

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 GLORIA GAIL KURNS, EXECUTRIX OF :

4 THE ESTATE OF GEORGE M. CORSON, :

5 DECEASED, ET AL., :

6 Petitioners : No. 10-879

7 v. :

8 RAILROAD FRICTION PRODUCTS :

9 CORPORATION, ET AL. :

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11 Washington, D.C.

12 Wednesday, November 9, 2011

13

14 The above-entitled matter came on for oral
15 argument before the Supreme Court of the United States
16 at 11:05 a.m.

17 APPEARANCES:

18 DAVID C. FREDERICK, ESQ., Washington, D.C.; on
19 behalf of Petitioners.

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21 General, Department of Justice, Washington, D.C.; for
22 United States, as amicus curiae, supporting
23 Petitioners.

24 JONATHAN D. HACKER, ESQ., Washington, D.C.; on behalf of
25 Respondents.

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1 P R O C E E D I N G S

2 (11:05 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument
4 next this morning in Case 10-879, Kurns v. Railroad
5 Friction Products Corporation.

6 Mr. Frederick.

7 ORAL ARGUMENT OF DAVID C. FREDERICK

8 ON BEHALF OF THE PETITIONERS

9 MR. FREDERICK: Thank you, Mr. Chief
10 Justice, and may it please the Court:

11 Congress enacted the Locomotive Inspection
12 Act to ensure the safety of locomotives in use on
13 railroad lines, not to regulate hazards to mechanics
14 conducting repairs of locomotives.

15 The doctrine of implied --

16 JUSTICE SOTOMAYOR: So, what do you -- what
17 do you make of the ICC in 1916, in the Tiller case,
18 regulating the lights that railroads had to have,
19 locomotives had to have in the yard, and that those
20 lights had to differ when the railroad was in use?

21 MR. FREDERICK: That was actually I think
22 pursuant to the Safety Appliance Act, Justice Sotomayor,
23 if I'm not -- if I'm not mistaken. And the principle
24 behind the safety in use regulation that this Court
25 construed in Napier was to ensure that locomotives were

1 safe for fit use on the line. And that was the
2 consistent construction both in the ICC's statement that
3 it made in 1922 and in this Court's post-Napier --

4 JUSTICE SOTOMAYOR: I'm not sure I
5 understand. It prescribed different lights when the --
6 when the locomotive was in the yard.

7 MR. FREDERICK: Yes.

8 JUSTICE SOTOMAYOR: That had nothing to do
9 with safety in use. It had to do with safety in repair.

10 MR. FREDERICK: Our position is that it was
11 not pursuant to the Locomotive Inspection Act that the
12 ICC promulgated that rule. As the Court has said in
13 numerous cases, the ICC had rules in place with respect
14 to different aspects of the train at different points in
15 time, but the Locomotive Inspection Act was designed to
16 address a very specific problem, which was boilers
17 exploding on the line when the train was in operation.
18 And that is the consistent way that the ICC, and
19 subsequently the Federal Railroad Administration, has
20 construed the Act.

21 JUSTICE SOTOMAYOR: Distinguish for me our
22 reasoning in the Ray case.

23 MR. FREDERICK: I'm sorry.

24 JUSTICE SOTOMAYOR: Distinguish for me the
25 difference in the Ray case, that had to do with

1 navigation and where we held that the agency, in
2 ensuring safety in navigation, controlled design
3 completely, whether in repair or not. So, how do we --
4 why don't we apply the logic of Ray to this case?

5 MR. FREDERICK: Well, of course in Ray you
6 addressed the Port and Tanker Safety Act, as well as the
7 Port and Waterway Safety Act. And in the United States
8 v. Locke case, the Court subsequently looked at Ray in
9 terms of design in a statute that also specifically
10 included the word "repair and maintenance," which is
11 absent here.

12 But what the Court was getting at in Ray was
13 to ensure that States were not using their law to
14 interfere with the design of equipment. Of course, that
15 was for --

16 JUSTICE SOTOMAYOR: That's the argument
17 here, which is --

18 MR. FREDERICK: No.

19 JUSTICE SOTOMAYOR: -- once you regulate
20 what -- what the design or use of asbestos is, you're
21 interfering with what available components there are for
22 locomotives.

23 MR. FREDERICK: If I could make two points
24 about that, Justice Sotomayor. That's not actually
25 correct. The first is anything that the Court might

1 think about design does not impair our failure-to-
2 warrant claims, which entail no challenge to the design
3 of a locomotive at all, only to the instructions for its
4 safe use. But to the --

5 JUSTICE SOTOMAYOR: So, you're giving up all
6 of your other claims?

7 MR. FREDERICK: No. My second argument is
8 that the design claim here involves repair work or
9 problems uniquely; it does not include or intrude on the
10 fitness for service standard that this Court announced
11 in Napier or that has consistently been applied. The
12 asbestos harms that the repair workers here faced are
13 unique to the repair process, where they are scraping
14 off the --

15 CHIEF JUSTICE ROBERTS: Well, but, counsel,
16 looking at Napier, the power that Justice Brandeis said
17 was conferred in that case was to specify the sort of
18 equipment to be used on locomotives, right?

