No. 10-272

IN THE
Supreme Court of the United States

OCT 5 - 2010

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
TO THE SUPERIOR COURT OF PENNSYLVANIA

REPLY BRIEF

WILLIAM SMITH
WILLIAM R. ADAMS
DICKIE, MCCAMEY & CHILCOTE
Public Ledger Building,
Suite 901
150 South Independence
Mall, West
Philadelphia, PA 19106-3409

DANIEL J. O'CONNELL
MARK I. TIVIN
THOMAS J. BURNS
O'CONNELL, TIVIN, MILLER & BURNS
135 S. LaSalle Street,
Suite 2300
Chicago, IL 60603

MICHAEL A. POLLARD
Counsel of Record
KATHLEEN T. SANDERSON
BAKER & MCKENZIE LLP
One Prudential Plaza
130 East Randolph Drive
Chicago, Illinois 60601
Michael.Pollard@
bakermckenzie.com
312-861-2786

Counsel for Petitioner

232660

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

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CORPORATE DISCLOSURE STATEMENT

The corporate disclosure statement for John Crane Inc.'s Petition for a Writ of Certiorari (hereinafter "Petition"), made pursuant to Supreme Court Rule 29.6, was set forth at page *ii* of the Petition, and it remains current, with no amendments necessary at this time.

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ARGUMENT

Respondent makes no effort to address, much less contest, the contention that a conflict exists between the Superior Court's decision below, and both this Court's decision in *Napier v. Atlantic Coast Line R.R. Co.*, 272 U.S. 605 (1926), and a consistent body of case law from other courts of review, including the very recent decision of the Court of Appeals for the Third Circuit in *Kurns v. A.W. Chesterton Inc.*, No. 09-1634, 2010 U.S. App. LEXIS 18853 (3d Cir. Sep. 9, 2010), *reh'g denied*, No. 09-1634 (3d Cir. Oct. 5, 2010) (ECF No. 003110305455). By failing to deny the existence of the conflicts identified in the Petition, Respondent impliedly concedes that such conflicts exist. This Court should grant a Writ of Certiorari.

I. RESPONDENT FAILS TO DISPUTE THAT A CONFLICT EXISTS THAT WARRANTS REVIEW BY THIS COURT.

Respondent does not address Petitioner's principal argument, i.e., that the Superior Court has decided an important federal question in a way that conflicts with this Court's decision in *Napier v. Atlantic Coast Line R.R. Co.*, 272 U.S. 605 (1926). Rather than arguing that *Napier* can be reconciled with the Superior Court's decision below, Respondent argues that JCI's "expansive reading of *Napier* is misguided," (Brief in Opposition at 2), and that "*Napier's* holding was not only limited by *Terminal Railroad*, but also by the 1970 FRSA and the 2007 FRSA amendments." (Brief in Opposition at 8). Contrary to Respondent's belief, there is "an overwhelming body of case law" that follows *Napier*, and

that holds that the Boiler Inspection Act ("BIA"), 49 U.S.C. §§ 20701-20703 (2006), preempts common law and statutory claims against manufacturers of locomotive equipment related to the design, construction, or material of locomotives and their parts. Many of those same courts have expressly rejected Respondent's claims that the holding of *Napier* has been limited. *See, e.g., In re West Virginia Asbestos Litig.*, 592 S.E.2d 818, 822 (W. Va. 2003), *cert. denied sub nom. Abbott v. A-Best Prods. Co.*, 549 U.S. 823 (2006); *Forrester v. American Dieselelectric, Inc.*, 255 F.3d 1205, 1210 (9th Cir. 2001) ("None of the Court's more recent preemption cases have questioned the authority of *Napier*, and, in any event, the rule is too well established to permit such a qualification by a lower court"); *Wright v. Gen. Electric Co.*, 242 S.W.3d 674, 679 (Ky. Ct. App. 2007) (rejecting plaintiffs' argument that modern preemption jurisprudence has undermined the continuing viability of *Napier*); *Gen. Motors Corp. v. Kilgore*, 853 So. 2d 171, 177-78 (Ala. 2002) (rejecting plaintiffs' claim that the field of the BIA's preemption has been narrowed by recent Supreme Court jurisprudence).

