

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.
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

AMICUS CURIAE BRIEF OF THE NATIONAL
ASSOCIATION OF MANUFACTURERS IN
SUPPORT OF RESPONDENTS

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INTEREST OF *AMICUS CURIAE*¹

The National Association of Manufacturers (“NAM”) is the nation’s largest industrial trade association, representing small and large manufacturers in every industrial sector and in all fifty states. The NAM’s mission is to enhance the competitiveness of manufacturers by shaping an environment conducive to economic growth and to increase understanding among policymakers, the media, and the general public about the vital role of manufacturing to America’s economic future and living standards. This appeal has the potential to permit product liability lawsuits long considered preempted by federal law; such an outcome would be detrimental to the NAM’s members.

STATEMENT OF THE CASE

The NAM adopts Respondents’ Statement of the Case.

¹ Pursuant to Rule 37.3(a), counsel represents that all parties have consented to the filing of this brief. Letters reflecting the parties’ consent have been lodged with the Court. Per Rule 37.6, no counsel for a party has authored this brief in whole or in part; no person or entity, other than the *amicus*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

Petitioners seek a change in the law that would allow them to pursue asbestos personal injury claims against locomotive equipment manufacturers and distributors not previously amenable to suit, further widening the net of asbestos litigation that has burdened the nation's courts, ensnarled more than 10,000 companies, and forced almost 100 employers into bankruptcy. Petitioners ask the Court to draw a distinction between preemption of state statutes and regulations and state common law claims that is inconsistent with precedent, artificial, litigation-generating, and could potentially expand liability in other contexts.

Asbestos litigation is the “longest-running mass tort” in U.S. history. Helen Freedman, *Selected Ethical Issues in Asbestos Litigation*, 37 Sw. U. L. Rev. 511, 511 (2008). “For decades, the state and federal judicial systems have struggled with an avalanche of asbestos lawsuits.” *In re Combustion Eng'g, Inc.*, 391 F.3d 190, 200 (3d Cir. 2005); *see also Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 597 (1997) (describing the asbestos litigation as a “crisis.”); *United States v. Weintraub*, 273 F.3d 139, 150 (2d Cir. 2001) (“High profile awards, settlements, and bankruptcies have resulted from the filing of thousands of lawsuits by sufferers of asbestos-related ailments.”). Now in its fourth decade, the litigation has been sustained by a relentless search for new defendants and new theories of liability. *See* Mark Behrens, *What's New in Asbestos Litigation?*, 28 Rev. Litig. 501 (2009). This case represents another instance of a creative

attempt to expand the types of defendants subject to suit.

Here, Petitioners seek to expand asbestos litigation to locomotive equipment manufacturers and distributors despite nearly a century of precedent, *see Napier v. Atlantic Coast Line R.R. Co.*, 272 U.S. 605 (1926), and an “avalanche of authority,” *In re W. Va. Asbestos Litig.*, 592 S.E.2d 818, 822 (W. Va. 2002), holding that such claims are preempted. Petitioners, joined by several *amici*, suggest that this Court should distinguish between state statutes and regulations, as subject to preemption, and state tort law claims, which they claim are preserved (Pet. Br. at 36-40). Such a distinction would not only impact Respondents, but significantly alter this Court’s preemption jurisprudence. Should the Court follow plaintiffs’ invitation, manufacturers of other federally-regulated products could face significant new liability and regulatory complexity.

Absent express federal statutory language to the contrary, this Court has properly treated state “positive” law and tort law as equivalent for preemption purposes. *See Riegel v. Medtronic, Inc.*, 552 U.S. 312, 324 (2008). Both effectively impose legal requirements. *See Geier v. American Honda Motor Co.*, 529 U.S. 861, 871 (2000). In fact, numerous individual tort claims, varying in their theories, have the potential to result in far greater complexity, inconsistency, and conflict than statutes or regulations. *See id.* Common law claims must be subject to ordinary principles of preemption.

ARGUMENT

I. OVERVIEW OF ASBESTOS LITIGATION TODAY: PLACING THIS CASE IN CONTEXT

In its earlier years, the asbestos litigation focused on companies that manufactured asbestos-containing products, often called “traditional defendants,” such as Johns Manville. Most of these primary historical manufacturers of asbestos are now bankrupt. Asbestos litigation has now forced at least ninety-six companies into bankruptcy, *see* Lloyd Dixon et al., *Asbestos Bankruptcy Trusts: An Overview of Trust Structure and Activity with Detailed Reports on the Largest Trusts* 25 (Rand Corp. 2010), available at http://www.rand.org/pubs/technical_reports/2010/RAND_TR872.pdf, with devastating impacts on defendants’ employees, retirees, shareholders, and surrounding communities. *See* Joseph Stiglitz et al., *The Impact of Asbestos Liabilities on Workers in Bankrupt Firms*, 12 J. Bankr. L. & Prac. 51 (2003).

