No. 10-879

In the Supreme Court of the United States

GLORIA GAIL KURNS, EXECUTRIX OF THE ESTATE OF GEORGE M. CORSON, DECEASED, AND FREIDA E. JUNG CORSON, WIDOW IN HER OWN RIGHT,

Petitioners,

v.

RAILROAD FRICTION PRODUCTS CORPORATION AND VIAD CORP.,

Respondents.

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

BRIEF FOR *AMICUS CURIAE* DRI—THE VOICE OF THE DEFENSE BAR IN SUPPORT OF AFFIRMANCE

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INTEREST OF AMICUS CURIAE[1]

Amicus curiae DRI – The Voice of the Defense Bar ("DRI") is an international organization comprised of approximately 22,000 attorneys defending businesses and individuals in civil litigation. DRI seeks to address issues germane to defense attorneys, to promote the role of the defense attorney, and to improve the civil justice system in America. DRI has long been a voice in the ongoing effort to make the civil justice system fairer, efficient, and – where national issues are involved – consistent. To promote these objectives, DRI participates as amicus curiae in cases such as this one because it raises an issue of importance to DRI's members and to the judicial system. DRI seeks to contribute to the Court's consideration of cases by offering its perspective.

DRI members represent federally-regulated businesses and industries in tort litigation in both state and federal courts. DRI members are regularly called upon to inform and advise clients about the potential liability that they face for making business decisions based upon state tort law. DRI members are asked to offer counsel regarding the parameters of permissible conduct

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[1] Pursuant to this Court's Rule 37.6, amicus curiae states that no counsel for any party authored this brief in whole or in part, and that no person or entity other than amicus curiae or their counsel made a monetary contribution to the preparation or submission of this brief. The parties have consented to the filing of this brief, and letters evidencing such consent have been filed with the Clerk of this Court, pursuant to this Court's Rule 37.3.

and the sometimes conflicting obligations imposed under federal and state law and federal and state regulations. DRI members are therefore well-positioned to offer this Court practical insight based on first-hand experience with the impact of state tort litigation on federally-regulated businesses and industries. Because our organization is devoted to representing the interests of lawyers who defend businesses and industries in civil litigation, the issue of federal preemption is of great importance to DRI. DRI frequently participates as amicus curiae in cases addressing federal preemption. *See*, *e.g.*, *Williamson v. Mazda Motor of America, Inc.*, No. 08-1314, among others.

The prevailing law on preemption must afford consistency and clarity to potential civil defendants about permissible conduct and its outer limits. Federal preemption has been a feature of this Court's jurisprudence for almost two centuries. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 82 (1824) ("[T]he act of Congress . . . is supreme; and the law of the State, though enacted in the exercise of powers not controverted [by the Constitution], must yield to it."). In particular, federal preemption that arises when Congress has decided to occupy a field has been embraced in decisions invalidating state laws as early as 1842. *Prigg v. Pennsylvania*, 41 U.S. 539, 617-18 (1842) ("[T]he legislation of Congress, in what it does prescribe, manifestly indicates, that it does not intend that there shall be any further legislation to act upon the subject-matter. Its silence as to what it does not do, is as

expressive of what its intention is, as the direct provisions made by it.").

In the course of applying federal preemption, this Court has recognized that private tort claims may be barred as a result; individuals may not accomplish by private lawsuit what a state government may not accomplish by legislative act. *See*, *e.g.*, *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 675 (1993) (holding that the Federal Railroad Safety Act "should be understood as covering the subject matter of train speed with respect to track conditions" therefore plaintiff's negligence claim for "excessive speed" is preempted); *Norfolk S. Ry. Co. v. Shanklin*, 529 U.S. 344, 358-59 (2000) (common law tort claim failed because federal law "displace[d] … state law concerning the [subject matter], [which] … pre-empts state tort actions").

Field preemption has been recognized in some of the country's oldest and most important businesses and industries, *e.g.*, railroads and locomotive equipment, shipping and tankers, savings and loan associations, national banks, and air traffic. The businesses and industries to which field preemption has been applied are heavily regulated by federal agencies and, not surprisingly, have reasonably relied on federal regulations to govern their conduct and business decisions. The erosion or removal of field preemption would expose these vital and inherently interstate enterprises to a myriad of different common law standards, the threat of potentially-debilitating tort liability and,

perhaps more importantly, tremendous uncertainty.

Businesses need to know what standard of care controls when business decisions are made. Railroads, locomotive equipment manufacturers and distributors, along with many other businesses, employees and consumers, have benefitted from a regime in which an expert federal regulatory agency makes informed and comprehensive decisions about design, construction, materials, services, and products. DRI therefore has a strong interest in assuring that this Court continues to enforce federal preemption and, in particular, field preemption.

SUMMARY OF ARGUMENT

The doctrine of federal preemption finds its source in the Supremacy Clause of the Constitution, which commands that the laws of the United States "shall be the supreme Law of the Land; … any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." United States Const. art. VI, cl. 2; *see also McCulloch v. Maryland*, 4 Wheat. 316, 427 (1819) ("It is the very essence of supremacy, to remove all obstacles to its action within its own sphere, and so to modify every power vested in subordinate governments"); *Int'l Longshoremen's Ass'n v. Davis*, 476 U.S. 380, 388 (1986) ("Pre-emption [is] the practical manifestation of the Supremacy Clause[.]").

Federal preemption has been applied case-by-case and has resulted in a modest mountain of case law. As this Court has commented, the Constitution's "clear and simple mandate has generated considerable discussion in cases where we have had to discern whether Congress has pre-empted state action in a particular area." *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 540-41 (2001). Over a number of decisions considering a wide variety of claims and sometimes overlapping federal acts, agency regulations, and state laws, this Court has articulated no bright-line test; "each case turns on the peculiarities and special features of the federal regulatory scheme in question." *City of Burbank v. Lockheed Air Terminal Inc.*, 411 U.S. 624, 638 (1973).

