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 Petition for a Writ of Certiorari to the U.S. Court of Appeals for the Third Circuit

BRIEF OF AMICUS CURIAE PRODUCT LIABILITY ADVISORY COUNCIL, INC. IN SUPPORT OF RESPONDENTS

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IDENTITY AND INTEREST OF THE *AMICUS CURIAE*

Amicus Curiae Product Liability Advisory Council, Inc. ("PLAC") is a non-profit association with 98 corporate members representing a broad cross-section of American and international product manufacturers. These companies seek to contribute to the improvement and reform of law in the United States and elsewhere, with emphasis on the law governing the liability of manufacturers of products. PLAC's perspective derives from the experiences of a corporate membership that spans a diverse group of industries in various facets of the manufacturing sector. Several hundred of the leading product liability defense attorneys in the country are also sustaining (non-voting) members of PLAC. Since 1983, PLAC has filed more than 850 briefs as *amicus curiae* in both state and federal courts, including at least 88 briefs in this Court, presenting the broad perspective of product manufacturers seeking fairness and balance in the application and development of the law as it affects product liability. A list of PLAC's corporate members is attached as an Appendix.[1]

Trains, aircraft, ships and trucks (some of which are manufactured by PLAC members), utilized to transport goods in interstate commerce, are ill-suited to satisfy conflicting design and warnings requirements of each of the fifty states in which they

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[1]Pursuant to Sup. Ct. R. 37.6, *amicus curiae* PLAC affirms that no counsel for a party authored this brief in whole or in part and that no person other than amicus and its counsel made a monetary contribution to its preparation or submission. The parties' letters consenting to the filing of this brief have been filed with the Clerk's Office.

may eventually be operated. PLAC has a vital interest in limiting the imposition of inconsistent standards for such products, given the federal government's uniform and comprehensive regulation of design and performance of such products. Avoiding "Balkanization"[2] by state regulation of modes of interstate transportation systems is a recognized purpose of the Commerce Clause. To allow such Balkanization to occur here would have ominous consequences not only for PLAC members and other manufacturers, but also for consumers and the Nation's economy as a whole. The issues raised in this case are therefore analogous to those presented in post-*Napier* decisions, such as *United States v. Locke*, 529 U.S. 89 (2000) (shipbuilding); *Bibb v. Navajo Freight Lines, Inc.,* 359 U.S. 520 (1959) (trucking); and *City of Burbank v. Lockheed Air Terminal Inc.,* 411 U.S. 624 (1973) (aviation). In the latter context, the Court made an observation that exemplifies the practical concern over the shortcomings of piecemeal local regulation of these kinds of federally regulated modes of interstate transportation:

> Federal control is intensive and exclusive. Planes do not wander about in the sky like vagrant clouds. They move only by federal permission, subject to federal inspection, in the hands of federally certified personnel and under an intricate system of federal commands. The moment a ship taxis onto a runway it is caught up in an

[2] *Hughes v. Oklahoma*, 441 U.S. 322, 325 (1979).

> elaborate and detailed system of controls.

Id. at 633-34, quoting *Northwest Airlines, Inc. v. Minnesota*, 322 U.S. 292, 303 (1944) (Jackson, J. concurring).

INTRODUCTION AND SUMMARY OF ARGUMENT

PLAC concurs with Petitioners' assertion that "*Napier* must be understood in its historical context." (Pet. at 40). However, contrary to Petitioners' argument, the historical and legal context strongly demonstrates Congress's intent to preempt the field when it enacted the Boiler Inspection Act ("BIA") and Locomotive Inspection Act ("LIA"), in 1911 and 1915.[3]

The Constitution's Framers recognized the dominant federal interest in interstate commerce. Political battles over the "railroad problem" raged throughout the country for decades following the Civil War until, after the turn of the new century, railroad regulation had become the central issue in the Progressive era. Congress implemented its dominant federal interest by enacting a succession of unprecedented statutes regulating the railroads. A

[3]Except where the context otherwise suggests, for brevity the term "LIA" hereafter refers to the BIA enacted in 1911 (Act of Feb. 17, 1911, ch. 103, §2, 36 Stat. 913) and as amended in 1915 (Act of Mar. 4, 1915, ch. 169, §1, 38 Stat. 1192) to broaden the scope of the federal law and the federal regulator's authority over the design and manufacture of locomotives and locomotive equipment. The Act, as amended, is known as the LIA, 49 U.S.C. § 20701 *et seq*. Petitioners adopted the same reference in the Petition at 4.

major purpose of federal regulation was to establish unified and effective control over the railroads because no one else could do so, let alone without killing the golden goose that had transformed the nation's economy.