As a result of the large number of bankruptcies, “the net has spread from the asbestos makers to companies far removed from the scene of any putative wrongdoing.” Editorial, *Lawyers Torch the Economy*, Wall St. J., Apr. 6, 2001, at A14, abstract available at 2001 WLNR 1993314. One former plaintiffs’ attorney described the litigation as an “endless search for a solvent bystander.” *Medical Monitoring and Asbestos Litigation’—A Discussion with Richard Scruggs and Victor Schwartz*, 17:3 Mealey’s Litig. Rep: Asbestos 5 (Mar. 1, 2002) (quoting Mr. Scruggs).

The Towers Watson consulting firm has identified more than 10,000 companies, including subsidiaries, named as asbestos defendants. *See* Towers Watson, *A Synthesis of Asbestos Disclosures From Form 10-Ks - Insights*, Apr. 2010, at 1, at http://www.towerswatson.com/assets/pdf/1492/Asbestos_Disclosures_Insights_4-15-10.pdf. At least one company in nearly every U.S. industry is involved in the litigation. *See* American Academy of Actuaries' Mass Torts Subcommittee, *Overview of Asbestos Claims Issues and Trends* 5 (Aug. 2007), available at http://www.actuary.org/pdf/casualty/asbestos_aug07.pdf. Nontraditional defendants now account for more than half of asbestos expenditures. *See* Stephen Carroll et al., *Asbestos Litigation* 94 (Rand Corp. 2005), available at http://www.rand.org/content/dam/rand/pubs/monographs/2005/RAND_MG162.pdf. The case before this Court exemplifies this trend because Petitioners seek to impose liability on an industry not previously considered subject to suit.

The change that Petitioners seek has the potential to alter a settled legal landscape and expose Respondents and like companies to substantial liability and unpredictability, undermining the goals of uniformity in the Locomotive Inspection Act as discussed in *Napier*, 272 U.S. at 210.

Adherence longstanding precedent will not leave railroad workers without an avenue for recovery. First, railroad workers such as Petitioner have a right to seek compensation from their employers under the Federal Employers' Liability Act (FELA), 45 U.S.C. § 51 et seq. FELA provides a

featherweight standard for causation. *See CSX Transp. v. McBride*, 131 S. Ct. 2630, 2640 (2011). Second, like all asbestos claimants, Petitioner also may be able to obtain recoveries from trusts created to pay claims relating to the scores of companies that have declared bankruptcy as a result of asbestos liabilities. Over sixty trusts have been established or proposed to collectively form a \$30-plus billion privately funded asbestos personal injury compensation system that operates parallel to, but wholly independent of, the civil tort system. *See* Lloyd Dixon et al., *An Overview of Trust Structure and Activity*, *supra*, at 25. “Trust outlays have grown rapidly since 2005.” Lloyd Dixon & Geoffrey McGovern, *Asbestos Bankruptcy Trusts and Tort Compensation* xi (Rand Corp. 2011), at <http://www.rand.org/pubs/monographs/MG1104.html>. “For the first time ever, trust recoveries may fully compensate asbestos victims.” Charles E. Bates & Charles H. Mullin, *Having Your Tort and Eating it Too?*, 6:4 Mealey’s Asbestos Bankr. Rep. 1 (Nov. 2006), *available at* <http://www.bateswhite.com/media/pnc/7/media.287.pdf>.²

² For example, it is estimated that mesothelioma plaintiffs in Alameda County (Oakland) will receive an average \$1.2 million from active and emerging asbestos bankruptcy trusts, *see* Charles E. Bates et al., *The Naming Game*, 24:15 Mealey’s Litig. Rep.: Asbestos 1 (Sept. 2, 2009), *available at* <http://www.bateswhite.com/media/pnc/9/media.229.pdf>, and could receive as much as \$1.6 million. *See* Charles E. Bates et al., *The Claiming Game*, 25:1 Mealey’s Litig. Rep.: Asbestos 27 (Feb. 3, 2010), *available at* <http://www.bateswhite.com/media/pnc/2/media.2.pdf>.