Yet some common themes have emerged within this substantial precedent: "The question in each case is what the purpose of Congress was." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947); *see also Medtronic v. Lohr*, 518 U.S. 470, 485 (1996) ("The purpose of Congress is the ultimate touchstone" in every preemption case). And Congress may express its purpose to preempt state action either expressly or by implication. *Fidelity Fed. Sav. & Loan Ass'n v. Cuesta*, 458 U.S. 141, 230 (1982). Indeed, Congress's purpose or intent may be "evidenced in several ways": (1) the "scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it"; (2) the "Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of

state laws on the same subject"; (3) the "object sought to be obtained by the federal law and the character of obligations imposed by it may reveal the same purpose"; or (4) the "state policy may produce a result inconsistent with the objective of the federal statute." *Rice*, 331 U.S. at 230 (citations omitted).

In the regulation of locomotive and locomotive equipment, this Court decided long ago that Congress intended the Boiler Inspection Act ("BIA") – now codified at 49 U.S.C. § 20701, *et seq.*, also known as the Locomotive Inspection Act ("LIA") – to "occupy the field." *Napier v. Atl. Coast Line R.R. Co.*, 272 U.S. 605, 613 (1926). The Court's conclusion was based on "[t]he broad scope of the authority conferred upon the Commission." *Id.* Congress has since transferred that authority to the Department of Transportation, but the scope of authority bestowed remains broad. As explained in *Napier*:

> [T]he power delegated to the Commission by the Boiler Inspection Act as amended is a general one. It extends to the design, the construction, and the material of every part of the locomotive and tender and of all appurtenances.

Id. at 611.

In this case, the district court granted summary judgment to respondents, who manufactured or distributed locomotives and

locomotive equipment, based on federal preemption as announced in *Napier*. The court reasoned that "because plaintiff alleges that [decedent] contracted mesothelioma through his contact with locomotive equipment, the reasoning and holding of *Napier* plainly applies." *Kurns v. Chesterton*, No. 08-2216, 2009 WL 249769, *3 (E.D. Pa. 2009). "Plaintiff's common law tort claims are preempted by the BIA, a federal law enacted to occupy the field of regulating locomotives, their parts and appurtenances." *Id.* at *7.

The Third Circuit affirmed. "The plaintiffs' claims undeniably involve the material used in locomotive parts, both of which fall under the definition of 'parts and appurtenances' of locomotives" and "therefore are preempted by federal law." *Kurns v. A.W. Chesterton. Inc.*, 620 F.3d 392, 399 (3d Cir. 2010). "Congress's intent in enacting and amending the LIA was to preempt completely the field of railroad parts and appurtenances." *Id.*

This Court should affirm the lower courts and hold that the Locomotive Inspection Act preempts the field of locomotive "design, construction, and the material of every part of the locomotive" and thereby preempts petitioners' attempt to impose standards through common law product liability claims.

At the heart of this appeal is how the scope of field preemption is determined. Petitioners and the Solicitor General correctly note that field preemption is determined by the scope of the

regulated field. (Pet. Br. at 16, 20; SG Br. at 11, 13.) But after that, petitioners and the Solicitor General narrowly focus their analysis of the LIA on how the federal agency has exercised its regulatory authority in the past and what the agency was "required" to do under the LIA. (Pet. Br. at 22, 42; SG Br. at 16, 18.) At the same time, petitioners and the Solicitor General distort the language of the LIA. (Pet. Br. at 21-23; SG Br. at 13-14.) This analysis is not consistent with this Court's precedent. Instead, the scope of the regulated field is determined by the scope of authority that Congress has delegated to the agency. This rule of law is evident in past decisions on field preemption which have consistently examined three touchstones – statutory language, Congressional intent, and the overall statutory scheme including the history of federal regulation.

Respondents' brief thoroughly explains the correct analysis of the LIA specifically and the federal regulatory scheme concerning railroads, locomotive and locomotive equipment generally; consequently, that analysis will not be repeated here. (Resp. Br. at 30-42.) But additional precedents incorporate a similar analysis in other heavily-regulated areas in which this Court has recognized field preemption, for example, oil tankers, savings and loan institutions, national banks, and air traffic. These parallel precedents lend force to respondents' arguments and illuminate how this Court consistently applies field preemption.

Additionally, related case law establishes that abandoning field preemption or narrowing it to allow regulation of interstate-commerce business through common law tort claims would have grave consequences. Not only would petitioners' proposed rule of law defy stare decisis, but also it would destroy settled expectations held by those in businesses and industries that have been historically regulated by federal law and not by widely-varying jury decisions issued from diverse pockets of the country.

ARGUMENT

I. THE PROPER ANALYSIS OF SCOPE OF PREEMPTION DRIVES THE RESOLUTION OF THIS APPEAL AND SUPPORTS AFFIRMANCE

A. The Scope Of Authority Delegated By Congress Determines The Scope Of Field Preemption.

This Court has recognized that a federal statute "implicitly overrides state law" when "the scope of a statute indicates that Congress intended federal law to occupy a field exclusively." *Freightliner Corp. v. Myrick*, 514 U.S. 280, 287 (1995); *see also English v. Gen. Elec. Co.*, 496 U.S. 72, 78-79 (1990). More to the point, this Court has held that the scope of preemption is determined, at least in part, by examining whether the challenged state action is within the authority delegated to the federal agency. *Fidelity Fed. Sav. & Loan Ass'n*,

458 U.S. at 154 ("whether the Board meant to pre-empt California's due-on-sale law, and, if so, whether that action is within the scope of the Board's delegated authority").