19 MR. FREDERICK: Yes, but on --

20 CHIEF JUSTICE ROBERTS: So, this is
21 equipment that was used in locomotives.

22 MR. FREDERICK: Yes, but, Mr. Chief Justice,
23 it also says on page 612 that the power delegated by
24 Congress is to determine fitness for service. So, the
25 words about the --

1 CHIEF JUSTICE ROBERTS: Yes, but that's the
2 same -- that's the same thing, I'll give you that,
3 fitness for service.

4 MR. FREDERICK: No, it's not --

5 CHIEF JUSTICE ROBERTS: It doesn't say
6 something that's going to cause harm while it's actually
7 being used.

8 MR. FREDERICK: But, Mr. Chief Justice, the
9 principle here is to ensure that the locomotives, when
10 they are outside the repair yard and are on the
11 locomotive -- on the railroad line, are -- are safe to
12 operate. That standard in Napier had --

13 CHIEF JUSTICE ROBERTS: Why does it
14 depend -- you want to know if this equipment is safe to
15 operate, right? To be used, whether -- whether it's
16 going to be used. If you have a --

17 MR. FREDERICK: Not to be broken down.

18 CHIEF JUSTICE ROBERTS: If you have a boiler
19 that's going to be used, that's within the power that
20 was confirmed. It's not merely to inspect as, again,
21 Justice Brandeis said.

22 MR. FREDERICK: But the point here is that
23 it is not to be broken down. And the locomotive repair
24 workers here face unique hazards in repairing
25 locomotives whose safety standards are to ensure that

1 they work properly on the railroad line, not when
2 they're being taken apart and repaired. That they --

3 CHIEF JUSTICE ROBERTS: Well, I guess your
4 argument isn't limited to being taken apart. Your
5 argument does depend on the fact that the asbestos
6 doesn't come out during use; right?

7 MR. FREDERICK: That's absolutely correct.
8 That's why this is --

9 CHIEF JUSTICE ROBERTS: Well, how do we know
10 that --

11 MR. FREDERICK: -- a unique hazard faced by
12 the repair workers.

13 CHIEF JUSTICE ROBERTS: Yes, but if there's
14 an accident or something, does the asbestos come out
15 during the use of the locomotive?

16 MR. FREDERICK: If it did, it would be
17 covered under the Locomotive Inspection Act safety
18 standard, and that would be covered by Federal law.

19 JUSTICE SCALIA: You -- you would say once
20 there's an accident and the locomotive is disabled, it's
21 no longer in use. I suppose that's what you'd say.

22 MR. FREDERICK: That's correct, and --

23 JUSTICE SCALIA: It's unrealistic, but
24 that's what you'd say.

25 MR. FREDERICK: No. Well, it's governed by

1 a different statute, which is found at 49 U.S.C. 303.

2 CHIEF JUSTICE ROBERTS: Well, that's the old
3 insurance cases we've had, that, you know, when the car,
4 you know, slams into a pole or something, it's not being
5 used as a car anymore; and, therefore, the insurance
6 doesn't cover it.

7 MR. FREDERICK: Well, if I could finish my
8 answer to your previous question, Mr. Chief Justice,
9 there's a specific statute on that point, and it
10 predated the Locomotive Inspection Act, and it provided
11 that when there was a crippled locomotive, the railroad
12 did not face liability, civil penalties, to bring the
13 crippled locomotive back to the yard, but it
14 specifically said if a worker was injured during that
15 process, the railroad would face liability.

16 Our point here is that the Locomotive
17 Inspection Act's field should be construed narrowly
18 because in 1970 Congress expressly and comprehensively
19 legislated in the Federal Rail Safety Act and provided a
20 conflict pre-emption regime in which if a State had a
21 rule in place, that rule would be permitted to survive
22 unless and until the Federal Rail Administration issued
23 a regulation. And there has never been a regulation on
24 asbestos.

25 JUSTICE BREYER: What I'm concerned about I

1 think is the same thing that the Chief Justice
2 mentioned, the particular language in Napier. And
3 whatever -- however this might come out today if Napier
4 were decided again, it did come out the way it did. And
5 Justice Brandeis did write it, and it's been the law a
6 long time.

7 And the argument is made in Napier that this
8 particular State regulation is aimed at preventing
9 sickness and disease, not at making locomotives safe,
10 and, therefore, it's not pre-empted. And the answer to
11 that was not sickness and disease are an object of the
12 statute, too. The answer was the Federal and the State
13 statutes are directed to the same subject, the equipment
14 of locomotives; and, therefore, it is pre-empted.

15 Now, how could we come out in your favor
16 without overturning what seems to be that key sentence
17 in Napier? That is the problem that's bothering me.

18 MR. FREDERICK: Well, first, I would urge
19 you not to read Napier like a statute, although Justice
20 Brandeis is obviously --

21 JUSTICE BREYER: I see. Okay. That's a --
22 the problem with (a) is that it's been followed and
23 followed and followed and followed, and really read for
24 all its worth, and so forth. So -- so one question is,
25 to what extent can I go back and revise that sentence?

1 That's (a). Okay? What's (b)?

2 MR. FREDERICK: (B) is that he was
3 addressing himself to fitness for service standards on
4 the line, the Wisconsin and Georgia statutes at issue
5 there purporting to regulate what the locomotive could
6 do while it was in operation on the line. That's not
7 what the claims in this case entail.

8 JUSTICE BREYER: Not -- now, is there any
9 way that you could win your case -- reasonably, in a
10 reasonable way, not some far-out way -- but you win your
11 case on this, and it does not affect the manufacturers'
12 way of dealing with their equipment?

13 MR. FREDERICK: Yes.

14 JUSTICE BREYER: What is that?

15 MR. FREDERICK: First is if you accept our
16 proposition that warning claims are valid negligence
17 claims. The warning claims are not -- do not affect the
18 equipment, how it is made at all. It's simply how do
19 you use the equipment safely.

