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IN THE  
**Supreme Court of the United States**

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JOHN CRANE INC.,

*Petitioner,*

*v.*

THOMAS F. ATWELL, JR., Executor of the Estate of  
THOMAS F. ATWELL, Deceased,

*Respondent.*

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

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**SUPPLEMENTAL BRIEF OF PETITIONER**

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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**

In accordance with Supreme Court Rule 15.8, Petitioner, John Crane Inc. (hereinafter “JCI”), respectfully submits this Supplemental Brief to bring to the Court’s attention a decision by 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), issued after filing of the Petition, on the very question at issue here. In *Kurns*, the Third Circuit rejected all of the arguments advanced by Respondent and accepted by the Superior Court below. The Third Circuit in *Kurns* held that the Boiler Inspection Act, (hereinafter “BIA”), currently codified at 49 U.S.C. § 20701 – 20703 (2006), preempts state law causes of action arising out of workplace exposure to asbestos in the course of manufacturing or working with railroad parts. 2010 U.S. App. LEXIS 18853, at \*18-19. In so ruling, the Third Circuit followed the “nearly unanimous interpretation of the breadth of [B]IA preemption.” *Id.* at \*21-22.

The *Kurns* decision fully ripens the conflict between the decision below and the decisions of the federal courts of appeals and all state courts of last resort that have addressed the issue. Unless this Court grants the Petition, and vacates the ruling below on the federal law issue presented here, claims for asbestos-related injuries against manufacturers of locomotive equipment will be allowed to be pursued in the Pennsylvania state court system, but not in other state courts or in federal courts within the Third Circuit, including federal courts in Pennsylvania.

In *Kurns*, the plaintiffs brought suit on behalf of the decedent, Mr. Corson, asserting a number of state law causes of action against two suppliers of locomotive equipment, Viad Corporation (hereinafter “Viad”) and Railroad Friction Productions Corporation (hereinafter “RFPC”), as well as fifty-seven other similar entities. 2010 U.S. App. LEXIS 18853, at \*1-2. The action sought recovery for Mr. Corson’s alleged exposure to asbestos during his years employed by a railroad company. *Id.* at \*1. Viad and RFPC filed a motion for summary judgment on the grounds that the plaintiffs’ claims were impliedly preempted by federal law. *Id.* at \*3-4. The district court granted summary judgment in favor of Viad and RFPC, holding that the plaintiffs’ state law product liability tort claims were preempted by federal law, namely the BIA. *Id.* at \*4.

On appeal, the Third Circuit affirmed the judgment of the district court, and held that the plaintiffs’ claims were preempted by the BIA. In so holding, the Third Circuit held, consistent with JCI’s arguments in the Petition, that this Court’s decision in *Napier v. Atlantic Coast Line R.R. Co.*, 272 U.S. 605 (1926), explicitly addressed the question of the scope of BIA preemption and remains the controlling precedent in the area of BIA preemption. *Kurns*, 2010 U.S. App. LEXIS 18853, at \*9-10; \*12, n.6. The Third Circuit recognized that “[t]he goal of the [B]IA is to prevent the paralyzing effect on railroads from prescription by each state of the safety devices obligatory on locomotives that would pass through many of them,” *Id.* at \*14 (citations omitted), and that “Congress’s goal of uniform railroad equipment regulation would clearly be impeded by state product liability suits against manufacturers, the purpose of which is, in part, to persuade defendants to comply with a standard of care established by the state.” *Id.* at \*16-

17. The Third Circuit further stated that “there is ‘no doubt’ that the design of locomotive parts and warning requirements are within the scope of the Secretary of Transportation’s authority.” *Id.* at \*17.

Moreover, the Third Circuit repudiated the Pennsylvania Supreme Court’s interpretation of federal law in *Norfolk & Western Ry. Co. v. Pa. Pub. Util. Comm’n*, 413 A.2d 1037 (Pa. 1980), on the issue of whether the Federal Railroad Safety Act of 1970, Pub. L. No. 91-458, title II, 84 Stat. 971 (1970) (codified as amended in scattered sections of 49 U.S.C.), narrowed the scope of BIA preemption. 2010 U.S. Lexis App. 18853, at \*21-23. In doing so, the *Kurns* court recognized that “the *Norfolk & Western* decision is the lone exception to the nearly unanimous interpretation of the breadth of [B]IA preemption” and that “[s]ignificantly. . . no court outside of Pennsylvania has followed [its] ruling or its reasoning.” *Id.* at \*21-22. The *Norfolk & Western* decision is the very precedent on the question of implied field preemption that the Superior Court below felt constrained to follow. *Atwell v. John Crane, Inc.*, 986 A.2d 888, 893-94 (Pa. Super. Ct. 2009). The Third Circuit’s repudiation of the Pennsylvania Supreme Court’s decision in *Norfolk & Western* further and fully ripens the current conflict identified in JCI’s Petition for a Writ of Certiorari.

In the Petition, JCI argued that this Court should grant discretionary review, because the Superior Court’s decision, which was allowed to stand by virtue of the Pennsylvania Supreme Court’s denial of discretionary review, conflicts with a consistent body of case law from state courts of last resort and federal courts of appeal on the precise issue before this Court. As a result of the *Kurns* decision, not only does the Third

Circuit Court of Appeals join the Ninth Circuit, the Eighth Circuit, the Sixth Circuit, the Second Circuit and the Fifth Circuit in holding generally that the BIA impliedly preempts state common law or statutes purporting to regulate locomotive equipment, but it is also the first federal Circuit Court of Appeals to address the specific issue of whether the BIA preempts state law causes of action arising out of workplace exposure to asbestos in the course of manufacturing or working with railroad parts. 2010 U.S. App. LEXIS 18853, at \*17. The conflict between the Superior Court's decision below and the "avalanche" of contrary authority on this important issue of federal law warrants review by this Court.

Although asbestos liability claims against locomotive equipment manufacturers are barred in the neighboring states of Ohio, New York, West Virginia, and Kentucky, and now in the federal courts in Pennsylvania itself, those same claims are continuing to be filed in the state court system in Pennsylvania as a result of the holding in *Atwell*. The issuance of *Kurns*, as powerful a precedent on federal law it may be, is likely to have no impact on the Pennsylvania state courts, because the Pennsylvania Supreme Court has previously held that it is "not obligated to follow the decisions of the Third Circuit on issues of federal law." *Hall v. Pa. Brd. of Probation and Parole*, 578 Pa. 245, 254 (Pa. 2004) (citing *Commonwealth v. Cross*, 555 Pa. 603 (Pa. 1999) (the Pennsylvania Supreme Court is not bound by a Third Circuit decision interpreting United States Supreme Court jurisprudence); *Commonwealth v. Ragan*, 560 Pa. 106 (Pa. 1999) (Pennsylvania Supreme Court is not constrained by a Third Circuit decision interpreting federal law)). Given these precedents, plaintiff's counsel in *Kurns*, who is also counsel for Respondent here, will



likely choose not to file a Petition for Writ of Certiorari with this Court in *Kurns*, content to bring all future asbestos liability cases in Pennsylvania state court. Thus, only this Court's acceptance of the instant Petition and the entry of an order vacating the decision below will effectively resolve this conflict. To ensure that this conflict on the federal law issue presented herein does not evade review, the Court should grant this Petition.

### CONCLUSION

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

Respectfully submitted,

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