Because the LIA broadly delegates regulatory authority to a federal agency for locomotive and locomotive equipment design, construction, and materials, petitioners' claims that purport to impose common law standards are preempted. Precedent from other highly regulated fields illustrates the correct analysis.

1. Field Preemption Of Oil Tanker Regulation

In *Ray v. Atl. Richfield Co.*, 435 U.S. 151, 168 (1978), this Court struck down a state law requiring tankers to have "standard safety features" as preempted by Congress's enactment of the Ports and Waterways Safety Act of 1972 ("PWSA"). The Court determined the scope of preemption by examining the statutory language, after which it concluded that Congress broadly delegated authority to the Secretary of Transportation and specifically delegated authority over the design, construction, and operation of oil tankers. The Court summarized:

> This statutory pattern shows that Congress, insofar as design characteristics are concerned, has entrusted to the Secretary the duty of determining which oil tankers are sufficiently safe to be allowed to

> proceed in the navigable waters of the United States. This indicates to us that Congress intended uniform national standards for design and construction of tankers that would foreclose the imposition of different or more stringent state requirements.

Id. at 163. Allowing state regulation of any aspect of tanker design "would at least frustrate what seems … to be the evident congressional intention to establish a uniform federal regime controlling the design of oil tankers." *Id.* at 165. Turning to legislative history leading to the passage of the PWSA, the Court concluded that, "the Nation was to speak with one voice with respect to tanker-design standards." *Id.* at 166. After reviewing statutory language, statutory pattern, and Congressional intent, the Court also held the PWSA preempted state laws that limited tanker size. *Id.* at 178. The Court declared that Congress intended that "there would be a single decisionmaker, rather than a different one in each State." *Id.* at 177.

Twenty-two years later, in *United States v. Locke*, 529 U.S. 89 (2000) the Court again struck down as preempted a variety of state laws concerning oil tankers, *i.e.*, navigation watch, language skills, training and casualty reporting requirements. *Id.* at 116. *Locke* relied in large part on *Ray's* application of field preemption. *Id.* at 104 ("The *Ray* Court's interpretation of the PWSA is correct and controlling."). Somewhat differently from *Ray*, the Court began its analysis in *Locke* by

considering the historical position Congress has occupied in regulating interstate navigation generally:

> The State of Washington has enacted legislation in an area where the federal interest has been manifest since the beginning of our Republic and is now well established. The authority of Congress to regulate interstate navigation, without embarrassment from intervention of the separate States and resulting difficulties with foreign nations, was cited in the Federalist Papers as one of the reasons for adopting the Constitution.

Id. at 99. The opinion discussed several precedents in which the Court had upheld federal supremacy in the regulation of maritime commerce during the 1800s. *Id.* at 99-100. And the Court recognized an even broader statutory pattern than the one discussed in *Ray*. *Locke* summarized federal statutes that delegated wide-ranging authority to federal agencies over the design and construction of tankers in 1936 and 1972.[2] *Id.* at 100-02.

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[2] The Court also noted that the assumption against preemption that sometimes applies to a State's exercise of its police powers "is not triggered when the State regulates in an area where there has been a history of significant federal presence." *Locke*, 529 U.S. at 90. Specifically, "[t]he state laws now in question bear upon national and international maritime commerce and in this area there is no beginning assumption that concurrent regulation by the State is a valid

"[A]gainst this background," the Court proceeded with its statutory analysis of the 1990 Act. *Id.* at 100.

Locke reaffirmed *Ray's* holding that state regulations were preempted "because they were within a field reserved for federal regulation." *Id.* at 111. The Court also rejected the suggestion that *Ray* narrowly applied field preemption only to tanker design and construction, noting that these terms "cannot be read in isolation from the other subjects" delegated to the federal government. *Id.* "Congress has left no room for state regulation of these matters." *Id.* at 91.

The Court concluded by flatly rejecting that sufficiency of federal regulations was at issue. "The issue is not adequate regulation but political responsibility; and it is, in large measure, for Congress and the Coast Guard to confront whether their regulatory scheme, which demands a high degree of uniformity, is adequate." *Id.* at 117.

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exercise of its police powers." *Id.* at 108. *Locke's* analysis on this point cannot be reconciled with petitioners' position. (Pet. Br. at 31-32.) A significant federal presence in railroad, locomotive and locomotive equipment regulation began long ago, contemporaneously with the widespread use of railroads. Respondents identify federal legislation dating back to 1887. (Resp. Br. at 3-4.)

2. Field Preemption Of Savings And Loan, And National Bank Regulation

In *Fidelity Fed. Sav. & Loan Ass'n v. Cuesta,* 458 U.S. 141 (1982), this Court upheld field preemption of state limitations on a due-on-sale practices because Congress had empowered the Federal Home Loan Bank Board ("Board") to provide for the organization, operation, and regulation of savings and loan associations. *Id.* at 170. Based on explicit language in the Board's regulations, the Court held that the federal regulations were "meant to preempt conflicting state limitations on the due-on-sale practices of federal saving and loans." *Id.* at 159. Additionally, in passing due-on-sale regulations, the Board was acting with the "ample authority" Congress had delegated to it. *Id.*

To reach this conclusion, the Court relied on the language and history of the 1936 Act that had created the Board. Congress gave the Board "plenary authority to issue regulations governing federal savings and loans." *Id.* at 160. In particular, the Court made three observations: (1) Congress did not create any express "limits on the Board's authority," (2) Congress authorized the Board to provide for "operations", a broad term that includes mortgage loan instruments, and (3) Congress gave the Board the authority to issue what it deemed "best practices" and gave this authority to "not any particular state." *Id.* at 161-62.