II. THIS CASE IS ANOTHER ATTEMPT TO EXTEND AND EXPAND FOUR DECADES OF ASBESTOS LITIGATION

It is in the context of this long history of plaintiffs seeking out new solvent defendants to compensate asbestos claimants that Petitioners ask this Court to abandon nearly a century of precedent, *see Napier*, 272 U.S. 605, and permit tort claims that would impose state requirements on locomotive equipment manufacturers and distributors³ Such a ruling also could potentially impact a myriad of other contexts where federal regulations may collide with state common law theories.

As this Court has recognized, *stare decisis* “demands that adhering to our prior case law be the norm. Departure from precedent is exceptional, and requires ‘special justification.’ This is especially true where, as here, the principle has become settled through iteration and reiteration over a long period of time.” *Randall v. Sorrell*, 548 U.S. 230, 244 (2006)

³ Given the longstanding federal regulation of railroads and locomotive equipment, any presumption against preemption “disappears . . . in fields of regulation that have been substantially occupied by federal authority for an extended period of time.” *Wachovia Bank, N.A. v. Watters*, 431 F.3d 556, 560 n.3 (6th Cir. 2005) (quoting *Flagg v. Yonkers Sav. & Loan Ass’n*, 396 F.3d 178, 183 (2d Cir. 2005), *aff’d*, 550 U.S. 1 (2007); *see also Silvas v. E*Trade Mortgage Corp.*, 514 F.3d 1001, 1005, 1008 (9th Cir. 2008) (finding that “[b]ecause there has been a history of significant federal presence in national banking, the presumption against preemption of state law is inapplicable” and holding that federal regulation preempted the field of lending regulation for federal savings associations, including class action lawsuit).

(internal citation omitted) (quoting *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984)). To overcome “an avalanche of authority,” *In re W. Va. Asbestos Litig.*, 592 S.E.2d at 822, finding that Congress intended to preempt the field of safety regulation of “the entire locomotive and tender and all parts and appurtenances thereto,” 49 U.S.C. § 20701, Petitioners present at least three theories to distinguish their case from *Napier*: (1) preemption applies only when a locomotive is “in use,” but not when it is stationary for repairs; (2) subsequent enactments indicate that Congress has altered its longstanding intent to preempt the field of locomotive safety; and (3) preemption is limited to state “positive” law (i.e., statutes and regulations), but does not reach state tort law claims.

These assertions lack merit, as demonstrated by the Respondents and other allied *amici*. This brief focuses on the third of the Petitioners’ suggestions for limiting the preemptive effect of the Locomotive Inspection Act (LIA) – namely, the broad implications for liability beyond locomotive equipment manufacturers and distributors.

In making their argument that preemption does not extend to state tort law claims (Pet. Br. at 36-40), Petitioners are joined by several *amici* that clearly seek from this Court a ruling that limits traditional principles of preemption to statutes and regulations, while preserving state common law claims. *See, e.g., Amicus Curiae Br. of the Am. Ass’n for Justice*, at 1-2 (“The crucial issue in this case is whether federal preemption of the field of state legislative and administrative regulation necessarily or impliedly

extends to preemption of common-law tort remedies. . . .”); Br. of *Amicus Curiae* Public Justice, P.C. at 1 (“Public Justice files this brief . . . to expand on the argument . . . that while pervasive federal regulation of a field may preempt positive state law, it cannot serve as a basis for depriving tort victims of their state common-law remedies”); *see also* Br. of Public Law Scholars as *Amici Curiae* at 21-25. These assertions are not supported by this Court’s jurisprudence, which treats common law duties as equivalent to state statutes and regulations for preemption purposes.

Preemption law has indeed evolved since Congress enacted the LIA, but not in the respect for which Petitioners and their supporting *amici* urge this Court’s reexamination of *Napier*. In numerous cases, this Court has considered the scope of preemption, including several cases in recent years involving the design of medical devices, warnings related to brand-name and generic prescription drugs, and automobile design. *See PLIVA v. Mensing*, 131 S. Ct. 2567 (2011); *Williamson v. Mazda Motor of Am., Inc.*, 131 S. Ct. 1131 (2011); *Wyeth v. Levine*, 555 U.S. 555 (2009); *Riegel v. Medtronic, Inc.*, 552 U.S. 312 (2008); *Geier v. American Honda Motor Co.*, 529 U.S. 861 (2000).

