.R.* v. *ICC*, 206 U.S. 441, 454 (1907) (noting that the "[C]ourt has ascribed to [decisions of the ICC] the strength due to the judgments of a tribunal appointed by law and informed by experience.").

2. The scope of the field the LIA preempts is coextensive with the scope of the field the LIA regulates

Because the LIA's standard of care does not govern liability for claims based on injuries arising from repairs to locomotives at maintenance facilities, those claims are not within the field preempted by the statute. See *Locke*, 529 U.S. at 111 (explaining that the scope of the field preempted by Title II of the Ports and Waterways Safety Act is coextensive with the scope of the activity regulated by that Title).

a. The decision in *Napier* supports that conclusion. The Court in *Napier* framed the question before it as "whether the [LIA] has occupied the field of regulating locomotive equipment *used* on a highway of interstate commerce, so as to preclude state legislation." 272 U.S. at 607 (emphasis added). The Court's holding that Congress intended the LIA to have such field-preemptive effect was based on "[t]he broad scope" of the ICC's regulatory authority under the statute. *Id.* at 613. The Court determined that the state requirements at issue—which regulated the design and features of in-use locomotives—fell within the preempted field because they were "within the scope of the authority delegated to the Commission," which was to set the standards governing when a locomotive is "fit[] *for service*" and "'in proper condition' *for operation*." *Id.* at 611-612 (emphasis added). Because Congress had vested in the ICC the "power to specify the sort of equipment to be *used* on

locomotives," *id.* at 612 (emphasis added), the state-law requirements at issue were within the preempted field.

Although respondents apparently agree that the LIA's duty of care covers only operational locomotives, tenders, and their parts and appurtenances, they have argued that the preempted field is broader because the regulatory authority granted to the Secretary (and originally to the ICC) is broader. See Viad Cert. Stage Supp. Br. 5-7; RFPC Cert. Stage Supp. Br. 3-5. But in so arguing, respondents misconstrue this Court's discussion in *Napier* of the ICC's—now the Secretary's—authority under the LIA, which is limited to prescribing rules governing the safety of locomotives for use and operation. See *Napier*, 272 U.S. at 612 (explaining that a locomotive engine was "not 'in proper condition' for operation" unless it complied with the rules promulgated by the ICC pursuant to the LIA). In particular, respondents rely on the statement in *Napier* that "the power delegated to the [ICC] by the [LIA] is a general one [that] extends to the design, the construction, and the material of every part of the locomotive and tender and of all appurtenances." *Id.* at 611. It is certainly true that the Secretary may prescribe safety rules governing "the design, the construction, and the material of every part of the locomotive and tender and of all appurtenances"; but such rules govern only whether the locomotive, tender, and parts and appurtenances, as designed and constructed, are safe to use or operate on a railroad line. See 49 U.S.C. 20701; *Napier*, 272 U.S. at 607, 612. And respondents are correct that any particular locomotive subject to the safety rules promulgated by the Secretary pursuant to the LIA will inevitably come in and out of use over time. But the substantive reach of the LIA, and of the Secretary's authority to promulgate

rules implementing it, extends only to whether a locomotive is "safe *to operate* without unnecessary danger of personal injury." 49 U.S.C. 20701 (emphasis added).[6]

b. The conclusion that the preempted field is coextensive with the regulated field also makes practical sense. Categorically preempting all state-law tort suits, even when the LIA does not govern the conduct giving rise to the injury, would leave several categories of injured persons without a remedy. Although the LIA preempts state substantive standards of care governing the use of locomotives, tenders, and their parts and appurtenances, see *Groeger*, 266 U.S. at 523, it does not preempt state common law causes of action for damages that are based on violations of the federal standard of care established by the LIA. The LIA—like the SAA—does not itself supply a cause of action. See *Urie* v. *Thompson*, 337 U.S. 163, 188 (1949); *Tipton* v. *Atchison, Topeka & Santa Fe Ry.*, 298 U.S. 141, 147-148, 150-151 (1936). Instead, States are "at liberty to afford any appropriate remedy for breach of the duty imposed" by the LIA, *id.* at 148, unless the state action is preempted by a differ-

