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No. 10-272

IN THE

Supreme Court of the United States

JOHN CRANE, INC.,

Petitioner,

v.

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

Respondent.

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

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Whether Petitioners have presented compelling reasons to grant the Petition, where the Pennsylvania Superior Court, following *Terminal Railroad v. Brotherhood of Railroad Trainmen*, the 1970 Federal Railroad Safety Act, as amended in 2007 and *Wyeth v. Levine*, ruled that Pennsylvania state tort law should not be preempted by federal railway legislation, and that there is no direct conflict between federal law and the Pennsylvania Supreme Court's ruling in *Norfolk & W.R. Co. v. Pa. Pub. Util. Com.*.

II. Whether Petitioners have presented compelling reasons to grant the Petition, where the Federal Railway Administration has chosen to defer to the Occupational Health and Safety Administration in the area of workplace safety in railroad repair shops, and the OSHA statute's savings clause provided that state law tort remedies for injuries in the workplace remain intact despite federal regulation in this area.

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INTRODUCTION

Petitioner has presented no compelling reasons for its Petition for a Writ of *Certiorari* to be granted ("Petition"). Relying on *Napier v. Atlantic. C. Ry. Co.*, Petitioner incorrectly claims that a statute enacted by Congress that lacks preemptive intent or language should be interpreted as indicating a congressional intent to invalidate all state statutes and preempt the entire field of railroad regulation. This is despite the explicit language of the Federal Railroad Safety Act ("FRSA"), as amended in 1970. Petitioner further claims that the Pennsylvania Supreme Court's decision in *Norfolk & W.R. Co. v. Pa. Pub. Util. Com.* is at odds with *Napier*, when *Norfolk* held that a state railroad safety regulation was not preempted by the Boiler Inspection Act, based on Congress' explicit rejection of preemptive intent in the 1970 FRSA Amendments.

However, after *Wyeth v. Levine*, *CSX Transportation, Inc. v. Easterwood*, and *Silkwood v. Kerr-McGee Corp.*, it is clear that state law should only be preempted when there is a direct conflict between federal law and state law, and even where there is field preemption, there is no bar to common law suits. Thus, there is no conflict between federal law and *Norfolk* because the Federal Railway Safety Act ("FRSA") provides that states may regulate railroad safety until the United States Secretary of Transportation adopts a rule or regulation covering the same subject matter. Petitioner's reliance on *Napier* is misplaced, as this Court's treatment of the Boiler Inspection Act and Safety Appliance Act in *Terminal Railroad v. Brotherhood of Railroad Trainmen* demonstrates that

Petitioner's expansive reading of *Napier* is misguided. *Terminal Railroad* clarified that the field preempted was never as large as Petitioner claims. The "field" comprised regulation of equipment, and did not extent to suits by individuals. The Pennsylvania Superior Court did not err when it followed *Terminal Railroad*, *Wyeth* and *Norfolk* and the intent of Congress when it ruled that federal law did not preempt Respondent's state court failure-to-warn tort claim.

The Federal Railway Administration ("FRA") has chosen not to regulate safety in railroad repair shops, but has allowed state court tort law claims to proceed. In 1978, the FRA stated that it would defer to the Occupational Health and Safety Administration ("OSHA") in the area of workplace safety in railroad repair shops, rather than regulate shop safety itself. The OSHA statute's savings clause provides that state law tort remedies for injuries in the workplace remain intact despite any federal regulation in this area. There is no federal regulation of shop safety. Petitioner cannot point to any intent by Congress to preempt, and thus the 1970 Amendments overrule *Napier* by clarifying that Congress wanted to allow a state role until the FRA or OSHA chose to act. There is no conflict between federal regulations of equipment and state tort claims based on a failure-to-warn, because no federal regulations exist in this area to cause a conflict, and because Congress chose to limit the field that it preempted.