20 Secondly, the design claims here go to the
21 unique hazards faced by repair workers. You could use
22 asbestos, under our theory of the case, on the
23 locomotive in exactly the same way that the locomotive
24 equipment manufacturers have done, so long as there's a
25 safer way to take the asbestos off the locomotive in the

1 repair yard.

2 That is a distinct kind of design claim that
3 doesn't go to the safe operation of the locomotive; it
4 goes to what hazards are created when a repair worker is
5 doing maintenance work on it.

6 JUSTICE SOTOMAYOR: I'm not sure I
7 understand this. Are you talking about wearing a
8 particular hazard suit?

9 MR. FREDERICK: That would be --

10 JUSTICE SOTOMAYOR: Are you talking about
11 blowing out air? Are you talking about changing the
12 design so the asbestos comes off without the dust cloud
13 that's generally created?

14 MR. FREDERICK: Both. The dust cloud is
15 something that can be warned against and protected
16 against with protective gear that has nothing to do with
17 the design of a locomotive. There are, and there is
18 evidence that there are, safer and were safer ways -- I
19 remind you that asbestos isn't used on locomotives
20 anymore, so this is part of an historical debate here --
21 but in ways that could be removed that would not create
22 the cloud dust. That's the essence of the design defect
23 claim. And the LIA and the FRA do not regulate in the
24 repair shop. So, there's a complete gap here in
25 terms --

1 JUSTICE KAGAN: Let me make sure I
2 understand you. Is -- if the Secretary tomorrow decided
3 to issue a regulation saying railroads should no longer
4 use these asbestos-containing brakes because of the
5 hazards in the repair shop, do you think the Secretary
6 could not do that under the statute?

7 MR. FREDERICK: No. Absolutely --
8 absolutely can do that under the Federal Rail Safety
9 Act, which, again, empowers the Secretary.

10 JUSTICE KAGAN: But the Secretary cannot do
11 that under LIA? Is that the idea?

12 MR. FREDERICK: It -- it very well could
13 because it's a fitness for service standard. But it
14 always -- and if you look at its regulations, in parts
15 229 and part 230 of 49 C.F.R., it always issues these
16 regulations under both authorities because the FRSA
17 expanded it.

18 JUSTICE KAGAN: Okay, then I'm a little bit
19 lost. If the Secretary can issue such a regulation
20 under LIA, L-I-A, then isn't it in the scope of
21 regulation, and then isn't it also in the scope of
22 what's pre-empted?

23 MR. FREDERICK: It would have to do so under
24 the B&O Railroad case in the early 1930s -- there was
25 another Justice Brandeis opinion -- in which it would

1 have to make a finding that to make that regulation that
2 you posit, Justice Kagan, was necessary to avoid
3 unnecessary peril to life or limb. In that case, the
4 Court struck down the ICC's attempt to issue a
5 regulation on a particular type of equipment because the
6 ICC could not make that demonstration.

7 So, in the current world, the FRA would
8 regulate under the FRSA; it would not regulate under the
9 LIA because under this Court's jurisprudence it is a
10 harder standard to meet to implement a regulatory
11 standard. That's our point.

12 The regulatory field here does not need to
13 be read as expansively as the other side posits, because
14 the FRA has all the authority it needs under the FRSA if
15 it chooses to promulgate those rules, and it has not
16 chosen to promulgate those rules. The FRA can use
17 conflict pre-emption to displace any State rule, but
18 what they are seeking to do is to take the doctrine of
19 implied field pre-emption, gain immunity from State law
20 liability, and not be subject to any Federal rules. And
21 it's that proposition that is an extraordinary
22 proposition of implied field pre-emption. We found no
23 case from this Court that goes that far.

24 JUSTICE GINSBURG: Mr. Frederick, could
25 you -- could you clarify what is at stake for the worker

1 here? The railroad worker ordinarily has the FELA
2 claim, but the FELA claim in this case was dismissed.
3 So, can you tell us what recourse -- if you lose, what
4 recovery can this plaintiff get? And also explain to me
5 why the FELA claim was dismissed.

6 MR. FREDERICK: If we lose this case,
7 Justice Ginsburg, the decedent's family gets nothing,
8 takes nothing, because the FELA claim was rendered
9 summary judgment on the finding that there was no
10 negligence by the railroad. The only claim that the
11 decedent's family has here is a third-party claim
12 against the manufacturer for failing to warn or design
13 defect on the basis of State law.

14 JUSTICE BREYER: You just -- you just said
15 that, which I think you certainly have the right to
16 bring a claim, don't you, to say the repair shop doesn't
17 have adequate warnings. And if -- if that's -- if the
18 railroad's at fault in that, or the manufacturers or the
19 owner of the repair shop, everybody who ever puts the
20 asbestos in there is negligent in not putting up
21 adequate warnings.

22 What's wrong with that?

23 MR. FREDERICK: Well, here -- ordinarily,
24 you'd bring a failure-to-warn claim directly against the
25 manufacturer for not putting in the manual or stamping

1 on the equipment --

2 JUSTICE BREYER: What about -- what about
3 not --

4 MR. FREDERICK: -- or providing instructions
5 for safe use.

6 JUSTICE BREYER: What about getting away
7 from the equipment and saying the failure here is not to
8 fail to put it on the equipment; it's to fail to put it
9 in the repair shop?