Furthermore, Respondent fails to address Petitioner's contention that lower courts are "bound by a direct holding of the Supreme Court of the United States" and that "the Supreme Court has held that '[i]f a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the [lower courts] should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." *Kurns*, 2010 U.S. App. LEXIS 18853, *12 fn.6, citing *Rodriguez*

de Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 484 (1989).

Moreover, Respondent fails to acknowledge, much less refute, the "avalanche" of state and federal decisions supporting federal preemption of state law claims implicating railroad equipment. *In re West Virginia Asbestos Litig.*, 592 S.E.2d at 822; *see, e.g., Kurns*, 2010 U.S. App. LEXIS 18853 (BIA preempts state law claims against the manufacturers of locomotive equipment asserting injury caused by alleged exposure to asbestos during installation); *Darby v. A-Best Prods. Co.*, 811 N.E.2d 1117 (Ohio 2004) (BIA preempts state law tort claims against the manufacturers of railroad locomotives asserting injury caused by exposure to asbestos contained in railroad locomotives), *cert. denied*, 543 U.S. 1146 (2005); *Gen. Motors Corp. v. Kilgore*, 853 So. 2d 171 (Ala. 2002) (BIA preempts claims against manufacturer for use of asbestos in locomotive parts); *Scheiding v. Gen. Motors Corp.*, 993 P.2d 996 (Cal. 2000) (BIA preempts state law defective design and failure-to-warn claims against manufacturer), *cert. denied*, 531 U.S. 958 (2000); *Wright v. Gen. Electric Co.*, 242 S.W.3d 674 (Ky. Ct. App. 2007) (BIA preempts state common law tort claims against carriers, locomotive manufacturers, and locomotive component part manufacturers); *Frastori v. Vapor Corp.*, 70 Cal. Rptr. 3d 402 (Cal. Ct. App. 2007) (BIA preempts state tort claims against locomotive manufacturers for defective design of their product); *Caradonna v. A.W. Chesterton Co., Inc.*, 2007 N.Y. Misc. LEXIS 8994 (N.Y. Slip Op. April 25, 2007) (BIA preempts claims of railroad worker against various manufacturers of locomotives and their component parts); *Seaman v. A.P. Green Indus.*, 707

N.Y.S.2d 299 (N.Y. Sup. Ct. 2000) (BIA preempts state tort claims against locomotive manufacturer); *Forrester v. American Dieselelectric, Inc.*, 255 F.3d 1205 (9th Cir. 2001) (BIA preempts product liability actions against manufacturer of locomotive cranes); *Law v. Gen. Motors Corp.*, 114 F.3d 908 (9th Cir. 1996) (BIA preempts design defect and failure to warn claims against manufacturer concerning engine insulation and brake noise); *First Security Bank v. Union Pacific R.R. Co.*, 152 F.3d 877 (8th Cir. 1998) (BIA preempts state common law remedies against railroad manufacturers for injuries arising out of alleged design defects); *Springston v. Consol. Rail Corp.*, 130 F.3d 241 (6th Cir. 1997) (BIA preempts claim based on inadequacy of warning devices), *cert. denied*, 523 U.S. 1094 (1998); *Oglesby v. Delaware & Hudson Ry.*, 180 F.3d 458 (2d Cir. 1999) (BIA preempts claim that manufacturer should have placed warning label on defective seat), *cert. denied sub nom. Oglesby v. Gen. Motors Corp.*, 528 U.S. 1004 (1999); *United Transp. Union v. Foster*, 205 F.3d 851 (5th Cir. 2000) (BIA preempts statute requiring engine to be equipped with signal devices); *Mo. Pac. R.R. Co. v. R.R. Comm'n of Tex.*, 833 F.2d 570 (5th Cir. 1987) (BIA preempts state requirement for emergency equipment); *Roth v. I & M Rail Link LLC*, 179 F. Supp. 2d 1054 (S.D. Iowa 2001) (BIA preempts state law negligence claims against the manufacturer of a locomotive); *Norfolk S. Ry. Co. v. Denson*, 774 So. 2d 549 (Ala. 2000) (BIA preempts state law claim seeking to hold locomotive manufacturer liable for failure to install air conditioning); *Mickelson v. Mont. Rail Link, Inc.*, 999 P.2d 985 (Mont. 2000) (BIA preempts common law claims against railroad concerning locomotive equipment); *In re Train Collision at Gary, Ind.*, 670 N.E.2d 902 (Ind. App. Ct. 1996) (BIA preempts claims regarding alleged defects in the design and