STATEMENT OF THE CASE

Thomas F. Atwell ("Mr. Atwell") filed this case in the Philadelphia County Court of Common Pleas in 2004 because he contracted lung cancer due to exposure to the defendants' asbestos products during the years that he worked in the railroad industry. Mr. Atwell worked for the Southern Railway and later the Norfolk Southern Railway from 1951-2004. Mr. Atwell died on July 23, 2006, and his son, Plaintiff-Respondent Thomas F. Atwell, Jr., ("Respondent") was substituted as party-plaintiff. After discovery was completed, John Crane, Inc., ("John Crane") moved for summary judgment, arguing that the claims against it were preempted by federal law. The trial court denied this motion. By the time of trial, all defendants except John Crane had settled or been dismissed. After a trial on the merits, the jury entered a verdict in the amount of $150,000 against John Crane and two other settled defendants, A.W. Chesterton, Inc. and Garlock, Inc., against whom John Crane had filed cross-claims.

John Crane filed post-trial motions, again arguing federal law preempted Respondent's claims. The post-trial motions were denied. John Crane took an appeal to the Pennsylvania Superior Court, which affirmed the trial court's denial of the post-trial motions. John Crane then petitioned the Pennsylvania Supreme Court for allowance of appeal. That petition was denied on May 24, 2010. This Petition followed. The Court should be aware that in a similar case involving a products liability claim by a railroad shop worker against manufacturers and suppliers of asbestos products for railroad equipment, the United States Court of Appeals for the

Third Circuit took the opposite position to the Pennsylvania Superior Court's position herein and held for the manufacturers in *Kurns v. A.W. Chesterton, Inc.*, 2010 U.S. App. LEXIS 18853 (3d Cir., 2010).[1]

Mr. Atwell was deposed before his death, and described how he worked in the railroad repair shops, repairing pipes on locomotives and "shop things." Mr. Atwell was not an over-the-rails railroad worker. Most of his work was done on incapacitated locomotives in the shop. Mr. Atwell testified that he used John Crane asbestos packing in this work for years. He saw the word "asbestos" on the label of the container. The packing had to be cut into pieces to fit before the packing could be install in a particular part of the locomotive, and also sometimes had to be pounded in with a screwdriver or hammer. When he was working with the asbestos packing this way, the asbestos packing gave off dust, which he inhaled. Mr. Atwell testified that he used a lot of John Crane asbestos packing. He also used John Crane asbestos gasket sheets, which gave off dust when used. The gasket sheets had to be cut before they could be installed in the locomotive. There were no warning labels on the John Crane asbestos packing's or gasket's containers warning of the necessity of taking safety precautions, such as wearing a mask while handling, installing or removing an asbestos product.

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1. A Petition for Rehearing by a court *en banc* is being filed in *Kurns*.

REASONS FOR DENYING THE PETITION

I. There is no need for review as there is no conflict between federal law and *Norfolk & Western Railway* in light of the amendments to the Federal Railroad Safety Act.

Wyeth v. Levine, — U.S. —, 129 S. Ct. 1187, 173 L. Ed. 2d 51 (2009), held that federal courts should not presume that preemption was intended unless Congress clearly showed its desire to preempt:

> Our answer to that question must be guided by two cornerstones of our preemption jurisprudence. First, "the purpose of Congress is the ultimate touchstone in every preemption case." *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485, 116 S. Ct. 2240, 135 L. Ed. 2d 700 (1996); *see Retail Clerks v. Schermerhorn*, 375 U.S. 96, 103, 84 S. Ct. 219, 11 L. Ed. 2d 179 (1963). Second, "[i]n all preemption cases, and particularly in those in which Congress has 'legislated . . . in a field which the States have traditionally occupied,' . . . we 'start with the assumption that the historic police powers to the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'" *Lohr*, 518 U.S., at 485, 116 S. Ct. 2240, 135 L. Ed. 2d 700 (*quoting Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 67 S. Ct. 1146, 91 L. Ed. 1447 (1947)).