10 MR. FREDERICK: It's both.

11 JUSTICE BREYER: There's something I'm not
12 seeing.

13 MR. FREDERICK: No. It's -- it's both.
14 Manufacturers routinely are held liable for failing to
15 warn if in their manuals or in their other instruction
16 materials they do not provide for instructions for the
17 safe use of their equipment.

18 If I could save the balance of my time.

19 CHIEF JUSTICE ROBERTS: Thank you,
20 Mr. Frederick.

21 Ms. Harrington.

22 ORAL ARGUMENT OF SARAH E. HARRINGTON

23 ON BEHALF OF THE UNITED STATES,

24 AS AMICUS CURIAE, SUPPORTING THE PETITIONERS

25 MS. HARRINGTON: Mr. Chief Justice, and may

1 it please the Court:

2 I think it's helpful in this case to try to
3 separate out the field pre-emption issues from the
4 conflict pre-emption issues. In the Government's view,
5 the only issue properly presented in this case is
6 whether Petitioners' tort claims fall within the field
7 pre-empted by the LIA, and our view is that they do not
8 because they arise from injuries that occurred when the
9 locomotive was not in use.

10 Now, Respondent would have the Court expand
11 the field that's pre-empted by the LIA to include any
12 claim that has anything to do with locomotive equipment,
13 regardless of whether the equipment or the locomotive
14 was in use at the time injury occurred.

15 But it doesn't make sense to --

16 JUSTICE SCALIA: Don't you think that one of
17 the purposes of the legislation, which everybody
18 understood, was to enable engine manufacturers to be
19 able to construct their engines without having to worry
20 about a variety of different State requirements?
21 Railroading is a national transportation industry, and
22 whoever makes the engine has to know, if I do it this
23 way, it's going to be okay.

24 MS. HARRINGTON: Absolutely.

25 JUSTICE SCALIA: And you're saying it won't

1 be okay because, although every State may have -- every
2 State's requirements may be pre-empted when the -- when
3 the locomotive is in use, all 50 States can have
4 different requirements with respect to what the design
5 has to be in order to make the engine safe when it's
6 being repaired. I think that truly frustrates the
7 purpose of the Act.

8 MS. HARRINGTON: I completely agree with
9 what you're saying. And -- and I'm sorry if you
10 missed -- if we didn't state our position clearly in our
11 brief. Our view is that those kinds of requirements --
12 requirements that go to the design, construction, or
13 materials on a locomotive that will be used, if those
14 requirements are directed at the repair shop, then they
15 would be conflict pre-empted.

16 But they wouldn't fall within the field
17 that's governed by LIA because the LIA's substantive
18 standard of care only applies to locomotives that are in
19 use.

20 JUSTICE SCALIA: I'm not -- I'm not
21 concerned about conflict pre-emption. I'm not concerned
22 about State requirements that conflict with the Federal.
23 I'm talking about 50 State requirements that conflict
24 with each other, so that the manufacturer has to look to
25 all 50 States instead of looking to the Secretary here,

1 which says your engine is safe if you do this. And
2 you're telling me the manufacturer can no longer assume
3 that.

4 MS. HARRINGTON: No, I'm sorry. And let me
5 clarify. I appreciate the opportunity to clarify. In
6 our view, what the conflict is, is not a conflict with a
7 Federal rule saying you have to use this piece of
8 equipment and you can't use that piece of equipment.
9 The conflict is with one of the purposes of the LIA,
10 which is that the Federal Government be the only
11 regulator of equipment that will be used on a
12 locomotive.

13 And so, what that means is if -- if the
14 Federal Government hasn't spoken as to whether piece of
15 equipment A can be used on a locomotive, that means that
16 it can be, that the manufacturers know that it's okay.
17 And if you have a State rule that would have the effect
18 of dictating the equipment that can be used on a
19 locomotive, that would conflict with the single
20 regulator objective of the LIA.

21 JUSTICE BREYER: So, what's the difference
22 then? How do you do it? How do you -- how do you --
23 what is it you're thinking of that the manufacturer's
24 going to have to do in respect to his locomotive in
25 order to comply with the State law about warning that is

1 not going to mean that he changes the locomotive when it
2 runs on the railroad?

3 MS. HARRINGTON: Well, I think it depends on
4 what the warning claim is.

5 JUSTICE BREYER: Well, give me an example.

6 MS. HARRINGTON: Well, under the -- under
7 the Respondents' -- under the Respondents' view of the
8 field that's pre-empted, a State could not regulate the
9 disposal of equipment that's removed from a locomotive
10 during their repair process, even though --

11 JUSTICE BREYER: Does that have anything to
12 do with this case, the removal, never further -- no
13 further use of a bit of a locomotive?

14 MS. HARRINGTON: No. But also --

15 JUSTICE BREYER: No. Okay. Let's get to
16 this case.

17 MS. HARRINGTON: Also, in Respondents' view
18 a State could not regulate workplace hazards, such as by
19 requiring that workers wear goggles or masks.

20 JUSTICE BREYER: Oh, I didn't know anybody
21 denied that, that the State could regulate the repair
22 shop, indeed require what warnings they wish, indeed
23 require what equipment workers have to have. I thought
24 we're only talking about those rules of State law that
25 would affect what the manufacturer has to put by way of

1 design in his locomotive.

