No. 10-272

In the Supreme Court of the United States

JOHN CRANE, INC., PETITIONER

v.

THOMAS F. ATWELL, JR., EXECUTOR OF THE ESTATE OF THOMAS F. ATWELL, DECEASED

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF PENNSYLVANIA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether the field preempted by the Locomotive Inspection Act, 49 U.S.C. 20701 *et seq.*, includes state-law tort claims based on exposure to asbestos-containing materials during the repair of locomotives at railroad maintenance facilities.

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This brief is submitted in response to the Court's order inviting the Acting Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be granted.

STATEMENT

1. 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. See, *e.g.*,

Interstate Commerce Act, ch. 104, 24 Stat. 379; Act of Mar. 2, 1893, ch. 196, 27 Stat. 531, as amended by Act of Mar. 2, 1903, ch. 976, 32 Stat. 943, as supplemented by Act of Apr. 14, 1910, ch. 160, 36 Stat. 298 (collectively, the Safety Appliance Act (SAA)).

In 1911, Congress enacted the Boiler Inspection Act, ch. 103, 36 Stat. 913, which made it unlawful for common carriers "to use any locomotive 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." Shortly thereafter, Congress amended the statute to cover "the entire locomotive and tender and all parts and appurtenances thereof," Act of Mar. 4, 1915, ch. 169, 38 Stat. 1192, and the statute became known as the Locomotive Inspection Act (LIA), 49 U.S.C. 20701 *et seq*. The LIA currently 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 Secretary of Transportation (Secretary) may impose civil penalties for violations of the LIA.

49 U.S.C. 21302. "An act by an individual that causes a railroad carrier to be in violation is a violation." *Ibid.* Thus, a manufacturer violates the LIA if its products cause a railroad carrier to violate the LIA.

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 the Federal Railroad Safety Act (FRSA), 49 U.S.C. 20101 *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 issued extensive safety standards. See 49 C.F.R. Pts. 227, 229, 230, 232 and 238.

Congress has also enacted laws designed specifically to promote safety for railroad employees. 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 the railroad has violated the LIA or another federal safety statute, 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).

The FRA also regulates working conditions connected to railroad operations under the LIA and other federal railroad statutes. Where, however, the FRA does not exercise statutory authority over working conditions, such as in railroad maintenance facilities, railroads must comply with the Occupational Safety and Health Act of 1970 (OSH Act), 29 U.S.C. 651 *et seq.*, which 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 provides 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).

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 "occupy the field." *Crosby* v. *National Foreign Trade Council*, 530 U.S. 363, 372 (2000). 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). 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). That intent

may be inferred 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 Resources Conservation & Dev. Comm'n*, 461 U.S. 190, 204 (1983) (internal quotation marks omitted).

a. Although the LIA does not expressly address its effect on state laws, this Court long ago held that the LIA "has occupied 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 (1926). In *Napier*, railroads challenged laws enacted by Georgia and Wisconsin 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 Interstate Commerce Commission, which at that time had the authority now possessed by the Secretary to administer the LIA, had not required railroads to install either device. *Id.* at 609.

This Court held in *Napier* that the state laws were preempted because the LIA "was intended to occupy the field." 272 U.S. at 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 pre-

scribe 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 no specific regulations regarding firebox doors or cab curtains, "the broad scope of [its] authority" dictated that state requirements were precluded. *Id.* at 613.

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). Sec-

tion 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 its 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) (Supp. III 2009).

3. From 1951 through 2004, decedent Thomas Atwell worked as a pipe fitter repairing locomotives in railroad maintenance facilities. His work required him to use asbestos-containing gaskets, packing, and pipe wrap manufactured by petitioner. Atwell used the packing to stop leaks on engine valves and used the gaskets to repair water pumps, air compressors, and oil pumps. In order to install the materials on the locomotives, Atwell had to cut and pound the materials, which released asbestos dust. Atwell was diagnosed with lung cancer in 2003. Pet. App. 2a; Phase I Videotape Dep. of Thomas F. Atwell 22-29, No. 040501366 (Phil. County Ct. Com. Pl. Aug. 12, 2004).