129 U.S. at 1194-1195, 173 L.Ed. at 60.

Wyeth requires a two-fold analysis of a failure-to-warn products liability case. The first issue is whether the governing statute demonstrates a congressional intent to preempt state product warning requirements or in shop requirements, or whether the Federal Railway Administration ("FRA") has issued regulations. Assuming that there is no express statement of preemption in the statute, the next question is whether state law either conflicts with or thwarts congressional purpose, or whether state law makes it impossible for the Petitioner to comply with both federal railroad regulations and state failure-to-warn products liability law. *Id.* at 1196-1200, 173 L.Ed. at 62-66.[2]

John Crane has not identified any provision in the Boiler Inspection Act ("BIA"), 49 U.S.C. § 20701 (1994), that would indicate an intention by Congress to preempt all state court tort remedies. John Crane instead relies upon *Napier v. Atlantic. C. Ry. Co.*, 272 U.S. 605 (1926), in which this Court found an implied intent to preempt state regulations but did not address suits against

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2. It is expected that Petitioner will argue that *Wyeth* is a conflict preemption case, and therefore not controlling in a field preemption appeal. This Court has observed more than once that field preemption is but a species of conflict preemption. *See Gade v. National Solid Waste Management Ass'n*, 505 U.S. 88, 102 n.2 (1992); *English v. General Elec. Co.*, 496 U.S. 72, 75 n.5 (1990). *Wyeth* itself relied on several field preemption cases, including *Medtronic, Inc. v. Lohr*, 518 U.S. 470 (1996); *California v. ARC Am. Corp.*, 490 U.S. 93 (1989); and *Retail Clerks Int'l Ass'n v. Schermerhorn*, 375 U.S. 96 (1963). The Third Circuit in *Kurns* adopted this same distinction, stating the issue of field preemption differed from conflict preemption, despite this Court's precedent.

suppliers. Subsequent developments in federal law, the text of the decision in *Napier* itself and the Federal Railway Safety Act ("FRSA"), 49 U.S.C. § 20106 (2007), demonstrate that John Crane's claim of field preemption over tort lawsuits has no merit today.

Napier struck down state laws that required particular kinds of locomotive equipment, such as firebox doors or cab curtains, on locomotives. 272 U.S. at 609-610. When *Napier* was decided, the federal government had not yet passed any laws nor issued any regulations as to cab curtains or fire-box doors, but *Napier* held that since these locomotive components were potentially within the federal government's scope of authority, the states could not legislate even in the absence of federal government action: "We hold that state legislation is precluded, because the Boiler Inspection Act, as we construe it, was intended to occupy the field." *Id.* at 612. *Napier* further held that by enacting the BIA, Congress had preempted the field, and any remedy for inadequate regulation must be addressed to the Interstate Commerce Commission ("ICC"), the federal agency that regulated the railroads in 1926. *Id.* at 613.

By 1943 *Terminal Railroad v. Brotherhood of Railroad Trainmen*, 318 U.S. 1 (1943), had modified federal preemption in the area of railroad legislation from *Napier*'s presumption of congressional intent to occupy an entire field, regardless of the existence of regulation, to the necessity of an inquiry as to the existence of any actual federal regulation and the import of the lack of such regulation on preemption. *Terminal Railroad* held that the BIA and the Safety Appliance

Act ("SAA"), by themselves, and unimplemented by any action of the ICC, did not preclude the state order. *Terminal Railroad*, 318 U.S. at 4. As in the case herein, *Terminal Railroad* involved not federal/state conflict, but a suit by an individual. In 1947, this Court in *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947), again emphasized that all federal preemption analysis should "start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Id.* at 230.

In *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984), this Court found that even in areas of obvious field preemption, such as nuclear energy, state tort claims were not barred. Congress had to enact a specific statute in response to this Court's holding in *Silkwood* to preempt. Likewise, when the federal courts interpreted preemption too broadly, Congress acted in 2007 to amend the FRSA to allow tort claims. *See* discussion in *Hunter v. Canadian Pac. Ry. Ltd*, 2007 U.S. Dist. LEXIS 85110 (D. Minn. 2007).

Napier's holding was not only limited by *Terminal Railroad*, but also by the 1970 FRSA and the 2007 FRSA amendments, which reiterated Congress' intention not to preempt state law in the area of railroad safety. Section 205, now 49 U.S.C. § 20106(a)(1), of the FRSA states:

> A State may adopt or continue in force any law, rule, regulation, order, or standard relating to railroad safety until such time as the Secretary of Transportation has adopted

> a rule, regulation, order, or standard covering the subject matter of such State requirement. A State may adopt or continue in force an additional or more stringent law, rule, regulation, order, or standard relating to railroad safety when necessary to eliminate or reduce an essentially local safety hazard, and when not incompatible with any Federal law, rule, regulation, order, or standard, and when not creating an undue burden on interstate commerce.
>
> 49 U.S.C. § 20106(a)(1) (2007).