By the time that Congress enacted the LIA, the law was settled that such federal legislation preempts state laws and regulations. When the Court decided *Napier v. Atlantic Coast Line R. Co.*, 272 U.S. 605 (1926), it understood the historical context of the LIA and correctly held that Congress intended field preemption when it enacted the statute. *Id.* at 613. The Court meant what it said in *Napier* when it held that the preempted field "extends to the design, the construction, and the material of every part of the locomotive and tender and of all appurtenances" (*id.* at 611), and the Petitioners have provided no valid reason to restrict that holding now. Rather, the historical record compels reaffirming what the Court decided in 1926.

ARGUMENT

I. The Court in *Napier* Correctly Held that Congress Intended Field Preemption When It Enacted the LIA.

Petitioners argue that the LIA should not be given broad preemptive effect because *Napier* was decided in an era when the Court routinely accorded preemptive effect to almost all federal enactments, while the Court does not do so today. (Pet. at 40). Petitioners' conclusion does not flow from their premise. The historical context of federal railroad regulation provides powerful evidence that Congress

necessarily understood that, in enacting the LIA, it voided any state law regulation of the same field.

The settled state of the law left no doubt that the preemptive effect of the LIA was expected. *South Dakota v. Yankton Sioux Tribe,* 522 U.S. 329, 351 (1998) ("[W]e assume that Congress is aware of existing law when it passes legislation…"), *quoting Miles v. Apex Marine Corp.,* 498 U.S. 19, 32 (1990); *see also, Cannon v. University of Chicago,* 441 U.S. 677, 696-697 (1979) ("It is always appropriate to assume that our elected representatives, like other citizens, know the law.").

A. The Framers Themselves Recognized the Dominant Federal Interest in the Regulation of Interstate Transportation.

Field preemption arises, among other occasions, whenever the federal interest in a field addressed by a Congressional enactment is so dominant, or the object to be attained by the enactment is such, that Congressional intent to exclude state regulation in the same field may be inferred. *Rice v. Santa Fe Elevator Corp.,* 331 U.S. 218, 230 (1947).

Petitioners' argument ignores the federal government's long-standing objective in promoting interstate commerce by removing state-imposed impediments to a unified, federally-regulated national system of transportation. Article I, Section 8 of the U.S. Constitution expressly delegates to Congress the power "[t]o regulate Commerce…among the several States…." In Federalist No. 22, Alexander Hamilton discussed a major shortcoming

of the absence of such a power in the Articles of Confederation, fearing that the nation would be undermined by "interfering and unneighborly regulations of some States" if "a national control" did not restrain them. He cited the problems of the German empire, in which "the fine streams and navigable rivers with which Germany is so happily watered are rendered almost useless" because of the "multiplicity of duties" the various princes and states exacted upon merchandise.

It is therefore not surprising that this Court's jurisprudence on the subject begins with *Gibbons v. Ogden,* 22 U.S. 1 (1824), in which the Court rebuffed one state's attempt to re-establish what Hamilton had feared. The Court's subsequent decisions applied field preemption to maritime navigation, then railroads and, more recently aviation and trucking. While the modes of interstate transportation have changed markedly over our history, our Founders' policy priority of unified national regulation of interstate commerce remains. *See Hughes,* 441 U.S. at 325 (noting that the Framers held the "conviction that in order to succeed, the new Union would have to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation").

In *Gibbons*, the Court invalidated New York's intrastate steamboat monopoly on the ground that a federal coasting license issued pursuant to the federal Navigation Act preempted the conflicting state statutes and authorized Gibbons to enter New York waters to conduct interstate trade. Chief

Justice Marshall declared that Congress's power over interstate commerce reached into the interior of each state, empowering Congress to regulate those activities within a state that "affect the states generally." 22 U.S. at 195. Only the "completely internal commerce of a State" was beyond Congress's constitutional authority. *Id.* More importantly, Marshall declared that the commerce power was "plenary" (22 U.S. at 197); it was "complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution." 22 U.S. at 196. In fact, Marshall declared that the power over commerce "is vested in Congress as absolutely as it would be in a single government." 22 U.S. at 197.