2 MS. HARRINGTON: Yes, but when you're --

3 JUSTICE BREYER: And that's what I'm having
4 trouble thinking of one that would only affect repair
5 shops and repairs, but -- maybe there's some kind of
6 equipment that you could stick on the front of it, and
7 it is a hook or something -- and it holds something, and
8 before it goes back on the line, you take it off and put
9 it in a locker. And -- but, you know, the more I
10 thought along those lines, I thought I'm getting into
11 outer space. This isn't reality. So --

12 MS. HARRINGTON: No. I think you could --
13 I'm sorry. I think you could imagine a world where a
14 State says when a locomotive comes into a repair shop,
15 the railroad or the repair shop has to attach a certain
16 kind of clamp on the wheels, a certain kind of brake,
17 that makes sure that the locomotive won't move while
18 it's in the repair shop. And when you're done repairing
19 the locomotive, you take them off, and the locomotive
20 goes back --

21 JUSTICE BREYER: All right. Now, does that
22 have more than theoretical value in this case?

23 MS. HARRINGTON: Well, I think in this case
24 the claims that we say would not be conflict pre-empted
25 or within the field are claims -- are the

1 failure-to-warn claims. Now, how a manufacturer
2 actually issues the warning that would be required I
3 think is a question that could be worked out as the case
4 proceeds.

5 JUSTICE SOTOMAYOR: If the manufacturer is
6 really not controlling the repair shop, of what value is
7 this failure-to-warn claim?

8 MS. HARRINGTON: Well, again, I think it
9 depends how the warning is issued. You could require
10 that the manufacturer tell the purchaser of the products
11 to pass the warning along, to post warnings in a repair
12 shop. You know, there --

13 JUSTICE SOTOMAYOR: How -- they can't
14 control whether they do or don't.

15 MS. HARRINGTON: They could require it
16 contractually through the sale of the products. I think
17 those sorts of detailed issues would be things that
18 would be worked out on remand in this case.

19 Again, in our view, the only question
20 squarely presented in this case is the field pre-emption
21 question. And --

22 JUSTICE KAGAN: So, on that question, Ms.
23 Harrington, I'm still confused about the scope of your
24 regulatory authority and whether you think you have the
25 capacity to issue rules that are meant to protect repair

1 workers on railway equipment. So, can you issue a rule
2 under the LIA that says no asbestos-containing brakes
3 because we're afraid that these brakes injure the -- the
4 guys in the roundhouse.

5 MS. HARRINGTON: No. The LIA -- the
6 standard of care under the LIA only goes to whether a
7 locomotive is safe for use, and that is also the limit
8 of the FRA's regulatory authority. This Court, in the
9 United States v. B&O, addressed that issue. The ICC at
10 the time had issued a regulation requiring a certain
11 kind of reverse gear instead of a different kind of
12 reverse gear.

13 JUSTICE SCALIA: Well, what -- what
14 self-abnegation by the Federal Government, that "safe
15 for use" does not include safe for use when it's being
16 repaired.

17 MS. HARRINGTON: Because the statute says
18 safe for use on -- safe for use on the line. It's safe
19 for use on lines of interstate commerce.

20 JUSTICE KAGAN: But this does seem a very
21 limiting construction. Napier seems to have a broader
22 construction, and if I read some of your history right,
23 you've taken a broader understanding of your regulatory
24 authority in the past. So, why this narrow view?

25 MS. SMITH: I'm not aware that we've taken a

1 broader view of our regulatory authority under the LIA.
2 In Napier, again, what's important to remember is that
3 the State statutes at issue applied only to locomotives
4 that were in use. And so, I think it's hard to take any
5 -- any broad statements that were made in Napier and
6 read them as applying outside that context.

7 CHIEF JUSTICE ROBERTS: Well, but if you're
8 talking about -- I bet there are a lot of things on
9 railroad cars that you can fix in the shop or you can
10 fix while it's under way, right? We're not always
11 talking about brakes. So, let's suppose there's one of
12 those things. You get to the shop and the guy says:
13 Boy, you got to fix this. And they said: Well, the
14 train's leaving, and we're going to go in 10 hours. And
15 he says: Okay, I can fix it during the -- while it's in
16 use. Is that covered or not?

17 MS. HARRINGTON: Well, again the LIA only
18 applies to the locomotives. So, if the thing that's
19 broken that you could fix while it's in use would not
20 make the locomotive unsafe to use, then it would not be
21 a violation of the statute to use it while --

22 CHIEF JUSTICE ROBERTS: So, the line you've
23 been talking about between the repair shop and the
24 locomotive on the tracks, that's not really the line at
25 all.

1 MS. HARRINGTON: The line is in use versus
2 not in use. And that tends to match --

3 CHIEF JUSTICE ROBERTS: Well, then -- well,
4 then what's the answer to my question? This is
5 something you can fix in either place. It's covered
6 while it's -- if you fix it while the train is under
7 way, but it's not covered if you wait until it's in the
8 shop?

9 MS. HARRINGTON: Well, if it's -- if the
10 fact that it's broken makes the locomotive unsafe to
11 use, then the railroad cannot use it, cannot repair it
12 while it's in use.

13 CHIEF JUSTICE ROBERTS: So, then it's not
14 whether it's in use or in the shop. It's whether it is
15 something that affects whether the locomotive can go,
16 whether it's --

17 MS. HARRINGTON: That's right. But here the
18 injuries occur when the locomotive is not in use because
19 it's in the repair shop. And in those situations, the
20 LIA's substantive heightened duty of care doesn't even
21 apply. And so, it doesn't make sense to think of those
22 claims as being within the field that's pre-empted by
23 the LIA because they're not governed by the LIA. Now,
24 those claims might bump up against the LIA in a
25 different way by conflicting again with the --

1 JUSTICE SCALIA: Do you have any --

2 JUSTICE GINSBURG: Can you explain --

3 JUSTICE SCALIA: I'm sorry. Go ahead.

4 JUSTICE GINSBURG: Can you explain the
5 difference -- you make a distinction between field
6 pre-emption and conflict pre-emption. Does that have
7 any practical significance at all in this case, because
8 I thought you agreed that the design defect claim would
9 be barred?