The Pennsylvania Supreme Court cited Section 205 in *Norfolk & W.R. Co. v. Pa. Pub. Util. Com.*, 413 A.2d 1037 (Pa. 1980), when it held that a state railroad safety regulation was not preempted by the BIA. Language contained in the FRSA allowed states to regulate railroad safety until the United States Secretary of Transportation adopted a rule or regulation covering the same subject matter. The Pennsylvania Supreme Court stated: "While the broad language of the [Boiler Inspection] Act at one time could have been interpreted as reflecting Congressional intent to pre-empt the entire field of railroad safety, the enactment of Section 205 of the Federal Railroad Safety Act in 1970 (FRSA) no longer permits that reading". *Norfolk & Western*, 413 A.2d at 1043. The Pennsylvania Supreme Court recognized that § 205 further abrogated *Napier*, and narrowed the area that was federally preempted, as the

§ 205 savings clause left open to state law or regulation any area not specifically covered by federal regulation.[3]

In the subsequent cases of *Silkwood, supra*, *CSX v. Easterwood*, 507 U.S. 658 (1993), and *Sprietsma v. Mercury Marine*, 537 U.S. 51 (2002), this Court followed the presumption against preemption, and held that in the absence of federal statutory or regulatory issuances covering the area there was no preemption, particularly

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3. John Crane's contention that *Consolidated Rail Corp. v. Pennsylvania Pub. Util. Comm'n*, 536 F. Supp. 653 (EDPa. 1982), *aff'd per curiam* 696 F.2d 981 (3d Cir. 1982), *aff'd per curiam* 461 U.S. 912 (1983) impliedly or explicitly overruled *Norfolk & Western* is incorrect. *Consolidated Rail* was summarily affirmed without opinion by the Third Circuit and by this Court. Summary affirmances by this Court are not precedential where two different possible explanations for affirmance exist. *City of Akron v. Akron Center for Reproductive Rights*, 462 U.S. 416 (1983), *overruled on other gds Gonzalez v. Carhart*, 550 U.S. 124 (2007).

Consolidated Rail had multiple bases for affirmance. One was field preemption. The more likely basis, however, was the specific conflict between state and federal regulation of speed recording devices on trains. John Crane ignores the fact that in *Consolidated Rail* the FRA *had* issued regulations concerning speed-measuring devices. Pennsylvania attempted to require a different type of device than the federally required version. United States District Court Judge James Giles properly held that this was regulation concerning the same subject matter and thus, it preempted state law. However, under *City of Akron, supra*, where there are two possible bases to uphold the trial court's ruling, one cannot assume that this Court's ruling was on either basis. *Consolidated Rail* could have been affirmed not on field preemption as John Crane argues, but on the narrower conflict preemption ground that the "FRA did cover the subject matter."

of state tort claims for injury. Throughout the 20th Century, the FRA, and its predecessor, the ICC, consistently left regulation of in-shop safety issues to OSHA or to the states or to the tort system. [4]

In 2007, Congress amended the FRSA, adding Section (b) in 2007 to the prior enactment, so the statute now reads:

> (a) National uniformity of regulation
>
> > (1) Laws, regulations, and orders related to railroad safety and laws, regulations, and orders related to railroad security shall be nationally uniform to the extent practicable.
> >
> > (2) A state may adopt or continue in force a law, regulation, or order related to railroad safety or security until the Secretary of Transportation (with respect to railroad safety matters), or the Secretary of Homeland Security (with respect to railroad security matters), prescribes a regulation or issues an order covering the subject matter of the State requirement. A State may adopt or continue in force an additional or more stringent law, regulation, or order related to railroad safety or security when the law, regulation, or order-

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4. *See also Southern R.R. v. OSHRC*, 539 F.2d 335 (4th Cir 1976), *cert. denied* 429 U.S. 999 (1976); 49 C.F.R. § 221 (1978) and discussion *infra*.

(A) is necessary to eliminate or reduce an essentially local safety or security hazard;

(B) is not incompatible with a law, regulation, or order of the United States Government; and

(C) does not unreasonably burden interstate commerce.