On May 10, 2004, Atwell filed suit in Pennsylvania state court against numerous defendants seeking damages for injuries caused by his exposure to asbestos. Complaint—Civil Action 2090 Asbestos, No. 040501366 (Phil. County Ct. Com. Pl.). Atwell sued his railroad-company employers under FELA. *Id.* at 21-22. Atwell also brought tort claims under state law against the manufacturers of the asbestos-containing products with which he worked. He alleged that the products were defective, in part because the manufacturers failed to provide adequate warnings about proper handling of the

products and about the danger of asbestos exposure. *Id.* at 10-29; Plaintiffs' General Master Long-Form Compl., No. 861000001 (Phil. County Ct. Com. Pl. Oct. 7, 1986); Jury Instructions/Verdict 12-13, No. 040501366 (Apr. 18, 2008). Atwell died before trial, and respondent—his son and executor—took over the suit. Pet. App. 2a.

Petitioner moved to dismiss the case on the ground that the LIA preempts respondent's claims. Pet. App. 25a. The trial court denied the motion, relying on *Norfolk & Western Railway* v. *Pennsylvania Public Utility Commission*, 413 A.2d 1037 (Pa. 1980). Pet. App. 25a-29a. The court explained that, in *Norfolk & Western*, the Pennsylvania Supreme Court had held that the FRSA altered the preemptive force of the LIA, replacing field preemption with a rule that States may regulate until the Secretary adopts a regulation covering the same subject matter. *Id.* at 26a-27a. Because petitioner had not identified a federal regulation addressing the subject matter of respondent's suit, the trial court held that the suit is not preempted. *Id.* at 29a.

The jury returned a verdict against petitioner, and petitioner filed a post-trial motion renewing its argument that the LIA preempts respondent's claims. Pet. App. 16a. The trial court again rejected petitioner's argument. *Id.* at 15a-24a. In addition to relying on and reaffirming its earlier ruling that the FRSA repealed the LIA's field-preemptive effect, *id.* at 17a-18a, 20a-21a, the court ruled that the LIA does not preempt respondent's claims because the LIA applies only to locomotives that are "in use," and Atwell sustained his injuries while locomotives were being repaired. *Id.* at 19a-20a. The court further reasoned that the LIA covers

only locomotives themselves and their parts and appurtenances, and the packing and gasket sheets that caused Atwell's injuries were not locomotive parts or appurtenances. *Id.* at 20a. Finally, the court ruled that the OSH Act's savings provision, 29 U.S.C. 653(b)(4), establishes that "state legal rights and remedies relating to the workplace * * * cannot be preempted by federal law." Pet. App. 22a.

4. The Pennsylvania Superior Court affirmed the trial court's judgment. Pet. App. 1a-14a. The appellate court first held that respondent's claims are not preempted by the LIA under *Napier*. *Id.* at 5a-8a. The court reasoned that the LIA and respondent's claims do not "operate upon the same object." *Id.* at 7a (quoting *Napier*, 272 U.S. at 612) (emphasis omitted). The court explained that the LIA covers only locomotives that are in use and their parts and appurtenances, and that the trial court correctly found that the locomotives repaired by Atwell were not in use and that the asbestos-containing products that caused his injuries were not parts or appurtenances. *Id.* at 8a.

The Superior Court further ruled that *Napier* has, in any event, been overruled by *Terminal Railroad* v. *Brotherhood of Railroad Trainmen*, 318 U.S. 1 (1943), which held that neither the LIA, the SAA, nor the Interstate Commerce Act preempted an Illinois regulation requiring railroad trains to include cabooses. Pet. App. 8a-9a. The state court reasoned that *Terminal Railroad* implicitly overruled *Napier*'s holding that the LIA preempts the field of safe locomotive operation because, in reaching its holding in *Terminal Railroad*, this Court relied on the absence of any relevant regulation by the Interstate Commerce Commission. *Ibid.*

The Superior Court also agreed with the trial court's ruling, based on *Norfolk & Western*, that "once [the] FRSA had been enacted, the [LIA] could no longer be interpreted to permit preemption of the entire field." Pet. App. 9a. Finally, the appellate court noted with approval the trial court's conclusion that the OSH Act establishes that "state legal rights and remedies relating to the workplace * * * cannot be pre-empted by federal law." *Id.* at 14a (citation omitted).