10 MS. HARRINGTON: Well, we agree that they
11 might be barred. I think, you know, this case comes to
12 the Court without any real development of the
13 plaintiffs' claim. All we have is what they stated in
14 their complaint. Their complaint incorporates a master
15 complaint which applies to all sorts of different kinds
16 of plaintiffs. And so, I think it's really hard to
17 understand exactly what their claims are, what the
18 effect of their claims would be with respect to the
19 design defect claims. And so, in our view, they would
20 -- the design defect claims would be pre-empted if they
21 would have the effect of dictating the character of
22 equipment that could be on a locomotive while it was in
23 use.

24 CHIEF JUSTICE ROBERTS: Thank you, counsel.

25 MS. HARRINGTON: Thank you.

1 CHIEF JUSTICE ROBERTS: Mr. Hacker.

2 ORAL ARGUMENT OF JONATHAN D. HACKER

3 ON BEHALF OF THE RESPONDENTS

4 MR. HACKER: Mr. Chief Justice, and may it
5 please the Court:

6 The LIA as construed by this Court in
7 Napier, in particular in the passage quoted by Justice
8 Breyer, delegates to the DOT the exclusive authority to
9 determine the design and the materials of locomotive
10 equipment. Petitioners, however, argue that States in
11 fact may dictate locomotive design and materials so long
12 as they do so for some purpose other than safety of use
13 on the line.

14 But, again, in the passage Justice Breyer
15 pointed out, Napier holds that LIA pre-emption is not
16 about the purpose of locomotive equipment regulation and
17 is not about the geographic location of the locomotive
18 on or off the line when the regulation is enforced. As
19 Justice Sotomayor pointed out in the earlier argument
20 this morning, regulatory power is broader than purpose.
21 As Napier says, under the LIA, pre-emption is about the
22 locomotive equipment itself, what Napier referred to as
23 the physical elements of the locomotive.

24 JUSTICE KAGAN: Well, Mr. Hacker, could you
25 explain to me -- I wasn't sure reading your brief

1 whether you agree or disagree with the Government's
2 point that the agency cannot, under the LIA, issue the
3 kind of rule that I suggested just, you know, saying no
4 asbestos-containing brakes because of the danger that
5 those brakes pose to the repairmen.

6 MR. HACKER: I -- frankly, I would have
7 thought it possible. I would have to defer to the -- to
8 the DOT's view. It seems to me it would have been
9 within DOT's power under the LIA to say a locomotive is
10 not safe to operate if it can't be safely repaired.
11 Because there's no point in having a locomotive ready to
12 go on the line if it -- as soon as it comes off the line
13 with a problem it's going to injure those who work with
14 it. But we don't need to assert that position to defend
15 the proposition we have now --

16 JUSTICE KAGAN: Well, how is that? If they
17 are right as to the scope of their authority -- and
18 maybe they're not right, but if they are right about the
19 scope of their authority, why doesn't it follow that
20 these claims would not be field pre-empted; might be
21 conflict pre-empted but would not be field pre-empted
22 because we're no longer in the field?

23 MR. HACKER: Because the field is not --
24 it's not about the repair shop versus not the repair
25 shop. The field is the physical elements of the

1 locomotive itself. What States cannot do -- what DOT
2 has exclusive authority over is the design, the
3 materials, and the construction of the locomotive.

4 JUSTICE SCALIA: But only the design,
5 materials, and constructions for use. If you make that
6 concession, it's only those aspects of design,
7 materials, and construction that pertain to use. And if
8 you take the position that use includes only use on the
9 line and not use when it's being repaired in the repair
10 shop, I think you're in trouble.

11 MR. HACKER: I think we're not, Your Honor,
12 because the design doesn't change between the line and
13 the repair shop. And that's the key. If a State comes
14 in and says --

15 JUSTICE SCALIA: It's design for use.

16 MR. HACKER: I understand, but --

17 JUSTICE SCALIA: I'm not talking about the
18 word "design"; I'm talking about "design for use."

19 MR. HACKER: But the statute -- the reason
20 the statute gives power to the DOT is to ensure that
21 locomotives are safe for use on the line. But in order
22 to accomplish that objective, the power they have is
23 plenary over the design itself. They -- only one entity
24 gets to decide what the design is, and that's DOT. A
25 State can't come in and say --

1 JUSTICE KENNEDY: It's not -- it's not
2 clear --

3 JUSTICE SOTOMAYOR: So, you're okay --

4 JUSTICE KENNEDY: It's not clear to me why a
5 railroad executive couldn't say, now I need to use 10
6 locomotives in this division because I will be using two
7 of them every week in the repair shop to repair them,
8 right? I don't know why that isn't use, but you
9 don't -- you don't seem to agree with that.

10 MR. HACKER: Well, I don't necessarily
11 disagree. We would certainly accept that proposition.
12 We're just saying you don't have to go there.

13 JUSTICE KENNEDY: Now, I know it's use on
14 the line, but it seems to me that the repair shop is an
15 obvious extension of the line. Everybody knows that
16 it's going to have to spend, I don't know, 1 day a month
17 in the repair shop, and that's just part of -- of the
18 use.