(b) Clarification regarding State law causes of action.

(1) Nothing in this section shall be construed to pre-empt an action under State law seeking damages for personal injury, death, or property damage alleging that a party-

(A) has failed to comply with the Federal standard of care established by a regulation order issued by the Secretary of Transportation (with respect to railroad safety matters), or the Secretary of Homeland Security (with respect to railroad security matters), covering the subject matter as provided in subsection (a) of this section;

> > (B) had failed to comply with its own plan, rule, or standard that it created pursuant to a regulation or order issued by either of the Secretaries; or
> >
> > (C) has failed to comply with a State law, regulation, or order that not incompatible with subsection (a)(2).
>
> (2) This subsection shall apply to all pending State law causes of action arising from events or activities occurring on or after January 18, 2002.

(c) Jurisdiction. Nothing in this section creates a Federal cause of action on behalf of an injured party or confers Federal question jurisdiction for such State law causes of action.

49 U.S.C. § 20106 (b) (2007).

Under this revised statute, Congress clearly showed its continued intent to reject the expansive and outdated reading of *Napier* that John Crane advocates.

There is no express congressional intent in the BIA to preempt state law failure-to-warn claims. *Napier* involved locomotive equipment, i.e., firebox door and cab curtains. The *Napier* court never considered the issue of warnings to the engineers about the release of asbestos fibers in the locomotives, much less the repair shop workers who would repair or replace the

equipment.[5] If Congress intended that the ICC, and later the FRA, regulate the warnings given to repair shop workers about the hazards of asbestos, then under *Terminal Railroad*, *Silkwood*, *Sprietsma* and *Wyeth* that intent should have been made clear in subsequent revisions of the BIA, and as state products liability law developed over the decades. [6]

Although Congress has stated a clear intent to preempt state court law on product warnings on vaccines,[7] and tobacco,[8] neither Congress nor the FRA have ever expressed such an intent regarding warnings on the hazards of asbestos products in railroad repair shops.

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5. *Napier* involved a dispute between a state and a private corporation, i.e., a railroad. *Terminal Railroad*, like the case herein, involved a private corporation seeking to defeat the claims of a railroad worker.

6. A review of the "avalanche of cases" cited by John Crane reveals an interesting and critical omission: not one of those cases mentions this Court's opinion in *Terminal Railroad*, unlike the Pennsylvania Supreme Court's opinion in *Norfolk & Western*. Furthermore, of the avalanche, only *Kurns v. A. W. Chesterton, Inc.*, 2009 U.S. Dist. LEXIS 7757 (E.D. Pa. Feb. 3, 2009) *aff'd* 2010 U.S. App. LEXIS 18853 (3d Cir. 2010) is a post-*Wyeth* case. The Third Circuit Court of Appeals dismissed the applicability of *Wyeth*, stating that *Wyeth* was a conflict preemption, not a field preemption, case. The Third Circuit did not examine *Wyeth*'s reliance on field preemption precedent, nor did it consider this Court's statements that field preemption is but a species of conflict preemption. *See* note 1, *supra*.

7. 42 U.S.C. § 300aa-22(b)(1) (1987).

8. 15 U.S.C. § 1334(b) (2009).

Finally, the recent *Wyeth* decision calls into question John Crane's arguments that compliance with state tort law on warnings on the use of hazardous products would conflict with federal purposes or be impossible with which to comply. *Wyeth,* 129 S. Ct. at 1203-1204, 173 L.Ed. 69-70.[9] John Crane does not state in its Petition what federal regulation conflicts with Respondent's state *failure-to-warn* claim. The 2007 FRSA amendments, subsection (a), allows for such state laws as long as there is no actual conflict:

> A State may adopt or continue in force a law, regulation, or order related to railroad safety or security until the Secretary of Transportation (with respect to railroad safety matters), or the Secretary of Homeland Security (with respect to railroad security matters), prescribes a regulation or issues an order covering the subject matter of the State requirement. A State may adopt or continue in force an additional or more stringent law, regulation, or order related to railroad safety or security when the law, regulation, or order