The Pennsylvania Supreme Court declined to review the Superior Court's decision. Pet. App. 30a.

DISCUSSION

Although the Pennsylvania Superior Court correctly held that respondent's state-law tort claims are not subject to field preemption under the LIA, the court's reasoning was erroneous in several respects. The court correctly concluded that the field covered by the LIA does not include requirements concerning the repair of locomotives that are not in use, but the court mistakenly held that the LIA's field-preemptive effect has been displaced by the FRSA, *Terminal Railroad*, and the OSH Act. The decision below conflicts with decisions of the United States Court of Appeals for the Third Circuit and the highest courts of several States; and the question whether the LIA preempts state-law tort claims based on exposure to asbestos during repairs to non-operational locomotives is a recurring and important one. Accordingly, this Court should grant the petition for a writ of certiorari.[1]

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[1] Two other pending petitions for writs of certiorari also present the question whether the field preempted by the LIA includes tort claims based on asbestos exposure during repairs to non-operational locomo-

A. The Pennsylvania Superior Court Reached The Correct Result, But Much Of Its Reasoning Was Flawed

1. The state appellate court correctly determined that respondent's claims are not within the field preempted by the LIA

The Superior Court correctly concluded that the field occupied by the LIA does not encompass state-law tort claims, such as respondent's, that are based on injuries arising during repairs to a locomotive when it is not in operation. The LIA regulates only the use on railroad lines of locomotives or tenders and their parts and appurtenances, and the field preempted by the statute is coextensive with the field regulated by the statute. The preempted field thus does not include tort claims based on injuries arising while locomotives are not in use.

a. 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 injury." 49 U.S.C. 20701. 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

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tives. See *Griffin Wheel Co.* v. *Harris*, No. 10-520 (filed Oct. 12, 2010); *Kurns* v. *Railroad Friction Prods. Corp.*, No. 10-879 (filed Jan. 3, 2011). If the Court grants review in this case, the Court should hold the petitions in *Griffin Wheel* and *Kurns* pending the resolution of this case, and then dispose of them accordingly.

indicates that the LIA governs only safety during use or operation. *Ibid*. (emphasis added).

That interpretation of the LIA comports with this Court's description in *Napier* of the Interstate Commerce Commission's authority under the statute. The Court stated that the Commission 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 was "'in proper condition' *for operation*." *Napier*, 272 U.S. at 612 (emphasis added). 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").

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). And, 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").

b. Because the LIA 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. The preempted field is coextensive with the regulated field and encompasses only claims based on injuries arising from operational locomotives.

Napier supports that conclusion. The Court's holding that Congress intended the LIA to have field-preemptive effect was based on "the broad scope" of the Commission's regulatory authority under the statute. *Napier*, 272 U.S. at 613. The Court determined that the state requirements at issue 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 "'in proper condition' for *operation*." *Id.* at 611-612 (emphasis added). And, consistent with the "in use" limitation, the Court described the occupied field as the regulation of "locomotive equipment *used* on a highway of interstate commerce." *Id.* at 607 (emphasis added).

The conclusion that the preempted field is coextensive with the regulated field also makes practical sense. Preempting all state-law tort suits, even when the LIA does not govern the conduct giving rise to the injury, would leave some injured persons without a litigation remedy. Although FELA provides employees of railroad carriers with a cause of action against their em-

ployers for negligence even when the LIA does not apply, FELA does not provide a cause of action against a railroad carrier by 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 based on the duties imposed by the LIA because the locomotive was not in use and because the LIA does not in any event contain its own private right of action.[2] He would have no claim under FELA because he is not a railroad employee. And, if petitioner is correct, the independent contractor also would have no state-law tort claims against either the railroad or the manufacturer of the injurious products because those claims would be preempted by the LIA. Moreover, FELA does not provide even railroad em-