Justice Johnson's concurring opinion noted that "commerce" included not only the exchange of goods and the means of transportation, but also shipbuilding; i.e., the instruments of transportation:

> Ship building, the carrying trade, and propagation of seamen are such vital agents of commercial prosperity, that the nation which could not legislate over these subjects, would not possess power to regulate commerce. That such was the understanding of the framers of the constitution, is conspicuous from provisions contained in that instrument.

22 U.S. at 230.

The *Gibbons* Court recognized that a core purpose of the Commerce Clause was to protect such navigation from conflicting demands of state governments. It is difficult to imagine how the

United States could have become a leading world economic power had the *Gibbons* Court upheld New York's monopoly on intrastate shipping on navigable waterways, let alone had the Court subsequently failed to apply similar principles to state regulation of other modes of federally-regulated interstate transportation systems, such as the railroad, aviation, trucking, and maritime shipping systems.

B. The Nation's History Predating the LIA Confirmed the Dominant Federal Interest in An Integrated System of Interstate Transportation.

The federal government played a pivotal role in fostering a transportation revolution in the late nineteenth and early twentieth centuries. The imperative of protecting interstate commerce, as reflected in *Gibbons,* was magnified exponentially as the railroads transformed the Nation's economy in the ensuing century, producing an unprecedented mix of rapid economic development, coupled with the rise of corporations too large for any one locality or state to regulate effectively without causing disruption in other localities, states, or the Nation as a whole.

Railroads revolutionized transportation during the century between *Gibbons* and *Napier*. They eclipsed shipping as the principal mechanism of interstate commerce and transformed the fabric of American commerce itself. While the Constitution created a climate of free trade across the original thirteen states, geographic constraints initially limited such trade to coastal commerce between the

major ports. *Encyclopedia of North American Railroads,* 2 (William D. Middleton, George M. Smerk, Roberta L. Diehl eds., 2007) (hereafter "*Encyclopedia"*).

For the first three decades of the Nineteenth Century, the federal government worked to develop a wider system of turnpikes and canals. *Encyclopedia*, *supra,* 2-4. Even as late as the mid-1840s, "natural waterways still carried the lion's share of American commerce, and sails remained the primary mover of goods and passengers over any extended distances, as they had been since the days of Greece and Rome." Alfred D. Chandler, *The Railroads--The Nation's First Big Business* 3 (1965).

The railway system expanded rapidly, stimulated by the federal government's reduction on the tariff for iron and grants of land to the railroads as an incentive for expansion. The increased regularity, speed, and volume of transportation "profoundly affected the American farmer, merchant and manufacturer during the decade before the Civil War" (*id*. at 8), and made possible the swift rise of the factory in the United States." *Id*. at 8-9.

The burgeoning rail industry not only played a vital role in the Union's victory over the Confederacy, but the nation also learned important lessons from the Civil War about the need for uniformity and systemization for a national transportation system to succeed. Southern railroads were handicapped by lack of systemization. *Encyclopedia, supra,* 7. "It should not be imagined that anything approaching standardization or interchangeability of parts existed. Cylinder measurements, the size of drivers,

boiler diameter, dimensions of firebox, gross weight, all were subject to a good deal of variation." Robert C. Black, III, *The Railroads and the Confederacy* 16 (1952). A typical southern railroad before the war was "far less of a railroad enterprise than a port developer." George E. Turner, *Victory Rode the Rails* 29 (1953). The railroads "did not constitute parts of a rail system." *Id.* The railroads were "built in the interest of rival port cities, so that connections with other railroads were carefully avoided rather than sought." *Id.* at 29-30. In other words, the transportation system of the South suffered from a form of Balkanization loosely analogous to what Hamilton described in Federalist No. 22, with parochial advantages seized at the expense of successful interstate commerce.