The Court supplemented this analysis of the statutory scheme with a review of legislative history. In the federal statute creating the Board, the Court concluded, "Congress delegated to the Board broad authority to establish and regulate 'a uniform system of [savings and loan] institutions where there are not any now' and to 'establish them with the force of the government behind them, with a national charter.'" *Id.* at 166 (quotation omitted).

Similarly, more than two decades later, this Court applied field preemption to state regulation of national banks. In *Watters v. Wachovia Bank*, N.A., 550 U.S. 1, 7 (2007), the Court struck down state licensing, reporting, and visitorial schemes for a national bank's mortgage activities, holding the bank was subject to a federal agency's "superintendence." As it did in *Locke*, the Court began its analysis by considering the historical position Congress has occupied in regulating national banks generally. The Court noted that *McCulloch v. Maryland*, 4 Wheat. 316 (1819) held that "federal law [is] supreme over state law with respect to national banking." 550 U.S. at 10. Congress thereafter enacted the National Bank Act in 1864, which established "the system of national banking still in place today." *Id.* The National Bank Act authorized mortgage lending, subject to regulation by the Office of the Comptroller of the Currency. *Id.* at 12 (citing 12 U.S.C. § 371(a)).

The Court then recognized that preemption of national banking regulations was not limited to express conflicts between state and federal law because the federal government had occupied the

field: "Congress did not intend, we explained, 'to leave the field open for the States to attempt to promote the welfare and stability of national banks by direct legislation…[C]onfusion would necessarily result from control possessed and exercised by two independent authorities.'" *Id.* at 14 (quoting with omissions from *Easton v. Iowa*, 188 U.S. 220, 229 (1903)). Since field preemption applied, states cannot confer "examination and enforcement authority over mortgage lending, or any other banking business done by national banks." *Id.* at 14-15.

But the Court's analysis went even deeper and concluded that field preemption also defeated state regulation of national bank operating subsidiaries:

> We have never held that the preemptive reach of the NBA extends only to a national bank itself. Rather, in analyzing whether state law hampers the federally permitted activities of a national bank, we have focused on the exercise of a national bank's *powers*, not on its corporate structure.

Id. at 18 (emphasis original). Because the subsidiary is "empowered to do only what the bank itself could do" and the National Bank Act "vests visitorial oversight" in Office of the Comptroller of Currency, state regulators cannot subject either national banks or their subsidiaries "to multiple

audits and surveillance under rival oversight regimes." *Id.* at 21.

3. Field Preemption of Air Traffic Regulation

This Court again analyzed statutory language, Congressional intent, and overall statutory scheme when it applied the field preemption doctrine to the regulation of air traffic. In *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624, 626, 640 (1973), the Court struck down a city ordinance prohibiting jet aircraft from taking off and landing between the hours of 11 p.m. and 7 a.m., even though the curfew affected only one regularly scheduled flight. In support of its decision, the Court examined the Federal Aviation Act of 1958, which not only asserted "exclusive national sovereignty in the airspace of the United States" but also gave the Federal Aviation Administration (FAA) "broad authority to regulate the use of the navigable airspace." *Id.* at 626-27. This authority included directing the FAA to "prescribe air traffic rules and regulations governing the flight of aircraft." *Id.* at 627 n.3.

Congress's decision in 1972 to specifically direct the regulation of noise was factored into the Court's analysis. The Noise Control Act provided that the FAA would consult with local authorities and make recommendations to Congress regarding aircraft noise. *Id.* at 628. But Congress also gave the Environmental Protection Agency (EPA) authority to propose aircraft noise regulations to the FAA. *Id.* at 629. Reading the 1958 and 1972

Acts together, the Court concluded that the 1972 Act "reaffirms and reinforces the conclusion that FAA, now in conjunction with EPA, has full control over aircraft noise, pre-empting state and local control." *Id.* at 633.

"There is, to be sure, no express provision of pre-emption in the 1972 Act," the Court stated, but that "is not decisive." *Id.* Rather, "the pervasive nature of the scheme of federal regulation of aircraft noise … leads us to conclude that there is pre-emption." *Id.* In addition to analyzing the regulatory scheme, this Court considered legislative history. *Id.* at 634-38. Even though noise control is "deep-seated in the police power of the States," field preemption applied because the 1972 Act "seems to us to leave no room for local curfews or other local controls." *Id.* at 638. Based on the interplay between the 1972 Act and the regulations already adopted by the FAA, the Court concluded that "interdependence of these factors requires a uniform and exclusive system of federal regulation if the congressional objectives underlying the Federal Aviation Act are to be fulfilled." *Id.* at 639.

Allowing local authorities to intervene with multiple curfews would lead to "fractionalized control of the timing of takeoffs and landings [and] would severely limit the flexibility of FAA in controlling air traffic flow." *Id.* This Court concluded it was "not at liberty to diffuse the power given by Congress to FAA and EPA by letting the States or municipalities in on the planning." *Id.* at 640.

4. Field Preemption Of Locomotive And Locomotive Equipment Regulation

Almost 85 years ago, this Court addressed whether the Locomotive Inspection Act "occupied the field of regulating locomotive equipment used on a highway of interstate commerce, so as to preclude state legislation." *Napier*, 272 U.S. at 607. At issue in *Napier* were Georgia and Wisconsin laws requiring that all locomotives operating in those states have certain equipment. Locomotive carriers sought to enjoin state officials from enforcing the state laws that prohibited the use of locomotives not equipped with the prescribed devices. *Id.* at 607-08.

This Court confirmed that Congress, through the LIA, conferred upon the Interstate Commerce Commission[3] "general" authority to regulate locomotive and locomotive equipment; consequently, the state requirements were preempted as falling "within the scope of the authority delegated to the Commission" by the LIA. *Id.* at 611-13. Importantly, the state laws were preempted even though the Court assumed the laws were a proper exercise of police power regulating health and safety. *Id.* at 610-11. But since Congress intended "to occupy the field" in respect to all regulation of locomotive and locomotive equipment, the LIA accordingly preempted state laws within "the scope of the

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[3] The Secretary of Transportation now holds this regulatory power.

authority delegated to the Commission." *Id.* at 611-13. Those areas include "the design, the construction and the material of every part of the locomotive and tender and of all appurtenances." *Id.* at 611.