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[2] Unlike FELA, which provides a federal cause of action for railroad employees against their employers that displaces state causes of action for employment-related injuries, see *Norfolk S. Ry.* v. *Sorrell*, 549 U.S. 158, 165 (2007), the LIA (like the SAA) does not itself provide a federal cause of action. See *Tipton* v. *Atchison, Topeka & Santa Fe Ry.*, 298 U.S. 141, 147-148, 151 (1936). Thus, States are "at liberty to afford any appropriate remedy for breach of the duty imposed" by the LIA, to the extent that the state action is not preempted by another federal law, such as FELA. *Id.* at 148; *e.g.*, *Crane* v. *Cedar Rapids & Iowa City Ry.*, 395 U.S. 164 (1969) (state-law suit by non-railroad employee to enforce duty imposed by SAA); *Fairport, Painesville & E. R.R.* v. *Meredith*, 292 U.S. 589 (1934) (same). The conclusion that the preempted field is limited to claims arising from the use or operation of locomotives thus is further reinforced by the fact that, even when LIA field preemption applies, the LIA itself displaces only the state standards of care, not the state cause of action.

ployees 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 negligent, the employee would be left without a remedy. Depriving injured individuals of a remedy may be justified when allowing a remedy would prevent the LIA from achieving its purposes (see pp. 16-17, *infra*), but it is not justified absent that kind of conflict.

Interpreting the field preempted by the LIA not to reach claims based on injuries occurring during repairs to non-operational locomotives is also consistent with the FRA's regulatory practice. Although the LIA does not authorize the FRA to regulate hazards posed by the repair process, the FRA has authority to regulate those hazards under the 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 regulate safety and health hazards at railroad maintenance facilities. Instead, the FRA has generally deferred to regulation of those hazards by the Occupational Safety and Health Administration, and the FRA has focused its regulation on railroad operations—the movement of equipment over railroad lines. See 43 Fed. Reg. 10,585 (1978).

c. Some courts have incorrectly held that the "in use" limitation does not restrict the field preempted by the LIA. See, *e.g.*, *Kurns* v. *A.W. Chesterton Inc.*, 620 F.3d 392, 396 n.5 (3d Cir. 2010), petition for cert. pending, No. 10-879 (filed Jan. 3, 2011); *Frastaci* v. *Vapor Corp.*, 70 Cal. Rptr. 3d 402, 409-411 (Cal. Ct. App. 2007); *Seaman* v. *A.P. Green Indus., Inc.*, 707 N.Y.S.2d

299, 302 (N.Y. Sup. Ct. 2000). Some of those courts have reasoned that state-law tort claims based on injuries occurring when locomotives are not in use may, in some situations, dictate locomotive design or construction. Because a locomotive's design and construction remain the same whether or not the locomotive is in use, those courts have concluded that allowing such claims could subject railroads and manufacturers to conflicting standards for operational locomotives, contrary to the LIA's goal that standards governing locomotive operation be nationally uniform. See, *e.g.*, *Frastaci*, 70 Cal. Rptr. 3d at 409-411.

Although concern about conflicting standards for "in use" locomotives is legitimate, courts need not artificially extend the field preempted by the LIA to address that concern. Tort claims that are not within the preempted field would still be preempted if they actually conflicted with the LIA—for example, if they would "stand[] 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).

For instance, a state-law tort suit might be based on a claim that locomotive parts containing asbestos are inherently defective because they are unreasonably dangerous however they are used. That claim would conflict with the LIA because accepting the claim would effectively prohibit locomotives traveling in that State from including parts containing asbestos. Other States might not impose a similar ban. Moreover, the FRA has not regulated asbestos use on locomotives, concluding that the presence of asbestos does not make locomotives unsafe to operate. See FRA, *Locomotive Crashworthiness and Cab Working Conditions: Report to Congress*

10-12 (Sept. 1996). Thus, unless the state-law claim were preempted, railroads could be subject to differing requirements concerning locomotive design and construction, frustrating the LIA's goal of uniform standards for locomotive use.

On the other hand, a state-law tort suit might claim only that asbestos-containing parts or other materials used to repair locomotives are defective unless users are warned to take precautionary measures against asbestos exposure during the repair process. That claim likely would not conflict with the LIA because accepting the claim would not require manufacturers of locomotives or railroads to alter the design or construction of their locomotives. Instead, they could avoid liability by providing appropriate warnings. The claim would therefore not be preempted.

d. In light of the above principles, the Pennsylvania Superior Court correctly concluded that respondent's claims do not fall within the field preempted by the LIA. Respondent's claims are not based on injuries arising from the use or operation of locomotives. Instead, respondent contends that Atwell was injured from asbestos exposure that occurred as he repaired locomotives that were in railroad maintenance facilities and thus not in use. See Pet. App. 8a.