In 1862, Congress chartered the first transcontinental rail route, from Council Bluffs, Iowa, to Sacramento. The railroads became a major national industry--and a transformational force in American commerce--in large measure because of federal land grants and subsidies. Following the war, rail transportation in the United States mushroomed from 30,000 miles of rail lines in 1860 to over 400,000 miles by 1920. *Encyclopedia, supra,* 6-7; 1132 (Table 1). By 1871, the federal government had granted 175 million acres of lands to the railroads (of which 35 million acres were later returned). *Id.* at 6-7. Land grants represented only 20,000 miles of track but "gave impetus to the construction of thousands of miles of line… attracted private investment and encouraged construction across vast, virtually empty lands, especially west of the Mississippi River." *Id.* In addition to the

expansion of the rail system itself, the quantity of locomotives increased exponentially, almost quadrupling between 1876 and 1920. *Id.* at 1133 (Figure 2). By 1914, "the United States had become the industrial leader of the world as a consequence of this transportation revolution." *Id.* at 1.

A key element in the revolutionary transformation of America's transportation system was unprecedented uniformity of the design of the critical components of the rail system. Standardized track gauges enabled railroad cars to be exchanged nationally. *Id.* at 8. "Interchanging traffic meant uniform couplers, brakes, bills of lading, and classification of products." By 1883, the railroad industry had adopted "standardized time zones or 'Railroad Time'… which became the unofficial national time system." *Encyclopedia, supra,* 8; s*ee also*, John H. White, Jr., "*Technology and Operating Practice in the Nineteenth Century*," in *Encyclopedia, supra,* 37-52.

The Interstate Commerce Commission ("ICC"), established in 1887, played a vital role in requiring standardization in ways that improved both the safety and the efficiency of rail transport. One example occurred early in the ICC's history, when the Commission became aware of the necessity for a new device to replace the "link and pin" system used to couple railroad cars, because the old system had caused numerous fatalities, and was clumsy and slow. Slason Thompson, *A Short History of American Railways* 235-236 (1925). In the early 1880s, several states had passed laws requiring the use of automatic couplers, but the lack of uniformity in the states' rules had increased, rather than reduced

coupling accidents. *Id*. at 236. The ICC reported in 1890 that most passenger cars, but less than ten percent of freight cars, had been equipped with automatic couplers. *Id*. at 238. Then, in 1893, Congress adopted the Safety Appliance Act which required all carriers engaged in interstate commerce to equip their cars with automatic couplers and their locomotives with driving wheel brakes (*id*.), and by 1900 the ICC reported that compliance had been achieved. *Id*. at 239. As discussed below, standardization of economic and safety rules became a focal point of many of this Court's decisions in which varying state rules, however well-intentioned, came into conflict with the federal interest in uniformity and were therefore held to be invalid.

II. Congress Implemented the Dominant Federal Interest by Comprehensively Regulating the Railroads.

A major premise of Petitioners' argument is that this case involves none of the "uniquely federal areas of regulation...recognized in this Court's preemption jurisprudence...." Pet. at 19, n. 17. During the nearly four decades before the Court's decision in *Napier,* Congress enacted comprehensive federal regulation of the railroads. It did so precisely because the federal government was the only institution capable of adequately regulating what has become a unified national transportation system. Extensive national debate occurred over regulation of the railroads and other large corporations from the Granger movement through the Progressive era. A succession of federal statutes between 1887 and World War I gave the federal government

comprehensive control that prevented inconsistent economic and safety regulation of the railroads by state and local authorities.

Increased federal involvement and restrictions on inconsistent state regulation helped the railroads become the Nation's first "big business" and ultimately, following establishment of the ICC in 1887, the Nation's first regulated industry. *Encyclopedia, supra,* 5-14. As the railroads grew and consolidated, state legislatures and commissions "were inadequate to deal with the national transportation problem" (*Short History of American Railways, supra,* 240), as the "bulk of the traffic became more and more interstate in its character and more difficult for the states to handle without undue partiality." *Id.*

Progressive-era Presidents Theodore Roosevelt and Taft, as well as the railroad industry, supported comprehensive federal regulation of the railroads as an antidote to inconsistent and parochial regulation by the states that discriminated against out-of-state merchants and manufacturers. Gabriel Kolko, *Railroads and Regulation: 1877-1916*, at 164-165 (1965). President Roosevelt believed that the best way to avoid the dangers of "ill-directed agitation" in the states was to "confer upon the national Government full power to act." *Id.* at 166. In his view, only the federal government could provide unified, effective control. *Id*. at 166-168.