Ten years later, this Court confirmed that the BIA's broad scope encompasses "[w]hatever in fact is an integral or essential part of a completed locomotive, and all parts or attachments definitely prescribed by lawful order of the Interstate Commerce Commission." *Southern Ry. v. Lunsford*, 297 U.S. 398, 402 (1936). An in-depth history of railroad, locomotive and locomotive equipment regulation is fully examined in respondents' briefs and will not be repeated here. (Resp. Br. at 3-4, 10-15.) Field preemption applies for locomotive and locomotive equipment, just as it does for other federally regulated industries like oil tankers, savings and loan institutions, national banks, and air traffic.

B. Field Preemption Of State Regulation And Common Law Tort Claims Should Be Upheld.

1. Following *Napier*, The Lower Courts Should Be Affirmed

Following the template evident in field preemption decisions from other heavily-regulated areas, this Court should affirm *Napier's* holding that Congress occupied the field of locomotive and locomotive equipment regulation. *Napier* is sound because (a) it is grounded in the Act's language

which delegates broad authority to the Secretary; (b) Congress has demonstrated its intent to occupy the field in the statutory scheme; and (c) a long history of federal authority exists in this regulated field. The details of each of these points are fully presented in respondents' brief. (Resp. Br. at 25-51.)

When the Act is read in its entirety, Congress intended to confer broad regulatory powers to the Secretary of Transportation. The breadth of Congress's delegation is the cornerstone of this Court's analysis of field preemption, as evident in each of the cases analyzed above. Just as this Court concluded that Congress extended broad federal authority to the board regulating savings and loan associations, this Court may also say of the Secretary of Transportation under the LIA: "Nowhere is there a suggestion of any intent somehow to limit the … authority." *Fidelity Fed. Sav. & Loan Ass'n*, 458 U.S. at 164.

This Court should reject petitioners' argument that this delegation was narrowed to mere "use" of locomotive and locomotive equipment on railroad lines. (Pet. Br. at 16, 21-23; SG Br. at 11, 13-16.) This pinched position rests an inappropriate focus on one word and is contradicted by a complete reading of the Act, which encompasses "the design, the construction, and the material of every part of the locomotive and tender and of all appurtenances." 49 U.SC. § 20701. Because the Act broadly delegates federal authority over design and construction of locomotive and locomotive equipment and petitioners' claims rest

on design and construction of locomotive and locomotive equipment, the statute's reference to "use" is not a material limitation. Respondents' point is well taken: "A locomotive's design and manufacture is the same whether it is on the tracks or in the roundhouse." (Resp. Br. at 21.)

Further, Congress's intent to occupy the field is evident in the "statutory pattern," just as it was in *Ray* and *Locke*. Through numerous statutes, the LIA and BIA among them, Congress intended to promote uniformity based on national design and construction standards; this is similar to the Congressional intent recognized in *Ray* and *Locke*. In this appeal, this Court should reach the same conclusion it reached concerning tanker regulation: "Congress has left no room for state regulation of these matters." *Locke*, 529 U.S. at 91. *See also City of Burbank*, 411 U.S. at 638 ("the 1972 Act seems to us to leave no room for local curfews or other local controls").

2. State Courts Of Last Resort Have Held That Locomotive Inspection Act Preemption Bars State Tort Claims

When Congress occupies the field, "any state law falling within that field is pre-empted." *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248 (1984). This Court also has recognized that tort claims are designed to affect conduct and regulate – just as statutes and regulations do. *See San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 247 (1959) ("[State] regulation can be as effectively

exerted through an award of damages as through some form of preventive relief. The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy.").

Numerous plaintiffs have asserted that the scope of field preemption recognized in *Napier* does not apply to their own claim, arguing as petitioners do here that preemption may apply to public regulation of railroads and locomotives but it does not include private litigation. But the majority of high state courts across the nation have rejected this assertion and upheld *Napier* preemption on the principle that federal law preempts *all* state claims – including tort claims – leaving no area within which states may act. *See*, *e.g.*, *General Motors Corp. v. Kilgore*, 853 So.2d 171, 176 (Ala. 2002) (observing "A majority of courts … have also found that the [Locomotive Inspection Act] preempts common-law actions against both locomotive operators and locomotive manufacturers"); *see also In re W. Va. Asbestos Litig.*, 592 S.E.2d 818, 823-24 (W. Va. 2003) (citing cases).

State courts must independently determine whether a state action is preempted by federal law. *Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140, 149-50 (1988) ("[W]hen a state proceeding presents a federal issue, even a preemption issue, the proper course is to seek resolution of that issue by the state court."). Tellingly, the state courts of last resort that have been tasked with deciding whether the Locomotive Inspection Act preempts common

law actions against the operators, manufacturers, and distributors of locomotive and locomotive equipment have consistently held that the Act preempts state tort claims. *See*, *e.g.*, *Darby v. A-Best Prods. Co.*, 811 N.E.2d 1117, 1125-26 (Ohio 2004); *In re W. Va. Asbestos Litig.*, 592 S.E.2d at 822; *Kilgore*, 853 So. 2d at 171; *Scheiding v. Gen. Motors Corp.*, 993 P.2d 996, 1011-1012 (Cal. 2000).