The Superior Court suggested that respondent's claims also fall outside the preempted field because the materials that caused his injuries were not locomotive "parts" or "appurtenances." Pet. App. 8a. Because the claims are outside the field based on the "in use" requirement, this Court need not address that issue if it grants review. The government notes, however, that "parts and appurtenances" include items that are "an

integral or essential part of a completed locomotive, and all parts or attachments definitely prescribed by lawful order." *Southern Ry.* v. *Lunsford*, 297 U.S. 398, 402 (1936). The FRA does not interpret locomotive "parts and appurtenances" to include generic materials that require modification before they are suitable for use on locomotives. The gaskets, packing, and pipe wrap manufactured by petitioner appear to fall into that category of generic materials because they required cutting and other manipulation before they could be installed on locomotives. To the extent that Atwell's asbestos exposure occurred in the process of making the materials suitable for railroad use, it did not result from "parts and appurtenances" of locomotives.

Although respondent's claims are not within the preempted field, the claims might still be preempted under conflict preemption principles, depending on the legal theory upon which the claims rest. See pp. 16-17, *supra* (explaining that claims based on a failure to warn are likely not preempted, but claims based on a theory that locomotive parts containing asbestos are inherently defective would be preempted). The Superior Court did not address conflict preemption, and the issue whether respondent's claims conflict with the LIA even if they fall outside the LIA's categorically-preempted field is not specifically included in the question presented. Pet. i. This Court could leave that issue open for the state courts to consider on remand, if those courts conclude that a conflict preemption claim has been properly preserved.

2. The state appellate court's alternative rationales for rejecting preemption were erroneous

Although the Pennsylvania Superior Court correctly ruled that respondent's state-law tort claims are not within the field preempted by the LIA, the court also offered several alternative reasons why respondent's claims are not preempted. Those alternative reasons were incorrect.

a. First, the Superior Court erroneously held (Pet. App. 9a-13a), based on the Pennsylvania Supreme Court's decision in *Norfolk & Western*, that the FRSA's preemption provision, 49 U.S.C. 20106, repealed the field-preemptive effect of the LIA. In *Norfolk & Western*, the Pennsylvania Supreme Court concluded that 49 U.S.C. 20106(a)(2)—which 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"—authorized States to regulate even in fields preempted by other, preexisting railroad safety statutes, such as the LIA. That conclusion is contrary to the operative language of the FRSA, which expressly states that it "supplement[s]" existing laws and regulations, instead of replacing or modifying them. 49 U.S.C. 20103(a).

The Pennsylvania courts' conclusion is also contrary to the FRSA's stated intent 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.

The legislative history confirms that Congress did not intend the FRSA to alter the preemptive effect of existing federal safety statutes. The House Committee Report accompanying the FRSA indicates that, although Congress determined additional regulation was needed to address railroad safety hazards not covered by existing federal laws, Congress also believed that the existing laws "ha[d] served well" and should be "continue[d] * * * without change." H.R. Rep. No. 1194, 91st Cong., 2d Sess. 8 (1970). The Report expressed the intent "that the existing statutes continue to be administered and enforced as if this legislation had not been enacted." *Id.* at 16. And Congress included the statutory language stating that the FRSA "supplement[s]" existing law to achieve that expressed intent. *Ibid.*

Thus, 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); accord *Kurns*, 620 F.3d at 401; *Springston* v. *Consolidated Rail Corp.*, 130 F.3d 241, 245 (6th Cir. 1997), cert. denied, 523 U.S. 1094 (1998); *Consolidated Rail Corp.* v. *Pennsylvania Pub. Util. Comm'n*, 536 F. Supp. 653, 657-658 (E.D. Pa.), aff'd, 696 F.2d 981 (3d Cir. 1982) (Table), aff'd, 461 U.S. 912 (1983). Section 20106(a)(2) allows States to continue to regulate in areas in which they previously had authority to regulate until the Secretary steps in, but Section 20106 does not

authorize States to regulate in areas already preempted by federal law.