structure of train cars), *appeal denied sub nom. Dillon v. Chicago Southshore & South Bend R.R. Co.*, 683 N.E.2d 591 (Ind. 1997), *cert. denied sub nom. Dillon v. Northern Ind. Commuter Transp. Dist.*, 522 U.S. 914 (1997); *Stevenson v. Union Pac. R.R. Co.*, No. 4:07CV00522BSM, 2009 U.S. Dist. LEXIS 6148 (E.D. Ark. Jan. 20, 2009) (BIA preempts a contribution and indemnification claim because the underlying claim was preempted by the BIA); *Key v. Norfolk S. Ry. Co.*, 491 S.E.2d 511 (Ga. Ct. App. 1997) (BIA preempts common law claims against railroad by employee injured in fall from locomotive steps); *In re Amtrak "Sunset Limited" Train Crash in Bayou Canot, Ala. On Sep. 22, 1993*, 188 F. Supp. 2d 1341 (S.D. Ala. 1999) (BIA preempts passenger and employee common law negligence and design defect claims against Amtrak).

The arguments against preemption that the Respondent advances in the Brief in Opposition, which were adopted by the Superior Court below, conflict with both this Court's decision in *Napier* and the "avalanche" of contrary authority on this important issue of federal law. This conflict warrants review by this Court.

II. RESPONDENT'S ARGUMENTS CONCERNING POST-*NAPIER* LEGISLATIVE ENACTMENTS HAVE CONSISTENTLY BEEN REJECTED.

Respondent's argument that the Federal Railroad Safety Act of 1970 ("FRSA"), Pub. L. No. 91-458, title II, 84 Stat. 971 (1970) (codified as amended in scattered sections of 49 U.S.C.), the subsequent amendments to the FRSA, ("2007 FRSA Amendments"), 49 U.S.C.S. § 20106(b) (Lexis 2010), enacted as part of the National Transit Systems Security Act of 2007, Pub. L. No. 110-

53, title XV, subtitle B, § 1528, 121 Stat. 453 (2007), and the decision by the Federal Railway Administration ("FRA") to defer to the Occupational Health and Safety Administration ("OSHA") in the area of workplace safety in railroad repair shops, have "narrowed" the scope of *Napier* preemption (Brief in Opposition at 7-14; 16-18), have likewise been uniformly rejected by other courts.

Respondent's argument that the FRSA, and its 2007 amendments, evidence a continued intent by Congress to reject an overly expansive and purportedly outdated reading of *Napier* has been rejected by both the Eastern District of Pennsylvania in *D'Amico v. Garlock Sealing Techs., LLC*, No, 92-5544, 2007 U.S. Dist. LEXIS 67664 (E.D. Pa. Sep. 13 2007), and also the Court of Appeals for the Third Circuit in *Kurns*, 2010 U.S. App. LEXIS 18853, at *24-25. In *Kurns*, the Third Circuit held that, in passing the FRSA, Congress did not intend to disturb the existing framework of federal preemption of the railroad industry established by the BIA. *Id.* at *24. Moreover, the Third Circuit concluded that "[w]hile the plaintiffs assert that Congress's purpose in passing §205 was to allow increased state regulation over railroad safety, this is flatly contradicted by the language of the statute itself, which provides that '[l]aws, regulations, and orders related to railroad safety . . . shall be nationally uniform to the extent practicable.' 49 U.S.C. § 20106(a)." *Id.* According to the Third Circuit, "the express purpose of the FRSA was to maintain, not decrease, federal uniform regulation of the railroad industry..."*Id.* at *25.