In its recent rulings, the Court reached various outcomes on the preemptive effect based on the language of the statute, other indications of Congressional intent, and the facts of the case before it. A consistent aspect of these decisions and the Court’s earlier jurisprudence is that, absent statutory language to the contrary, the Court has not

distinguished between state statutes and regulations, and state common law tort claims. The Court has applied principles of preemption equally to all state law.

For example, the Court closely considered preemption of tort law claims in *Geier*, where the Court found that a Federal Motor Vehicle Safety Standard (FMVSS) that gave manufacturers the option of installing airbags in vehicles, but did not require that they do so, precluded tort lawsuits that would have taken away the choice, provided by federal regulators, to either install an airbag or another passive restraint system. 529 U.S. at 865. In that case, the federal statute at issue included both an express preemption provision and a savings clause preserving certain state tort law claims. *Id.* at 869. Nevertheless, the Court found that “operation of ordinary pre-emption principles” precluded tort suits that posed an obstacle to the accomplishment of the objectives of the FMVSS at issue. *See id.* at 871-72.

The Court recognized that Congress’s preemption of “all state standards, even those that might stand in harmony with federal law, suggests an intent to avoid the conflict, uncertainty, cost, and occasional risk to safety itself that too many different safety-standard cooks might otherwise create.” *Id.* at 871. Tort suits, the Court found, must be included within the realm of preemption because they have the same effect in creating inconsistent or undesirable regulatory obligations as state “positive” law. As the Court reasoned, “rules of law that judges and juries create or apply in such suits may themselves

similarly create uncertainty and even conflict, say, when different juries in different States reach different decisions on similar facts.” *Id.* The Court saw no reason why a “jury-imposed safety standard” should be treated differently than a safety standard promulgated by a state regulatory agency or enacted by a state legislature. *See id.* Thus, the Court concluded that federal law preempted a “common-law ‘no airbag’ action” that set a conflicting standard. *See id.* at 874; *see also Williamson*, 131 S. Ct. at 1136 (reaffirming that a federal standard may preempt state tort law, while finding that the particular tort claim at issue did not stand as an obstacle to an important federal regulatory objective).

Most recently, in *PLIVA*, the Court again applied preemption to state tort law duties that conflicted with federal regulatory requirements, and did not reserve preemption for state “positive” law. In that case, the Court found that “[s]tate tort law places a duty directly on all drug manufacturers to adequately and safely label their products,” while federal regulations required manufacturers of generic drugs to use the exact same label as the branded counterpart. 131 S. Ct. at 2557. Since federal law did not permit generic manufacturers to adopt stronger warnings than those approved for the branded drug, the Court found tort claims seeking to impose such an obligation impermissible. *See id.* at 2577-78. Certainly, this Court would not treat a state statute or regulation requiring generic drug manufacturers to supplement warnings any differently.

The same principle of equivalence holds true with express preemption. For instance, in *Riegel*, this Court considered whether a provision in the Medical Device Act that expressly preempts state requirements “different from, or in addition to, any requirement applicable . . . to the device” applies to state common law claims related to the safety and effectiveness of the device. 552 U.S. at 335 (quoting 21 U.S.C. § 360k(a)). The Court concluded that it did. In finding preemption, the Court noted two other instances in which it had held that provisions pre-empting state “requirements” preempted common-law duties. *Id.* at 324 (citing *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 433 (2005) (holding that a provision of Federal Insecticide, Fungicide, and Rodenticide Act preempted common-law actions because they imposed state law requirements for labeling or packaging in addition to or different from those required under federal law) and *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 523 (1992) (plurality opinion) and *id.* at 548-49 (Scalia, J., concurring in judgment in part and dissenting in part) (holding that a provision of the Public Health Cigarette Smoking Act of 1969 preempted common law actions because they would impose state law requirements or prohibitions based on smoking and health with respect to the advertising or promotion of any cigarettes whose packages were labeled in accordance with federal law)).