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[6] Respondent RFPC has supported its argument that the scope of the regulated field under the LIA extends beyond operational locomotives and tenders and their parts and appurtenances by noting (RFPC Cert. Stage Supp. Br. 6) that the Secretary has required warning labels on railroad equipment. But the regulations RFPC cites do not support its argument. Two of the regulations apply by their terms to locomotives that are being "operate[d]" or are "in service." 49 C.F.R. 210.27, 229.113. A third cited regulation applies to railroad freight cars, which are not locomotives, tenders, or their parts and appurtenances. 49 C.F.R. 215.9(a). And two of the four cited regulations were adopted pursuant to the Secretary's authority under both the LIA and the much broader FRSA. See 49 C.F.R. Pt. 229, p. 441 (2010).

ent federal law.[7] *E.g.*, *Crane* v. *Cedar Rapids & Iowa City Ry.*, 395 U.S. 164 (1969) (state-law tort suit by non-railroad employee based on violation of duty imposed by SAA); *Fairport, Painesville & E. R.R.* v. *Meredith*, 292 U.S. 589 (1934) (same); *Herold* v. *Burlington N., Inc.*, 761 F.2d 1241, 1245-1247 (8th Cir.) (recognizing a state-law cause of action based on a violation of the LIA), cert. denied, 474 U.S. 888 (1985). It would therefore make little sense to preempt state-law causes of action that do not even involve the standard of care imposed by the LIA, and are for that reason outside the preempted field of substantive safety standards.

In the same vein, although FELA provides employees of railroad carriers with a cause of action against their employers for all negligence actions, regardless of whether the LIA applies, FELA does not provide a cause of action to independent contractors and employees of third parties. See *Kelley* v. *Southern Pac. Co.*, 419 U.S. 318, 323-324 (1974). Thus, an independent contractor or other non-railroad employee improperly exposed to asbestos dust in a locomotive maintenance workshop would be left without recourse for his injuries. He would have no claim under FELA because he is not a railroad employee. And, if respondents are correct, the independent contractor also would have no state-law tort claim against either the railroad or the manufacturer of the injurious products because those claims would be preempted by the LIA even though the LIA's substantive safety standards do not govern non-operational locomotives.

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[7] For example, FELA provides a federal cause of action for railroad employees against their employers that displaces state-law causes of action for employment-related injuries. See *Norfolk S. Ry.* v. *Sorrell*, 549 U.S. 158, 165 (2007).

In addition, FELA does not provide even railroad employees with a cause of action against manufacturers of locomotives and locomotive parts. See 45 U.S.C. 51. Thus, if a railroad employee was injured by a defectively manufactured part while repairing a locomotive, but the railroad carrier was not itself negligent, the employee would be left without a remedy.[8] Depriving an injured individual of a remedy for an injury that occurred outside the field in which the LIA preempts state substantive law may be justified if allowing the remedy would prevent the LIA from achieving its purposes (see pp. 22-29, *infra*), but it is not justified absent that kind of conflict.

The FRA's regulatory practice lends further support to the conclusion that the field preempted by the LIA does not reach state law governing claims for injuries occurring during repairs to non-operational locomotives. Although the LIA does not authorize the FRA to regulate hazards posed by the repair process, the FRA has broad authority to regulate those hazards under the

[8] Similarly, if the preempted field were as broad as respondents contend, railroads apparently would be deprived of a contribution remedy against manufacturers of locomotive parts if a railroad employer was found under FELA to be negligent in the injury of a repair shop employee and some or all of that negligence was attributable to a manufacturer. See *Engvall* v. *Soo Line R.R.*, 632 N.W. 2d 560, 569-571 (Minn. 2001) (holding that railroad has state-law cause of action for contribution against manufacturer based on violation of the LIA); see also *Northwest Airlines, Inc.* v. *Transport Workers Union*, 451 U.S. 77, 86-88 (1981) ("At common law there was no right to contribution among joint tortfeasors. In most American jurisdictions, however, that rule has been changed either by statute or by judicial decision. Typically, a right to contribution is recognized when two or more persons are liable to the same plaintiff for the same injury and one of the joint tortfeasors has paid more than his fair share of the common liability.") (footnotes omitted).