The preemptive scope of the LIA was also unchanged by the 2007 amendment adding Section 20106(b). That provision states 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 its 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) (Supp. III 2009). The plain language of the amendment thus makes clear that it limits only the preemptive effect of Section 20106 itself ("this section") and has no impact on the preemptive effect of other statutes, such as the LIA.

b. The Pennsylvania Superior Court also erred in holding (Pet. App. 8a-9a) that this Court's decision in *Terminal Railroad* implicitly overruled *Napier*'s holding that the LIA preempts the field of locomotive operation safety. *Terminal Railroad* held that the LIA did not preempt an Illinois regulation ordering railroads to attach cabooses to their trains. 318 U.S. at 4-5. Cabooses are not locomotives or tenders, or parts or appurtenances of locomotives or tenders. Thus, the Illinois regulation was not within the LIA's preempted field as identified in *Napier*.

c. Finally, the Superior Court erred in holding that the OSH Act's savings provision, 29 U.S.C. 653(b)(4), establishes that "state legal rights and remedies relating to the workplace * * * cannot be pre-empted by federal law." Pet. App. 14a (citation omitted). The savings provision states that

> [n]othing in this chapter shall be construed * * * to 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 with respect to injuries, diseases, or death of employees arising out of, or in the course of, employment.

29 U.S.C. 653(b)(4). "[T]his chapter" refers to Chapter 15 of Title 29 of the United States Code, which contains the OSH Act and no other federal laws. Thus, by its terms, the OSH Act's savings provision does not address the preemptive effect of any other federal laws, including the LIA.

B. This Court's Review Is Warranted Because The Question Presented Is Important And Has Divided The Lower Courts

Although the Pennsylvania Superior Court correctly held that respondent's claims are not within the field preempted by the LIA, this Court's review is warranted. The state appellate court's decision conflicts with decisions of the United States Court of Appeals for the Third Circuit and the highest courts of four States. Those courts have all held that the field preempted by the LIA includes state-law tort claims against manufacturers of locomotives and locomotive parts based on injuries from asbestos exposure. See *Kurns*, 620 F.3d at 395-401; *Darby* v. *A-Best Prods. Co.*, 811 N.E.2d 1117, 1119 (Ohio 2004), cert. denied, 543 U.S. 1146 (2005); *In re West Virginia Asbestos Litig.*, 592 S.E.2d 818, 820 (W. Va. 2003); *General Motors* v. *Kilgore*, 853 So. 2d 171, 174-176 (Ala. 2002); *Scheiding* v. *General Motors*, 993 P.2d 996, 998-1004 (Cal.), cert. denied, 531 U.S. 958 (2000). *Kurns* and *Darby* expressly stated that

they involved claims based on injuries arising from exposure during repairs of non-operational locomotives. *Kurns*, 620 F.3d at 394-395; *Darby*, 811 N.E.2d at 1123. And *Kurns* expressly rejected the proposition that the field preempted by the LIA is limited to requirements concerning "in use" locomotives and their parts or appurtenances.[3]

The question whether the field preempted by the LIA encompasses state-law tort claims based on injuries from asbestos exposure during repairs of non-operational locomotives is a recurring and important one. As the cases giving rise to the conflict illustrate, the issue has arisen in multiple jurisdictions. Moreover, the issue is presented by "several thousand" cases in the multi-district litigation on asbestos claims pending in the Eastern District of Pennsylvania. 95-cv-01996, Docket entry No. 213, at 32 (E.D. Pa. Aug. 5, 2010). Unless this Court grants review, those cases will be governed by the Third Circuit's decision in *Kurns*, which, like most of the decisions addressing the issue, resolved it incorrectly.

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[3] In *Scheiding*, the California Supreme Court declined to decide whether the "in use" requirement limits the field preempted by the LIA because the court concluded that the plaintiffs had forfeited that argument. 993 P.2d at 1004 n.5. In *Frastaci*, however, the California Court of Appeal subsequently concluded that the preempted field includes claims based on injuries arising during repairs to non-operational locomotives. 70 Cal. Rptr. 3d at 409-411.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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