In *Scheiding*, the California Supreme Court analyzed whether the federal preemption analysis in *Lohr* and *Silkwood* "had undermined the viability of *Napier*." 993 P.2d at 998. Based on a careful reading of this Court's precedent, the California high court confirmed that *Napier* foreclosed state law claims. *Id.* at 1000-02 ("unpersuaded on the merits" by the plaintiff's position that "in the wake" of *Medtronic* and *Silkwood* "preemption analysis has evolved to narrow the proper construction and application of *Napier*"). The high court also relied on the Ninth Circuit Court of Appeal's "practical rationale" for that determination:

> [The] broad preemptive sweep is necessary to maintain uniformity of railroad operating standards across state lines. Locomotives are designed to travel long distances, with most railroad routes wending through interstate commerce. The virtue of uniform national regulation is "self evident: locomotive companies need only concern themselves with one set of equipment regulations and need not

> be prepared to remove or add equipment as they travel from state to state."

Id. at 998 (quoting *Law v. Gen. Motors Corp.*, 114 F.3d 908, 911-12 (9th Cir. 1997)) (internal quotation omitted).

Simply put, if each state were to adopt different liability standards – through legislation, regulation, or tort claims – "manufacturers would have to sell locomotives and cars whose equipment could be changed as they crossed state lines, or adhere to the standard set by the most stringent state." *Id.* at 999 (quoting *Law*, 114 F.3d at 910-911). "Either way, Congress's goal of uniform, federal railroad regulation would be undermined." *Id.*

The California Supreme Court confirmed that the field occupied "must necessarily extend to state law tort recovery" because the Locomotive Inspection Act "cannot remove 'the design, the construction, and the material of every part of the locomotive and tender and of all appurtenances' from the purview of state regulation without concomitantly precluding tort actions premised on a defect in such design, construction, or material." *Id.* at 1001-02 (quoting *Napier*, 272 U.S. at 611). "Any other result would place regulation of these requirements in the hands of state juries, thereby constraining the Secretary of Transportation's regulatory authority and undermining the goal of uniformity." *Id.* at 1002 (citations omitted).

Following similar reasoning, a majority of state and federal courts have found that the Locomotive Inspection Act preempts common-law actions against both locomotive operators and locomotive manufacturers. *See*, *e.g.*, *Forrester v. Am. Dieselelectric*, 255 F.3d 1205 (9th Cir. 2001) (common-law product liability action against manufacturer); *Oglesby v. Delaware & Hudson Ry.*, 180 F.3d 458 (2d Cir. 1999) (common-law failure to warn claim); *Springston v. Consol. Rail Corp.*, 130 F.3d 241 (6th Cir. 1997) (common-law negligence claim for inadequate warning devices); *Roth v. I & M Rail Link, L.L.C.*, 179 F. Supp. 2d 1054 (S.D. Iowa 2001) (state common-law tort claims against manufacturer); *Bell v. Ill. Cent. R.R.*, 236 F. Supp. 2d 882 (N.D. Ill. 2001) (same); *In re: Amtrak "Sunset Limited" Train Crash in Bayou Canot, Alabama, on September 22, 1993*, 188 F. Supp. 2d 1341 (S.D. Ala. 1999) (common law negligence and design-defect claims); *Seaman v. A.P. Green Indus., Inc.*, 707 N.Y.S.2d 299 (Sup. Ct. 2000) (common-law claims against manufacturers of train components containing asbestos); *see also Darby*, 811 N.E. 2d at 1125-26; *In re W. Va. Asbestos Litig.*, 592 S.E.2d at 822; *Kilgore*, 853 So. 2d at 180.

3. Modern Preemption Jurisprudence Does Not Diminish *Napier's* Viability

Silkwood and *Lohr* undermine neither the viability nor the applicability of *Napier* to preempt state tort claims.

In *Silkwood*, this Court held that the Atomic Energy Act did not preempt state-law tort remedies because the federal legislation made clear that "persons injured by nuclear accidents were free to utilize existing state tort remedies." 464 U.S. at 251-52. The statutory language, therefore, made it plain that "Congress was quite willing to accept" the regulatory affect of tort law on radiation safety. *Id.* at 256. But nothing in *Silkwood* allows state tort law to intrude when a statute contains no evidence that Congress was willing or intended that state common-law remedies would be preserved. To the contrary, *Silkwood* confirms the rule that applies to petitioners' claim in this case: when Congress occupies a field, "any state law" in the field is preempted. *Id.* at 248.

Similarly, *Lohr* involved an express preemption provision contained in the Medical Device Amendments of 1976 ("MDA") and this Court's holding turned on the scope of preemption that Congress expressed in that clause – not on the distinction between tort law and other laws. Construing the provision according to its terms, the Court found no congressional intent to preempt state common-law negligence actions. *Lohr*, 518 U.S. at 491 ("If Congress intended such a result, its

failure even to hint at it is spectacularly odd, particularly since Members of both Houses were acutely aware of ongoing product liability litigation."). The preemption clause specified that the federal act would preempt state law only if there were an on-point federal regulation. *Id.* at 496. Thus, common law negligence suits were exempted from preemption under the MDA because the federal agency with authority to do so had not imposed any such regulation. *Id.* at 496-97.

Lohr's analysis, however, is not applicable to the LIA which commands national uniformity, preempts the field of locomotive design and construction, and preempts state law within the field. The LIA preempts state action whether or not there is an on-point federal regulation; indeed, whether a federal regulation exists is "without legal significance." *Napier*, 272 U.S. at 613. Importantly, since *Silkwood* and *Lohr,* this Court has repeatedly held that ordinary preemption principles apply to common-law damage actions. *See*, *e.g.*, *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 868-69 (2000) (holding common law products liability claim preempted); *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 521-23 (1992) (common law failure to warn claims preempted); *Easterwood*, 507 U.S. at 664, 675 (FRSA preempts common law claim related to speed of train); *Norfolk S. Ry. Co. v. Shanklin*, 529 U.S. 344, 358 (2000) ("FRSA pre-empts respondent's state tort claim"). Consequently, preemption of a common law claim turns on the scope of authority delegated by Congress.