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9. John Crane also relies on a pre-*Wyeth* case, *Consolidated Rail Corp. v. Pennsylvania Pub. Util. Comm'n,* 536 F. Supp. 653 (E.D.Pa. 1982), *aff'd per curiam* 696 F.2d 981 (3d Cir. 1982), *aff'd per curiam* 461 U.S. 912 (1983), without considering that in *Consolidated,* the FRA had actually issued regulations concerning speed measuring devices. In *Consolidated,* the state wanted to require a different device design. The district judge in *Consolidated* held that since there was federal regulation specifically concerning speed-measuring devices, the regulations preempted state law. There was a clear conflict between the state and federal laws in that case, so it is inapposite

(A) is necessary to eliminate or reduce an essentially local safety or security hazard;

(B) is not incompatible with a law, regulation, or order of the United States Government; and

(C) does not unreasonably burden interstate commerce.

49 U.S.C. § 20106(a)(2) (2007).

Just as the *Wyeth* saw no intent expressed by Congress for uniformity in warnings about the risks of using Phenergan, there is no congressional intent for uniformity of warnings regarding the use of asbestos in repairing railroad equipment in the shop. Since there has never been an FRA warning label regulation for railroad shop workers about the hazards of asbestos exposure, there is no federal statute or regulation with which Pennsylvania's tort law could conflict. The Pennsylvania Superior Court correctly denied John Crane's claim of federal preemption.

II. There is no need for review as the Occupational Safety and Health Act, including its state savings clause, applies to railroad repair shop safety, not the Boiler Inspection Act or the Safety Appliance Act or their successor statute, the Federal Railway Safety Act.

When the FRA took over regulation of the railroads from the ICC, the lack of congressional intent to preempt state law failure-to-warn claims by the repair shop workers was further buttressed by the fact that

the FRA had never issued regulations regarding railroad repair shop safety or asbestos exposure. The Fourth Circuit noted this in 1976 in *Southern R.R. v. OSHRC*, 539 F.2d 335 (4th Cir. 1976), *cert. denied* 419 U.S. 999 (1976): "The Department of Transportation and FRA do not purport to regulate the occupational health and safety aspects of railroad offices or shop and repair facilities." 539 F.2d at 338.[10] It had always been left to the states to regulate prior to OSHA. In 1978, after the creation of OSHA, the FRA stated that it would henceforth rely on OSHA to regulate workshop safety, and so stated in 49 C.F.R.§ 221 (1978):

> We, therefore, believe that FRA must exercise a continuing role in the area of railroad occupational safety and health. However, given the present staffing level for field investigation and inspection, the FRA has determined that, at this time, it would not be in the best interests of the public and of railroad safety for this agency to become involved extensively in the promulgation and enforcement of a complex regulatory scheme covering in minute detail, as do the OSHA standards, working conditions which, although located within the railroad industry, are in fact similar to those of any industrial workplace. Rather, we believe that the proper role for FRA in the area of occupational safety in the immediate future is one that will concentrate

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10. Until 1978, the FRA had left it to the states to regulate railroad shop safety, as compared to the over-the-road railroad safety issues that the FRA monitored.

> our limited resources in addressing hazardous working conditions in those traditional areas of railroad operations in which we have special competence.
>
> 49 C.F.R.§ 221 (1978).

The OSHA standards expressly do not preempt state law claims. The OSHA savings clause, 29 U.S.C. § 653(b)(4) (1970), states that nothing "...shall be construed to supersede or in any manner affect any workmen's compensation law or to enlarge or diminish or affect in any other manner the common law or statutory rights, duties, or liabilities of employers and employees under any law with respect to injuries, diseases, or death of employees arising out of, or in the course of, employment." Thus, even assuming *arguendo* that field preemption existed as *Napier* suggested in 1926, the FRA has since narrowed the field of federal regulation by excluding railroad shops from its ambit. There is no conflict between federal regulations on warning labels on asbestos products used in railroad shops and state tort claims based on a failure-to-warn, because no federal regulations exist in this area to cause a conflict.

CONCLUSION

For the reasons set forth above, this Court should deny John Crane's Petition for a Writ of Certiorari. However, should the Court be inclined to accept the case, it is respectfully suggested the Court should await presentation of *Kurns* for review and accept both cases for simultaneous review.

Respectfully submitted,

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