The economic and safety regulatory controls imposed on the railroad industry during the Progressive era, including the LIA, were premised on the presumption that federal regulation would be

exclusive. President Theodore Roosevelt forcefully argued for such comprehensive federal regulation--to the exclusion of the states--in his Eighth Annual Message in December 1908. He stated:

> The chief reason, among the many sound and compelling reasons, that led to the formation of the National Government was the absolute need that the Union, and not the several States, should deal with interstate and foreign commerce; and the power to deal with interstate commerce was granted absolutely and plenarily to the central government and was exercised completely as regards the only instruments of interstate commerce known in those days--the waterways, the highroads, as well as the partnerships of individuals who then conducted all of what business there was. Interstate commerce is now chiefly conducted by railroads; and the great corporation has supplanted the mass of small partnerships or individuals. The proposal to make the National Government supreme over, and therefore to give it complete control over, the railroads and other instruments of interstate commerce is merely a proposal to carry out to the letter one of the prime purposes, if not the prime purpose, for which the Constitution was founded. It does not represent centralization. It represents

merely the acknowledgment of the patent fact that centralization has already come in business. If this irresponsible outside business power is to be controlled in the interest of the general public it can only be controlled in one way--by giving adequate power of control to the one sovereignty capable of exercising such power--the National Government. Forty or fifty separate state governments cannot exercise that power over corporations doing business in most or all of them; first, because they absolutely lack the authority to deal with interstate business in any form; and second, because of the inevitable conflict of authority sure to arise in the effort to enforce different kinds of State regulation, often inconsistent with one another and sometimes oppressive in themselves. Such divided authority cannot regulate commerce with wisdom and effect. The central government is the only power which, without oppression, can nevertheless thoroughly and adequately control and supervise the large corporations. To abandon the effort for national control means to abandon the effort for all adequate control and yet to render likely continual bursts of action by State legislatures, which cannot achieve the purpose sought for, but which can do a great deal of damage to

> the corporation without conferring any real benefit on the public.

Theodore Roosevelt: An American Mind; A Selection from his Writings 134-135 (Mario R. DiNunzio ed., 1994).

His successor (and later Chief Justice) William Howard Taft shared similar views, observing that a "great increase in the volume of Federal jurisdiction" had arisen because, with the inventions of steam navigation and the construction of the railroads, "the interstate commerce of the country has increased from one-fourth of the entire country's commerce to three-fourths of it." *William Howard Taft: Essential Writings and Addresses* 366 (David H. Burton ed.), (2009). Taft also extolled the broad range of federal legislation enacted under his predecessors for the protection and interest of labor concerning railroads engaged in interstate commerce, including the Safety Appliance Act. *Id*. Much of the academic literature during this period reflected the perception that uniform regulation, especially (but not only) of the railroads, had become a national necessity. *See,* Stephen A. Gardbaum, *The Nature Of Preemption*, 79 Cornell L. Rev. 767, 801, n 162 (1994), *citing* Woodrow Wilson, *The States and the Federal Government*, 187 N. Am. Rev. 684 (1908); Henry Wade Rogers, *The Constitution and the New Federalism*, 188 N. Am. Rev. 321 (1908); Philip Allen, *States With Ideas of Their Own*, 190 N. Am. Rev. 515 (1909); *see* Herbert Hovenkamp, *Regulatory Conflict in the Gilded Age: Federalism and the Railroad Problem*, 97 Yale L.J. 1017 (1988).

It was in this context that Congress enacted the succession of statutes imposing economic and safety regulation on the railroads. The Interstate Commerce Act of 1887 was followed by the Safety Appliance Act (1893), the Elkins Act of 1903 (outlawing rebates), and the Hepburn Act of 1906 (authorizing the ICC to establish maximum rates and thereby making the ICC a "substantial regulatory agency." Robert H. Wiebe, *The Search for Order, 1877-1920,* at 192 (1967)). This legislation was followed by FELA (1908); the Mann-Elkins Act of 1910 (placing a higher burden of proof for higher rates on the carriers); the Boiler Inspection Act (1911); the Railroad Valuation Act of 1913; the Locomotive Inspection Act (1915); and the Adamson Act of 1916 (8-hour day for railroad workers). S*ee* Pet. at 3-5; *Encyclopedia, supra,* 13-14. For the reasons explained below, no federal lawmaker could have reasonably expected that the LIA (or any of these laws, for that matter) would not displace state laws in the same fields.

III. This Court's Jurisprudence Prior to and Contemporaneous With Enactment of the LIA Also Recognized the Dominant Federal Interest.