II. EROSION OR ABANDONMENT OF FIELD PREEMPTION WOULD FLOUT STARE DECISIS AND DESTROY SETTLED ECONOMIC EXPECTATIONS.

Field preemption is by now a jurisprudential truth that informs countless business decisions every day, as it has for many decades. Congress has always had the power to eliminate or narrow the scope of field preemption merely by amending the laws this Court has deemed to occupy the field. Yet lawmakers have stood by this Court's application of the field preemption doctrine. The time-honored principle of stare decisis exists to protect centuries-old expectations and understandings. Neither petitioners nor the Solicitor General have made the case for the dramatic departure from precedent that they demand.

A. Stare Decisis Is Fundamental And Must Be Preserved.

Stare decisis ensures that "the law will not merely change erratically" and "permits society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals." *Vasquez v. Hillery*, 474 U.S. 254, 265 (1986). This Court has held that "stare decisis is a basic self-governing principle within the Judicial Branch, which is entrusted with the sensitive and difficult task of fashioning and preserving a jurisprudential system that is not based upon 'an arbitrary discretion.'" *Patterson v. McLean Credit Union*,

491 U.S. 164, 172 (1989) (quoting *The Federalist*, No. 78, at 490 (A. Hamilton) (H. Lodge ed. 1888)).

This doctrine is of fundamental importance to the rule of law and "the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Payne v. Tennessee*, 501 U.S. 808, 827-28 (1991); *Welch v. Texas Dep't of Highways & Pub. Transp.*, 483 U.S. 468, 494 (1987) ("[T]he doctrine of stare decisis is of fundamental importance to the rule of law."). Plainly stated, adherence to precedent "reflects a policy judgment that in most matters it is more important that the applicable rule of law be settled than it be settled right." *State Oil Co. v. Kahn*, 522 U.S. 3, 20 (1997). Consequently, reconsideration of decisions must be approached "with the utmost caution." *Id.*; *see also Agostini v. Felton*, 521 U.S. 203, 235 (1997).

Adhering to stare decisis is particularly compelling in the realm of field preemption which is based on "a scheme of federal regulation so pervasive" it gives rise to "the inference that Congress left no room for the States to supplement it." *Rice*, 331 U.S. at 230. *See, e.g., Local 20, Teamsters, Chauffeurs & Helpers Union v. Morton*, 377 U.S. 252, 260 (1964) (state could not prohibit organized labor conduct that Congress had contemplated but not regulated because state law could "upset the balance of power … expressed in our national labor policy"). Stare decisis weighs especially "heavily in the area of statutory

construction, where Congress is free to change this Court's interpretation of its legislation." *Illinois Brick Co. v. Ill.*, 431 U.S. 720, 736 (1977). This Court affords deference to

> longstanding and well-entrenched decisions, especially those interpreting statutes that underlie complex regulatory regimes. Adherence to precedent is, in the usual case, a cardinal and guiding principle of adjudication, and "[c]onsiderations of stare decisis have special force in the area of statutory interpretation, for here, unlike in the context of constitutional interpretation, the legislative power is implicated, and Congress remains free to alter what we have done."

California v. Fed. Energy Reg. Comm'n, 495 U.S. 490, 498-99 (1990) (quoting *Patterson*, 491 U.S. at 172-73); *see also Hilton v. S. Car. Pub. Rys. Comm'n*, 502 U.S. 197, 202 (1991) ("Congress has had almost 30 years in which it could have corrected our decision in *Parden* if it disagreed with it, and has not chosen to do so. We should accord weight to this continued acceptance of our earlier holding. *Stare decisis* has added force when the legislature, in the public sphere, and citizens, in the private realm, have acted in reliance on a previous decision, for in this instance overruling the decision would dislodge settled rights and expectations or require an extensive legislative response. This is so in the case before us.").

Other than wishing for an opposite rule, petitioners offer no sound basis for departing from the field preemption doctrine that has governed so long. Yet, "special justification" must be shown for the extraordinary abandonment of long-standing doctrine. *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984) ("[A]ny departure from the doctrine of stare decisis demands special justification."). Indeed, the Court must be presented with "the most convincing of reasons [which] demonstrate[ ] that adherence to it puts us on a course that is sure error." *Citizens United v. Fed. Election Comm'n*, -- U.S. --, 130 S. Ct. 876, 911-12 (2010).[4] To contrast, this Court has held that the extraordinary act of revising its precedent "is particularly appropriate where, as

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[4] For other examples of the high burden imposed to overturn existing prudent or long-standing legal doctrines, *see also Amalgamated Ass'n of St., Elec., Ry. & Motor Coach Emps. of Am. v. Lockridge*, 403 U.S. 274, 302 (1971) ("While we do not assert that the *Garmon* doctrine is without imperfection, we do think that it is founded on reasoned principle and that until it is altered by congressional action or by judicial insights that are born of further experience with it, a heavy burden rests upon those who would, at this late date, ask this Court to abandon *Garmon* and set out again in quest of a system more nearly perfect. A fair regard for considerations of *stare decisis* and the coordinate role of the Congress in defining the extent to which federal legislation pre-empts state law strongly support our conclusion that the basic tenets of *Garmon* should not be disturbed."); *Hilton*, 502 U.S. at 202 ("Time and time again, this Court has recognized that the doctrine of *stare decisis* is of fundamental importance to the rule of law. … Adherence to precedent promotes stability, predictability, and respect for judicial authority. … For all of these reasons, we will not depart from the doctrine of *stare decisis* without some compelling justification.") (quotation marks and citations omitted).

here, a departure would not upset expectations, the precedent consists of a judge-made rule that was recently adopted to improve the operation of the courts, and experience has pointed up the precedent's shortcomings." *Pearson v. Callahan*, 555 U.S. 223, 233 (2009). Field preemption does not fit within this extremely narrow construct. Stare decisis compels preservation of field preemption.