FRSA. See 49 U.S.C. 20103(a) (authorizing the Secretary to regulate "every area of railroad safety"). The FRA has not, however, generally chosen to exercise its authority under the FRSA to regulate safety and health hazards at railroad maintenance facilities. Rather, the FRA has generally deferred to the Occupational Safety and Health Administration (OSHA), focusing its regulations instead on railroad operations—the movement of equipment over railroad lines. See 43 Fed. Reg. 10,583-10,590 (1978) (notice of termination of rulemaking and policy statement clarifying that FRA will continue to regulate working conditions closely associated with operational locomotives but will leave to OSHA the task of regulating working conditions in other areas of the railroad industry).[9] Thus, OSHA's rules governing workplace safety generally, rather than railroad-specific

[9] Petitioners argued below that the FRSA narrowed the scope of the field preempted by the LIA because it provides that a State "may adopt or continue in force a law, regulation, or order related to railroad safety" until the Secretary "prescribes a regulation or issues an order covering the subject matter of the State requirement." 49 U.S.C. 20106(a)(2) (Supp. III 2009). The court of appeals correctly rejected that argument, Pet. App. 18a-20a, and petitioners do not renew it in this Court. The operative language of the FRSA expressly provides that it "supplement[s]" existing laws and regulations, instead of replacing or modifying them. 49 U.S.C. 20103(a). In addition, the FRSA's stated intent is that "[l]aws, regulations, and orders related to railroad safety * * * be nationally uniform to the extent practicable." 49 U.S.C. 20106(a)(1) (Supp. III 2009). Because the FRSA was expressly designed to maximize national uniformity in laws regulating railroad safety, it would make little sense to interpret the statute as authorizing States to enact differing, and potentially conflicting, safety regulations in areas previously governed by a uniform national standard. As the Ninth Circuit observed in an opinion authored by then-Judge Kennedy, "the language and structure of the [FRSA] indicate a congressional intent to leave the [LIA] intact, including its preemptive effect." *Marshall* v. *Burlington N., Inc.*, 720 F.2d 1149, 1153 (1983).

rules of the FRA, govern working conditions in railroad repair shops.

B. Some Of Petitioners' Claims May Nevertheless Be Preempted To The Extent They Conflict With The LIA

The court of appeals expressed concern (Pet. App. 13a-14a) that permitting suits against manufacturers of locomotive parts for injuries sustained during locomotive repairs would undermine the LIA's goal of nationwide "uniform railroad equipment regulation." That is a legitimate concern, but it is best addressed through application of conflict-preemption principles rather than by artificially extending the scope of the field preempted by the LIA. See *Northwest Cent. Pipeline Corp.* v. *State Corp. Comm'n*, 489 U.S. 493, 510-522 (1989) (applying conflict-preemption principles after determining that state regulation in question was outside any field preempted by federal law). The court of appeals declined to consider whether conflict preemption would bar any of petitioners' claims. See Pet. App. 11a n.7. And because the district court granted summary judgment to respondents soon after the case was removed to federal court, petitioners' claims have not yet been developed beyond their articulation in petitioners' complaint. It may, therefore, be appropriate for this Court to remand the case to allow the district court or court of appeals an opportunity to apply principles of conflict preemption in the first instance. See *Bates* v. *Dow Agrosciences LLC*, 544 U.S. 431, 453 (2005) (remanding for determination of whether particular claims were preempted).[10]

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[10] The question presented in the petition for a writ of certiorari is broad enough to encompass application of conflict-preemption principles to petitioners' claims. See Pet. i ("Did Congress intend the federal railroad safety acts to preempt state law-based tort lawsuits?").

As this Court has held, in an area in which "Congress has not entirely displaced state regulation over the matter in question, state law is still pre-empted to the extent it actually conflicts with federal law, that is, when it is impossible to comply with both state and federal law, or where the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress." *Silkwood* v. *Kerr-McGee Corp.*, 464 U.S. 238, 248 (1984) (citation omitted); see *Barnett Bank of Marion County, N.A.* v. *Nelson*, 517 U.S. 25, 31 (1996); *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941). Thus, tort claims outside the preempted field are still preempted if they actually conflict with the LIA. See *Locke*, 529 U.S. at 111-112 (holding that conflict-preemption rules apply to state regulation of oil tankers if the regulations in question fall outside the field preempted by Title II of the Ports and Waterways Safety Act).