19 MR. HACKER: We don't disagree with that.

20 JUSTICE BREYER: Why would their law be
21 pre-empted, a State law that says since the railroad
22 knows that asbestos is dangerous when revealed and since
23 it would be revealed in a repair shop, the railroad has
24 to provide the repair shops with appropriate worker
25 safety equipment; or alternatively, and lesser, the

1 railroad has to provide for the repair shop's documents
2 to be given to the workers which explain the risks and
3 how they can overcome them.

4 Now, in respect to that, which I'll lump
5 under various kinds of failure-to-warn claims, how does
6 the Act pre-empt those? It doesn't affect design of the
7 railroad, nor does it affect the use. Neither.

8 MR. HACKER: I would say two points, Your
9 Honor. First of all, it does affect the design because
10 a way to comply with that regulation is to use something
11 other than asbestos, to change the design. It's the
12 State saying, because you're using this design, you can
13 only use it lawfully in this State if you do the
14 following two or three things.

15 JUSTICE GINSBURG: I thought that that was
16 not the nature of the notice claim. The design is
17 whatever it is. But the manufacturer has to issue
18 warnings so that the worker can protect himself against
19 that hazard. So, I thought that the defective design --
20 yes, I understand your argument. You would have one
21 standard for on the line and another when it's in the
22 repair shop. But this is not telling them to change the
23 design in any respect. It just says: Asbestos -- you
24 could take these measures to protect yourself.

25 MR. HACKER: At common law, a design -- a

1 failure-to-warn claim was a type of design defect claim.
2 It was a way of saying you can't use that design
3 lawfully unless you have the following type of warning.
4 If you -- you can't assume away the design aspect of it
5 because it still turns on -- it's a State conditioning
6 the design.

7 The LIA and the FRSA and SCAA and OSHA all
8 together solved this problem by -- and FELA, solved this
9 problem by saying it is the repair shop's responsibility
10 to ensure the safety of workers. We are not, to be
11 absolutely clear -- Ms. Harrington was incorrect when
12 she said: We don't believe that repair shop -- States
13 have the power to impose workplace conditions to protect
14 employee safety in the repair shop. They do.

15 JUSTICE BREYER: But -- no, no, no. That
16 argument would prevent States doing what they can do
17 lawfully, which is to regulate the repair shop because
18 with any given repair, with many of them, you could say,
19 well, we wouldn't have to -- we can just change the
20 locomotive design, for example. It carries beds with it
21 so that the workers who are repairing it get adequate
22 sleep. I mean, that isn't an answer to the argument
23 that it doesn't affect design to say, well, they could
24 comply with it by changing design, I don't think.

25 MR. HACKER: Well, what we would say is that

1 generally applicable laws that govern the repair shop --
2 States have authority -- to the extent not pre-empted by
3 OSHA, States have authority to require workplace
4 conditions and to require employers to protect employees
5 working. But what they can't do is tell manufacturers
6 here's the conditions under which you can use this
7 design, sell this design, distribute the design and
8 these materials lawfully within the State --

9 JUSTICE SCALIA: What would apply to the
10 repair shop would also apply to the locomotive in use,
11 I suppose, and it would be of little comfort to the
12 manufacturer that although the engine he has
13 manufactured has been certified as safe for use by the
14 Secretary, he is liable unless he warns the engineer:
15 Oh, it isn't safe for use in these circumstances; I have
16 to give you warning.

17 I mean, I cannot imagine that that's what --
18 that that's what the statute means as applied, at least
19 to the use of the engine on the -- on the tracks.

20 MR. HACKER: Well, we agree with that, but
21 we also think it applies with respect to manufacturers'
22 liability in the repair shop for the reason I said
23 earlier. The locomotive doesn't change. So, when it's
24 certified as safe for use on line, it can't be -- and
25 the locomotive manufacturer knows everything they know

1 by looking at DOT regulations. It can't be that a State
2 can come along and say: No, no, you can't use any of
3 that design; you have to use this completely different
4 one --

5 JUSTICE BREYER: No, what they're saying
6 is --

7 MR. HACKER: -- because this will make it
8 safe in the repair shop.

9 JUSTICE BREYER: What they're saying is
10 because when you open up the box, something no one does
11 on line, you will expose yourself to risk, and what we
12 are saying is, therefore, you must post a notice that
13 tells workers about those risks. And, indeed, if there
14 is a conflict, conflict pre-emption will take care of
15 it. But why should that kind of thing fall within the
16 scope of field pre-emption even under Napier, which, of
17 course, referred to equipment while this rule doesn't?
18 It refers to a sign. You're not going to change the
19 equipment.

20 MR. HACKER: Well, for the reason I said
21 earlier, Your Honor, which is, you don't know in
22 advance. If you say, in theory, a State can adopt a
23 warning requirement specific to a design otherwise
24 approved by the DOT, you don't know in advance whether
25 the warning requirements -- the manufacturers will be

1 able to easily comply with all 50 different types of
2 warning requirements and whether or not the warning
3 requirements -- some will be so stringent that it will
4 be easier to simply adopt a different design. The point
5 of the LIA is to take that kind of decisionmaking out of
6 the State's hands and put it into a Federal authority
7 which can make the relevant and appropriate decisions --

8 JUSTICE KENNEDY: Suppose --

9 MR. HACKER: -- as to what designs are
10 unlawful.

11 JUSTICE KENNEDY: Suppose the allegation is
12 there's a failure to warn workers to use a special kind
13 of mask that's very important if you're working near
14 asbestos. That's the claim they want. Now, are you
15 saying that the manufacturer cannot be required to give
16 that warning?