In the four decades before Congress enacted the LIA, the U.S. Supreme Court consistently held that federal regulation of interstate transportation would render any state regulation on the same subject void. Contrary to Petitioners' assertion that the LIA "does not reflect a clear and manifest Congressional intent to displace state-law claims" (Pet. at 31), the preemptive effect of federal

regulation was settled law decades before the LIA's enactment. The so-called "Granger cases," most notably *Munn v. Illinois*, 94 U.S. 113 (1876), upheld state laws that attempted to counteract the high prices charged by the railroads via the grain elevators (often owned by the railroads) by enacting state laws regulating freight and warehousing charges that could be imposed within the state. The Court concluded that the warehouses, whose business was carried on entirely within one state, could, in the absence of federal legislation, be regulated by the state "*until Congress acts in reference to their inter-state relations*, the State may exercise all the powers of government over them, even though in so doing it may indirectly operate upon commerce outside its immediate jurisdiction." *Id*. at 135 (emphasis added).

Nine years later, in *Wabash, St. L. & P. Ry. Co. v. State of Illinois*, 118 U.S. 557 (1886), the Court held invalid an Illinois law prohibiting long-haul and short-haul clauses in transportation contracts as an infringement on the exclusive powers of Congress granted by the commerce clause. The "very object" of the Commerce Clause, the Court concluded, "'was to insure this uniformity against discriminating state legislation.'" *Id*. at 574, *quoting Welton* v. *Missouri*, 91 U. S. 275, 280 (1875). The Court noted that the regulation at issue purported only to control the carrier when engaged within the state, but that "it must necessarily influence his conduct to some extent in the management of his business throughout his entire voyage. * * * It was to meet just such a case that the commerce clause in the constitution was adopted." *Id*. at 572-73. The Court

discussed commerce on and along the Mississippi River:

> The River Mississippi passes through or along the borders of ten different states, and its tributaries reach many more. The commerce upon these waters is immense, and its regulation clearly a matter of national concern. If each state was at liberty to regulate the conduct of carriers while within its jurisdiction, the confusion likely to follow could not but be productive of great inconvenience and unnecessary hardship. Each state could provide for its own passengers, and regulate the transportation of its own freight, regardless of the interests of others. Nay, more, it could prescribe rules by which the carrier must be governed within the state in respect to passengers and property brought from without. On one side of the river or its tributaries he might be required to observe one set of rules; and on the other, another. Commerce cannot flourish in the midst of such embarrassments.

Id. at 572, *citing Hall v. DeCuir*, 95 U.S. 485, 489 (1877).

Recalling *Gibbons*, the *Wabash* Court revisited the origins of the Commerce Clause, this time in the context of a country that was now far larger and more mobile, and whose economy was even more

dependent upon a rapid, reliable, and cost-effective system of interstate transportation:

> This clause, giving to congress the power to regulate commerce among the states, and with foreign nations, as this court has said before, was among the most important of the subjects which prompted the formation of the constitution. *Cook* v. *Pennsylvania*, 97 U. S. 574; *Brown* v. *Maryland*, 12 Wheat. 446. And it would be a very feeble and almost useless provision, but poorly adapted to secure the entire freedom of commerce among the states which was deemed essential to a more perfect union by the framers of the constitution, if, at every stage of the transportation of goods and chattels through the country, the state within whose limits a part of this transportation must be done could impose regulations concerning the price, compensation, or taxation, or any other restrictive regulation interfering with and seriously embarrassing this commerce.
>
> The argument on this subject can never be better stated than it is by Chief Justice MARSHALL in *Gibbons* v. *Ogden*, 9 Wheat. 195, 196. He there demonstrates that commerce among the states, like commerce with foreign nations, is necessarily a commerce which crosses state lines, and extends into the

> states, and the power of congress to regulate it exists wherever that commerce is found. Speaking of navigation as an element of commerce, which it is only as a means of transportation, now largely superseded by railroads, he says: "The power of congress, then, comprehends navigation within the limits of every state in the Union, so far as that navigation may be, in any manner, connected with 'commerce with foreign nations, or among the several states, or with the Indian tribes."

118 U.S. at 573. The Court cited a line of cases reiterating the vital importance, as expressed in the commerce clause, of "one system of rules" or "uniformity of regulation" governing interstate, as well as international commerce.[4] *Id.* at 574-575. Shortly after *Wabash*, in upholding a state law requiring vision standards to prevent color-blind people or others with poor vision from serving on railroad lines in any capacity requiring such visual acuity, the Court specifically noted that Congress had plenary power over the issue and that if Congress enacted a rule, "such legislation will supersede any state action on the subject."