1. The LIA and other railroad safety laws do have the purpose of "promot[ing] the safety of employees and travelers upon railroads," 36 Stat. 913; see *Lilly* v. *Grand Trunk W. R.R.*, 317 U.S. 481, 486 (1943) (referring to LIA's "humanitarian purpose"). But Congress enacted those laws for the additional purpose of imposing uniform national standards on common carriers, thereby "prevent[ing] 'the paralyzing effect on railroads from prescription by each state of the safety devices obligatory on locomotives that would pass through many of them.'" *Oglesby* v. *Delaware & Hudson Ry.*, 180 F.3d 458, 461 (2d Cir.) (quoting *Swift & Co.* v. *Wickham*, 230 F. Supp. 398, 408 (S.D.N.Y. 1964) (three-judge court) (Friendly, J.)), cert. denied, 528 U.S. 1004 (1999). See *United Transp. Union*, 455 U.S. at 688 (noting that Congress has determined that "a uniform regulatory scheme is necessary to the operation of the national rail sys-

tem"); 49 U.S.C. 20106(a)(1) (Supp. III 2009) ("Laws, regulations, and orders related to railroad safety * * * shall be nationally uniform to the extent practicable."); see also Pet. App. 12a-13a; *First Sec. Bank* v. *Union Pac. R.R.*, 152 F.3d 877, 880-881 (8th Cir. 1998); *Law* v. *General Motors Corp.*, 114 F.3d 908, 910-911 (9th Cir. 1997). Some state-law tort claims arising from injuries sustained while a locomotive is not in use would have the effect of prescribing rules about whether a locomotive is fit for use, resulting in different rules in different States regarding locomotives' fitness for service. Because such a result would undermine one of the important objectives of the LIA, those claims would conflict with the LIA and be preempted.

For example, just as a FELA plaintiff could not bring an LIA-based claim seeking to impose damages liability on an employer for failing to install the newest device or technology on its locomotive, a plaintiff could not bring a state-law tort claim that would call for the same result. As the Court explained in *Groeger*, the LIA requires that locomotives, tenders, and their parts and appurtenances be maintained in a condition that "would permit use of the locomotive without unnecessary danger." 266 U.S. at 530. The Court also made clear, however, that when the Secretary (or the ICC) has not required that a particular device or type of equipment be installed or used on a locomotive, the LIA "left to the carrier the choice of means to be employed to effect that result." *Id.* at 529-530. As the Court explained:

> 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, boilers, engine tenders and appurtenances 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. at 530-531. Thus, a tort action claiming that a particular device or piece of equipment must be used on a locomotive in order for the locomotive to be safe to operate would be conflict-preempted even if the claim arose from an injury sustained when the locomotive was not in use.

Applying that principle in this case, it appears that some of petitioners' claims would likely be preempted while others would not. For example, petitioners allege that locomotive parts containing asbestos are inherently defective because they are unreasonably dangerous however they are used. J.A. 27. Such a theory of liability would amount to a claim that the use of asbestos-containing products on locomotives would as a matter of law render such locomotives not "safe to operate without unnecessary danger of personal injury," 49 U.S.C. 20701(1), thereby permitting courts and juries to "restrict the carriers in their choice of mechanical means by which their locomotives, boilers, engine tenders and appurtenances are to be kept in proper condition," *Groeger*, 266 U.S. at 530-531. Such a theory of liability would, therefore, be conflict-preempted even if it arose in a claim concerning an asbestos-related injury sustained while a locomotive was in a repair shop (and therefore not in use). That kind of claim would undermine the uniformity-of-regulation objective of the LIA because it could effectively prohibit locomotives traveling in the relevant State from including parts containing asbestos while other States might not impose a similar ban.[11]

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[11] In 1996, after being directed by Congress to consider whether to regulate the use of asbestos-containing products on locomotives, the

Petitioners also allege, however, that Corson sustained his injuries because the respondents did not warn him and other repair-shop workers to take precautionary measures against exposure to asbestos while handling the brakes and insulation. J.A. 27. These claims are unlikely to be preempted because they would not require manufacturers of locomotives or railroads to alter the design or construction of their locomotives —and, therefore, would not conflict with the LIA.

Respondent Viad argues that allowing petitioners' failure-to-warn claims to go forward would permit States to "promulgate otherwise preempted safety regulations in the guise of instructional labels and then create causes of action for injured workers if railroads failed to post them." See Viad Cert. Stage Supp. Br. 9 (quoting *Ogelsby*, 180 F.3d at 461). That is incorrect. If a State promulgates a regulation that has the effect of governing whether a locomotive is safe to operate, the regulation would be preempted. But if a State requires manufacturers of locomotive parts to warn repair-shop employees about how to protect themselves from potential hazards from exposure to asbestos when the employees work with the parts while the locomotive is not in use, such a requirement would neither be within the field covered by the LIA nor conflict with the Act's pur-

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FRA opted not to do so. The FRA concluded that newer locomotives no longer incorporate asbestos-containing products and that, although "older locomotives remaining in services may still contain limited amounts of asbestos, there is no evidence that the presence of asbestos poses a problem to humans or the environment." See FRA, *Locomotive Crashworthiness and Cab Working Conditions: Report to Congress* 10-12 (Sept. 1996). In other words, the FRA concluded that the continued use on older locomotives of products containing asbestos did not render such locomotives unfit for service.

poses and objectives—and would not, therefore, be preempted.