B. Field Preemption Has Resulted In Reasonable And Settled Industry Expectations.

Affirming *Napier* is particularly sound in this case. Field preemption is not a new doctrine; it dates back to the first half of the nineteenth century. *See, e.g.*, *Prigg v. Pennsylvania*, 41 U.S. 539, 617-18 (1842) ("For if Congress have a constitutional power to regulate a particular subject, and they do actually regulate it in a given manner, and in a certain form, it cannot be, that the state legislatures have a right to interfere, and as it were, by way of compliment to the legislation of Congress, to prescribe additional regulations, and what they may deem auxiliary provisions for the same purpose."); *see also Houston v. Moore*, 18 U.S. 1, 24 (1820) ("Congress has exercised the powers conferred on that body by the constitution, as fully as was thought right, and has thus excluded the power of legislation by the States on these subjects, except so far as it has been permitted by Congress[.]").

Since the 1800s, nationally regulated industries have made business decisions, created designs, manufactured equipment, parts, and products, and run companies with the idea that federal law governs their conduct. State, county or municipal interference with the federally regulated businesses has not been allowed because Congress left no room in the field. *See, e.g., Rice*, 331 U.S. at 236 (field of regulating federally licensed grain elevators is preempted due to congressional intent to eliminate dual regulation of the industry); *City of Burbank.*, 411 U.S. at 633, 638 (Federal Aviation Act preempts local ordinance limiting overnight flights due to "the pervasive nature of the scheme of federal regulation of aircraft noise…leav[ing] no room for local curfews or other local controls").

Continuing application of field preemption in areas where national uniformity has ruled supreme is critical to the success of affected businesses and the country's economy. This Court should not lightly undertake to upset settled expectations by allowing state action through tort jury verdicts to interfere with business decisions that occurred decades ago in reliance on federal regulations and oversight. The business "reliance interests are important considerations in property and contract cases, where parties have acted in conformance with existing legal rules in order to conduct transactions." *Citizens United*, -- U.S. --, 130 S. Ct. at 913; *see also Payne v. Tennessee*, 501 U.S. 808, 828 (1991). Federally regulated industries, which, by their very nature, are interstate enterprises have relied on the field preemption doctrine in making business decisions. *See City of Burbank*,

411 U.S. at 638-39 ("interdependence of factors [at issue in air traffic regulation] requires a uniform and exclusive system of federal regulation.").

The long-standing effects of field preemption are felt across the country every day, and decisions made long ago in the regulatory light of field preemption continue to have life today. For example, the engineering and business decisions regarding design and construction of locomotive or locomotive equipment, tanker vessels or tanker equipment, were made decades ago with the understanding that federal law governed the conduct of those decisions. To allow 50 different state legislatures or, worse, thousands of diverse juries empanelled in various counties throughout the country, to impose standards different from the federal law would sunder the national uniformity that these industries depend upon. *See, e.g.*, 49 U.S.C. § 20106 (Congress precludes state law interference with railroad oversight to ensure "[n]ational uniformity of regulation"); 46 U.S.C. § 391a(1)(3) (Congress requires promulgation of "comprehensive minimum standards" for oil and fuel tankers).

A similar Congressional intent favoring national uniformity is present for savings and loan institutions, national banks, and air traffic. *See, e.g.*, 12 U.S.C. § 1464(a)(1) (Congress authorizes board to prescribe rules and regulations for the operation of savings and loan institutions); 12 U.S.C. § 371(a) (Congress authorizes national banking associations to engage in mortgage lending subject to restrictions by federal agency); 49 U.S.C.

§ 1348 (Congress authorizes FAA to regulate use of navigable airspace "in order to insure the safety of aircraft and the efficient utilization of such airspace"). Upending field preemption will call into question the vibrancy of the Congressional intent underlying these acts and will send ripples across the thousands of business decisions made in reliance upon that intent. Such uncertainty could have devastating consequences with economic ramifications which this Court cannot predict.

Abandoning field preemption is distinctly different from changing a course established by an opinion that is merely a decade or two old, where this Court has held expectations would not be upset. *See Montejo v. Louisiana*, -- U.S. --, 129 S. Ct. 2079, 2088-89 (2009). Unlike in *Montejo*, field preemption has governed since the early 1800s and federally regulated businesses and industries have made countless decisions based upon the premise that federal law, regulations, and agency discretion defines fundamental parameters for the entire industry. Field preemption cannot be cast aside without doing substantial harm to the established legal framework within which businesses and industries operate.

C. This Court Should Preserve Field Preemption.

Given the long-settled acceptance of field preemption as attendant to broad federal legislation and regulation, the question posed by petitioners implicates not only the Court's faith in its own precedent but also the supremacy of

Congress's decision not to alter the federal regulatory schemes that generated those very opinions. Recognizing that *Napier* was decided in 1926, Congress has had ample opportunity to change the scope of preemption for locomotive and locomotive equipment design and construction, as well as many other fields that this Court has recognized as being occupied by the federal law and regulation.

The fact that Congress has not significantly revised these statutes or expressly limited preemption by authorizing common law claims "may reflect nothing more than the settled character of implied preemption doctrine that courts will dependably apply, and in any event, the existence of conflict cognizable under the Supremacy Clause does not depend on express congressional recognition that federal and state law may conflict[.]" *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 387-88 (2000). Field preemption cannot be overturned or compromised without deconstructing the understanding upon which Congress has based legislation. This case presents no just cause to engage in such a tear down of precedent that has been so important to business and industry.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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