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[4] *County of Mobile v. Kimball*, 102 U. S. 691, 702 (1880) ("For the regulation of commerce…there can be only one system of rules."); *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196, 203 (1885) ("[T]he commerce with foreign nations and between the states…is a subject of national character, and requires uniformity of regulation."); *Pickard v. Pullman Southern Car Co.*, 117 U.S. 34 (1886).

Nashville, C. & St. L. Ry. Co. v. Alabama, 128 U.S. 96, 99-100. (1888).

The Court reaffirmed these holdings in a series of railroad cases during the decade in which Congress enacted the LIA. In *Charleston & Western Carolina Ry. Co. v. Varnville Furniture Co,* 237 U.S. 597 (1915), the Court disallowed a penalty imposed under state law for a carrier's failure to resolve a property damage claim promptly. Writing for the Court, Justice Holmes rejected as "immaterial" the plaintiff's contention that the state law penalty was "in aid of interstate commerce." *Id.* at 604. "When Congress has taken the particular subject-matter in hand, coincidence is as ineffective as opposition, and a state law is not to be declared a help because it attempts to go farther than Congress has seen fit to go." *Id.*; *see also, Northern Pac. Ry. Co. v. State of Washington ex rel. Atkinson*, 222 U.S. 370 (1912) (invalidating Washington's state law penalty for railroad's violation of federal law enacted in 1907 limiting the hours of service of railway employees); *Southern Ry. Co. v. Reid*, 222 U.S. 424, 440 (1912) ("There is scarcely a detail of regulation which is omitted to secure the purpose to which the interstate commerce act is aimed."); *Chicago, Rock Island & Pacific Ry. Co. v. Hardwick Farmers' Elevator Co.*, 226 U.S. 426, 435 (1913) ("[T]he power of the state over the subject-matter ceased to exist from the moment that Congress exerted its paramount and all-embracing authority over the subject. We say this *because the elementary and long-settled doctrine is that there can be no divided authority over interstate commerce, and that the regulations of*

Congress on that subject are supreme."). (Emphasis added). The LIA was enacted in this legal context.

Likewise, in *New York Cent. Ry. Co. v. Winfield*, 244 U.S. 147 (1917), the Court held that the federal workers compensation system for railroad workers preempted a more liberal state system. "Whether and in what circumstances railroad companies engaging in interstate commerce shall be required to compensate their employees in such commerce for injuries sustained therein are matters in which the nation as a whole is interested, and there are weighty considerations why the controlling law should be uniform, and not change at every state line." *Id*. at 149. Compensation under state law would "disturb…the uniformity which the act is designed to secure." *Id*. at 153. Once Congress had regulated the subject, the state was not free "by way of complement to the legislation of Congress, to prescribe additional regulations…." *Id*.

The Court applied the same principles to federal safety regulation of the railroads. In *Pennsylvania R. Co. v. Public Service Comm'n. of Com. of Pennsylvania*, 250 U.S. 566 (1919), Justice Holmes, writing for the Court, explained the decision to invalidate a state law that, for safety reasons, required the rear rail car on mail or express trains to contain a platform, whereas the ICC required a caboose at the rear that did not have such a platform. Justice Holmes wrote, "The subject matter in this instance is peculiarly one that calls for uniform law and in our opinion regulation by the paramount authority has gone so far that the statute of Pennsylvania cannot impose the additional obligation in issue here." *Id*. at 569.

Given this consistent line of cases, Congressional awareness of the preemptive effect of the LIA when it was enacted should be presumed. The Court normally assumes that, "when Congress enacts statutes, it is aware of relevant judicial precedent." *Merck & Co., Inc. v. Reynolds*, 130 S. Ct. 1784, 1795 (2010).

Finally, few people would have had a more thorough understanding of the history, meaning, and effect of federal railroad regulation than the author of *Napier*, Justice Lewis Brandeis, one of whose most prominent victories before joining the Court was the *Advance Rate Case* he successfully litigated against the railroads before the ICC (Thomas C. McCraw, *Prophets of Regulation* 91-94 (1984)), and who had also served from 1912 to 1916 as President Wilson's chief economic adviser. Arthur S. Link, *Woodrow Wilson and the Progressive Era: 1910-1917*, p. 68 (1954). Likewise, William Howard Taft, Chief Justice when the Court decided *Napier*, had as President advocated the passage of numerous bills to regulate the railroads. One of the bills he signed into law in 1911 was the BIA.