It is true, as respondent Viad points out (Viad Cert. Stage Supp. Br. 9), that different States might impose different warning requirements. But variance among required warning labels would not have the effect of imposing non-uniform standards about whether locomotives are safe to operate. Manufacturers and railroads may post warnings in repair shops themselves (which obviously do not move from State to State) or on the packaging for the materials in question. To the extent a particular part might need to be repaired "at any time" (*ibid.*)—and presumably in any place—manufacturers or railroads may either affix the most stringent form of warning required by any particular State or affix a label that incorporates requirements imposed by several States. Such requirements are a cost of doing interstate business in many industries and do not amount in this context to requirements governing the safe design and construction for use of locomotives, tenders, or their parts and appurtenances.

2. Petitioners further argue (Br. 28-30) that, even setting aside the in-use limitation on the field preempted by the LIA, their claims against manufacturers of locomotive parts (*i.e.*, respondents) would not fall within that field because manufacturers were not regulated under the LIA at the time Corson was exposed to products that allegedly contained asbestos.[12] Petitioners'

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[12] As explained in petitioners' brief (Br. 29-30), the LIA did not apply to manufacturers until 1988, when the penalty provision was revised to apply to "[a]ny person (including a railroad and any manager, supervisor, official, or other employee or agent of a railroad) violating" the Act. Rail Safety Improvement Act of 1988, Pub. L. No. 100-342, § 14(7)(A), 102 Stat. 633. As noted at n.2, *supra*, regulations promulgated in 1988

argument assumes that the relevant field is defined by the persons directly regulated rather than the subject matter—the safety for use of locomotives and tenders and their parts or appurtenances. Cf. *Napier*, 272 U.S. at 612 ("The federal and state statutes are directed to the same subject—the equipment of locomotives. They operate upon the same object."). There is no need to address that question here, however, for regardless of whether that contention is correct, petitioners' claims are preempted to the extent they actually conflict with a purpose or objective of the LIA. In *Engine Manufacturers Association* v. *South Coast Air Quality Management District*, 541 U.S. 246 (2004), this Court considered whether state air quality rules applicable to purchasers of motor vehicles were preempted by a provision in the Clean Air Act stating that "[n]o State or political subdivision thereof shall adopt or attempt to enforce any standard relating to the control of emissions from new motor vehicles or new motor vehicle engines subject to this part." *Id.* at 252 (quoting 42 U.S.C. 7543(a)). The Court rejected an argument that the state regulations at issue were not preempted because they were directed at purchasers of cars rather than the manufacturers of

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to enforce the LIA defined "[a]ny person" to include a "manufacturer * * * of railroad equipment, track, or facilities." 53 Fed. Reg. at 28,601. In 1992, the Act's penalty provision was again amended to explicitly include manufacturers within the persons to whom the LIA's substantive safety provisions apply. Rail Safety Enforcement and Review Act, Pub. L. No. 102-365, § 9(a)(8), 106 Stat. 978. In 1994, the LIA was repealed as part of a comprehensive re-codification of the statutes governing railroad transportation, see Act of July 5, 1994, § 7(b), 108 Stat. 1380, and the reenacted provisions do not include the LIA's penalty provision. The LIA does continue to provide that "[a]n act by an individual that causes a railroad carrier to be in violation is a violation." 49 U.S.C. 21302(a)(1).

cars, which were the subject of direct regulation under the Clean Air Act. The Court reasoned that "treating sales restrictions and purchase restrictions differently for pre-emption purposes would make no sense. The manufacturer's right to sell federally approved vehicles is meaningless in the absence of a purchaser's right to buy them." *Id.* at 255.

Just as a car manufacturer's right to sell a car that meets certain specifications would be meaningless if no one were permitted to purchase such a car, a railroad's ability to operate a locomotive that meets certain specifications would be meaningless if no one were permitted to manufacture the parts of such a locomotive. Thus, regardless of whether petitioners' state-law tort claims against respondent manufacturers could fall within the field preempted by the LIA, they may be preempted under principles of conflict preemption.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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