Further, Respondent's argument (Brief in Opposition at 2) that *Terminal Railroad v. Brotherhood*

of Railroad Trainmen, 318 U.S. 1 (1943), demonstrated that the field preempted by the BIA was never as large as Petitioner claims, is likewise without merit. This very argument was rejected by the Eastern District of Pennsylvania in *Kurns v. A.W. Chesterton, Inc.*, 2009 U.S. Dist. LEXIS 7757, *10-11 (E.D. Pa. Feb. 3, 2009), *aff'd* 2010 U.S. App. LEXIS 18853 (3d Cir. Sep. 9, 2010), *reh'g denied*, No. 09-1634 (3d Cir. Oct. 5, 2010) (ECF No. 003110305455)) (ruling that plaintiff's reliance on *Terminal Railroad* is misplaced, because the state statute at issue there involved working conditions and not "parts" or "appurtenances"). *Terminal Railroad* implicated the Railway Labor Act, not the BIA. The part of the train at issue in *Terminal Railroad* was the caboose, not the locomotive. Given that the BIA addresses locomotives, not cabooses, *Terminal Railroad* is not implicated in a BIA preemption analysis. *See Mo. Pac. R.R. Co. v. R.R. Comm'n of Tex.*, 833 F.2d 570 (5th Cir. 1987) ("Cabooses are not within the purview of the Locomotive Boiler Inspection Act."). Indeed, *Terminal Railroad* has never been cited favorably in any reported federal BIA decision, nor since 1980 in any reported state BIA decision (and only then in the discredited Pennsylvania Supreme Court decision in *Norfolk & Western Ry. Co. v. Pa. Pub. Util. Comm'n*, 413 A.2d 1037 (Pa. 1980), on which the Superior Court relied).

In addition, the Respondent's argument that the BIA does not purport to encompass the field of safety in the maintenance of locomotives, because the Occupational Health and Safety Act of 1970, Pub. L. 91-596, 84 Stat 1590 (current version at 29 U.S.C. §§ 651-678 (2006)), governs working conditions in a repair shop,

has also been explicitly rejected. *Kurns*, 2010 U.S. App. LEXIS 18853 at *19-21. As explained by the Third Circuit, which addressed a claim identical to the one presented here, "the plaintiffs' claims do not involve hazardous working conditions." *Id.* at *19. "Instead, plaintiffs assert product liability claims (failure to warn and design defect claims) against the manufacturers of certain locomotive parts that allegedly contained asbestos." *Id.* at *19-20.

Numerous other courts have held that the safety of certain locomotive parts is the exclusive jurisdiction of the FRA through the BIA, *see Seaman v. A.P. Green Indus.*, 707 N.Y.S.2d 299 (N.Y. Sup. Ct. 2000); *Frastori v. Vapor Corp.*, 70 Cal. Rptr. 3d 402 (Cal. Ct. App. 2007); *In re West Virginia Asbestos Litig.*, 592 S.E.2d 818 (W. Va. 2003), *cert. denied sub nom. Abbott v. A-Best Prods. Co.*, 549 U.S. 823 (2006); *Darby v. A-Best Prods. Co.*, 811 N.E.2d 1117 (Ohio 2004), *cert. denied*, 543 U.S. 1146 (2005); *Scheiding v. Gen. Motors Corp.*, 993 P.2d 996 (Cal. 2000), *cert. denied*, 531 U.S. 958 (2000), and Respondent has failed to cite a single decision that contradicts this consistent line of precedents. The Petition should be granted.

CONCLUSION

For the foregoing reasons, JCI respectfully requests that the Court grant the instant Petition for a Writ of Certiorari.

Respectfully submitted,

MICHAEL A. POLLARD
Counsel of Record
KATHLEEN T. SANDERSON
BAKER & MCKENZIE LLP
One Prudential Plaza
130 East Randolph Drive
Chicago, Illinois 60601
Michael.Pollard@
bakermckenzie.com
312-861-2786

WILLIAM SMITH
WILLIAM R. ADAMS
DICKIE, MCCAMEY & CHILCOTE
Public Ledger Building,
Suite 901
150 South Independence
Mall, West
Philadelphia, PA 19106-3409

DANIEL J. O'CONNELL
MARK I. TIVIN
THOMAS J. BURNS
O'CONNELL, TIVIN, MILLER & BURNS
135 S. LaSalle Street,
Suite 2300
Chicago, IL 60603

Counsel for Petitioner

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