The historical and jurisprudential context in which the LIA was enacted, and in which *Napier* was decided, compels the conclusion that *Napier* correctly determined that Congress intended to preempt the field and that the preempted field "extends to the design, the construction, and the material of every part of the locomotive and tender and of all appurtenances." 272 U.S. at 611. *Napier's* field preemption holding is grounded in: (1) the federal government's paramount constitutional authority of the regulation of the channels and instruments of

state commerce; (2) the historic growth of the integrated rail transportation system from 1876-1920 and the contribution of uniform standards of design and manufacture to that growth; (3) the varied state responses to that growth; and (4) federal legislative and regulatory action in response to the growth of transportation and the diverse state regulations. Petitioners' arguments seeking to narrow the scope of preemption of the LIA should be rejected.

CONCLUSION

Amicus PLAC respectfully asserts that the decision of the Third Circuit should be affirmed.

Respectfully submitted,

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APPENDIX
Corporate Members of the
Product Liability Advisory Council
as of 8/24/2011
Total: 98

3M
Altec Industries
Altria Client Services Inc.
American Airlines
Arai Helmet, Ltd.
Astec Industries
Bayer Corporation
Beretta U.S.A. Corp.
BIC Corporation
Biro Manufacturing Company, Inc.
BMW of North America, LLC
Boeing Company
Bombardier Recreational Products, Inc.
BP America Inc.
Bridgestone Americas, Inc.
Brown-Forman Corporation
Caterpillar Inc.
Chrysler Group LLC
Cirrus Design Corporation
Continental Tire the Americas LLC
Cooper Tire and Rubber Company
Crown Cork & Seal Company, Inc.
Crown Equipment Corporation
Daimler Trucks North America LLC
The Dow Chemical Company
E.I. duPont de Nemours and Company
Emerson Electric Co.

Engineered Controls International, Inc.
Environmental Solutions Group
Estee Lauder Companies
Exxon Mobil Corporation
Ford Motor Company
General Electric Company
General Motors Corporation
GlaxoSmithKline
The Goodyear Tire & Rubber Company
Great Dane Limited Partnership
Harley-Davidson Motor Company
Hawker Beechcraft Corporation
Honda North America, Inc.
Hyundai Motor America
Illinois Tool Works, Inc.
Isuzu North America Corporation
Jaguar Land Rover North America, LLC
Jarden Corporation
Johnson & Johnson
Johnson Controls, Inc.
Kawasaki Motors Corp., U.S.A.
Kia Motors America, Inc.
Kolcraft Enterprises, Inc.
Kraft Foods North America, Inc.
Lincoln Electric Company
Magna International Inc.
Marucci Sports, L.L.C.
Mazak Corporation
Mazda (North America), Inc.
Medtronic, Inc.
Merck & Co., Inc.
Meritor WABCO
Michelin North America, Inc.
Microsoft Corporation

Mitsubishi Motors North America, Inc.
Mueller Water Products
Mutual Pharmaceutical Company, Inc.
Navistar, Inc.
Niro Inc.
Nissan North America, Inc.
Novartis Pharmaceuticals Corporation
PACCAR Inc.
Panasonic
Pella Corporation
Pfizer Inc.
Porsche Cars North America, Inc.
Purdue Pharma L.P.
Remington Arms Company, Inc.
RJ Reynolds Tobacco Company
Schindler Elevator Corporation
SCM Group USA Inc.
Shell Oil Company
The Sherwin-Williams Company
Smith & Nephew, Inc.
St. Jude Medical, Inc.
Stanley Black & Decker, Inc.
Subaru of America, Inc.
Techtronic Industries North America, Inc.
Thor Industries, Inc.
TK Holdings Inc.
The Toro Company
Toyota Motor Sales, USA, Inc.
Vermeer Manufacturing Company
The Viking Corporation
Volkswagen Group of America, Inc.
Volvo Cars of North America, Inc.
Vulcan Materials Company
Whirlpool Corporation

Yamaha Motor Corporation, U.S.A.
Yokohama Tire Corporation
Zimmer, Inc.