As this Court clearly recognized in *Riegel*, and is directly applicable in the case at bar, “[a]bsent other indication, reference to a State’s ‘requirements’

includes its common-law duties.” 552 U.S. at 324.⁴ The Court’s reasoning in finding that “excluding common-law duties from the scope of pre-emption would make little sense” is particularly instructive here. *Id.* at 324-25. As the Court understood:

State tort law that requires a manufacturer's catheters to be safer, but hence less effective, than the model the FDA has approved disrupts the federal scheme no less than state regulatory law to the same effect. Indeed, one would think that tort law, applied by juries under a negligence or strict-liability standard, is less deserving of preservation. A state statute, or a regulation adopted by a state agency, could at least be expected to apply cost-benefit analysis similar to that applied by the experts at the FDA: How many more lives will be saved by a device which, along with its

⁴ *Sprietsma v. Mercury Marine, a Div. of Brunswick Corp.*, 537 U.S. 51 (2002), provides an example of where *Congress* distinguished between state statutes and regulations and common law. In that instance, the Federal Boat Safety Act (FBSA), expressly stated that “a State or political subdivision of a State may not establish, continue in effect, or enforce a law or regulation establishing a recreational vessel or associated equipment performance or other safety standard, 46 U.S.C. § 4306, while preserving “liability at common law, *id.* § 4311(g). This statutory text was the foundation of this Court’s language, relied upon by Petitioners (Pet. at 38-39) to support their view that common law should be treated differently than statutes and regulations for field preemption purposes. *See Sprietsma*, 537 U.S. at 69 (“The FBSA might be interpreted as expressly occupying the field with respect to state positive laws and regulations but *its structure and framework* do not convey a ‘clear and manifest’ intent . . . to go even further and implicitly pre-empt all state common law relating to boat manufacture. Rather, our conclusion that *the Act’s express pre-emption clause does not cover common-law claims* suggests the opposite intent.” (internal citations omitted) (emphasis added)).

greater effectiveness, brings a greater risk of harm? A jury, on the other hand, sees only the cost of a more dangerous design, and is not concerned with its benefits; the patients who reaped those benefits are not represented in court. As Justice BREYER explained in *Lohr*, it is implausible that the MDA was meant to “grant greater power (to set state standards ‘different from, or in addition to’ federal standards) to a single state jury than to state officials acting through state administrative or legislative lawmaking processes.”

Id. at 325. The Court concluded that it would “not turn somersaults” to create a “perverse distinction” between state statutory and common law in considering the scope of preemption unless required to do so by Congress. *Id.*

In the context of field preemption, and the LIA specifically, there is likewise no reason to give state tort law claims greater insulation from the intent of Congress to provide a uniform federal regulatory system than state statutes or regulation. As these cases recognize, there are several reasons warranting treatment of common law claims in the same manner as state statutes and regulations for purposes of federal preemption.

First, tort law claims seek to impose regulatory requirements (through the threat of liability) that have the same effect as a state statute. While the primary goal of tort law is to compensate an injured party, in product liability suits, it does so through imposing a state law duty on a manufacturer to alter the design or warnings of a product that allegedly

caused the harm. In fact, product liability lawsuits may impose exponentially harsher consequences for noncompliance than the maximum penalty authorized by statutes or regulations. *See, e.g., BMW of N. Am., Inc. v. Gore*, 701 So. 2d 507 (Ala. 1997) (on remand from this Court, requiring remittitur of punitive damage award from \$4 million to \$50,000, in addition to compensatory damages of \$4,000, when maximum statutory penalty was \$2,000).

Second, the benefits of uniformity are not equal, but greater, with respect to preemption of tort claims than with respect to state “positive law.” While state statutes and rules have the potential to subject manufacturers to fifty-one different standards with respect to the design or labeling of products, there is no limit to the number of regulatory obligations that individual state lawsuits may impose. State tort claims may subject already-regulated parties different, inconsistent, conflicting, or burdensome obligations in every case. Field preemption provides clarity by subjecting parties in an area of particular federal concern to a single set of requirements.

Finally, as the Court observed in *Riegel*, it would seem that common law claims deserve less protection than state statutes in a preemption analysis. *See* 552 U.S. at 325. Principles of federalism seek to preserve the power of state governments vis-à-vis the federal government. With respect to common law claims, however, the state standard that is in tension with federal law did not result from an official act of the legislature or a regulatory body acting pursuant to statutory authority, but originated from a lawsuit

between two private parties. Common law standards are not the product of deliberation by state officials, but a civil jury composed of as little as six individuals. *See Williams v. Florida*, 399 U.S. 78, 86 (1970) (permitting a state jury of six members and finding that “the 12-man panel is not a necessary ingredient of ‘trial by jury’”). Nevertheless, tort lawsuits have the potential to create complexity, inconsistency, and conflict to an even greater extent than state “positive” law. For that reason, it is particularly important to subject common law claims to ordinary principles of preemption.

CONCLUSION

For the foregoing reasons, the NAM respectfully requests that this Court affirm the court below.

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