17 MR. HACKER: That's correct.

18 JUSTICE KENNEDY: Are you also saying the
19 railroad cannot be forced to give that warning in its
20 repair shop?

21 MR. HACKER: The railroad can be required to
22 ensure the safe protection of employees that work there.
23 A workplace safety claim isn't really a warning claim.

24 JUSTICE KENNEDY: No, no. That was my --
25 can the railroad be held liable for failing to tell the

1 worker to use the mask?

2 MR. HACKER: It can be under OSHA, be held
3 liable for that.

4 JUSTICE SCALIA: Can the manufacturer be
5 held liable for failing to tell the railroad?

6 MR. HACKER: No. That would be a failure
7 to --

8 JUSTICE SCALIA: How is the railroad going
9 to know whether it's unsafe or not?

10 MR. HACKER: Because they have the --

11 JUSTICE SCALIA: How is the railroad going
12 to know whether there's asbestos in there unless the
13 manufacturer at least tells the railroad, even it
14 doesn't have to tell the worker?

15 MR. HACKER: Railroads have a duty under
16 FELA to ensure a safe workplace environment. That's
17 clear. And so, they have adequate incentives to ensure
18 that their employees have a safe work environment. If
19 they're -- if a worker is exposed to asbestos --

20 JUSTICE KENNEDY: But you could -- could
21 State law say you need a special kind of mask?

22 MR. HACKER: Well, not under the current
23 regime because FELA would pre-empt any claim by a
24 railroad worker. So, there wouldn't be -- there isn't
25 room for State law already.

1 JUSTICE KENNEDY: What about an independent
2 contractor who's not covered by FELA?

3 MR. HACKER: Could be -- could not have a
4 claim against the manufacturer. An independent
5 contractor would not have claim against the manufacturer
6 for failure to warn.

7 JUSTICE KENNEDY: Under State law which by
8 hypothesis says you need this very special kind of mask.
9 It's required only in Illinois.

10 MR. HACKER: Right. The manufacturer could
11 not be held liable under that State law. That would be
12 a condition on the design, an effort by the State to
13 prescribe the condition, the type of design that could
14 be --

15 JUSTICE KENNEDY: Could the railroad be held
16 liable for failure to give that kind of mask under State
17 law if it's not a FELA worker?

18 MR. HACKER: If it's a generally applicable
19 law about asbestos use, yes. I would say at some point
20 a law like that that's directed at a particular type of
21 equipment becomes potentially conflict pre-empted
22 because it puts a condition on the design of the
23 particular equipment. States are free to enforce
24 generally applicable laws about safe workplace
25 environments, asbestos handling --

1 JUSTICE KENNEDY: Let me ask this question:
2 Is it your position that the -- that the engine is as
3 much in use when it's in the shop as when it's running
4 on the track? Is that your position?

5 MR. HACKER: We don't have a problem with
6 that position. We don't have -- we don't have a --
7 because we don't believe you have to establish that it's
8 in use in the repair shop to establish that the
9 pre-emption described by Justice Brandeis in Napier
10 controls, because the pre-emption he was describing
11 was -- the regulatory authority was over the equipment
12 itself which is the same exact equipment. A railroad --
13 a locomotive designed a particular way doesn't change
14 when it enters the repair shop; so, it's designed to be
15 fit for service.

16 JUSTICE KENNEDY: Well, the reason it seems
17 to me somewhat important is that I can't conceive of 50
18 different State regulations for the kind of gloves and
19 things that the engineer has to wear on -- when he's
20 running the train on the track. And if that's so, it
21 seems to me it would help you to say that the shop was
22 the same, but you seem to say the shop was different.

23 MR. HACKER: Well, I only mean to say that
24 our position doesn't change whether or not the shop is
25 different because it's not -- the LIA pre-emption -- LIA

1 regulation isn't about repairing. The DOT may well have
2 authority -- they seem to think not -- over repairs
3 under the LIA, but what the LIA is about is the design
4 and the materials themselves. And States can't say for
5 themselves what a better or more preferable or -- a
6 locomotive design is for any other reason. The
7 Respondents' brief and reply brief on page 5 makes an
8 interesting point. They think they've proved their case
9 when they say the LIA doesn't for example permit the DOT
10 to impose a U.S. steel requirement, a domestic content
11 requirement, on locomotives. The implication would be,
12 of course, that a State could because it's outside the
13 field as Petitioners define it, that a State could say
14 locomotives can only be used within our State if they're
15 made of U.S. steel.

16 I don't think that makes any sense at all.
17 It can't possibly be right, and the reason it's not
18 right is that it misunderstands pre-emption under the
19 LIA as described by Napier. Of course, it's within the
20 general authority of the DOT to determine that a
21 locomotive should be made with U.S. steel, but that
22 authority can be abused. It might be arbitrary and
23 capricious; it's not permissible for them to do that.
24 But the content of locomotives is exclusively within the
25 jurisdiction of the DOT, and States can't decide for

1 themselves that a locomotive otherwise compliant under
2 Federal regulations is --

3 JUSTICE SCALIA: Well, they're -- they're
4 not saying here you have to manufacture it a certain
5 way. They're just saying if you manufacture it in a
6 manner that we consider unsafe, you have to warn people.

7 MR. HACKER: Well, that's part of their
8 argument, but their main claim is the first one, which
9 is that you are prohibited in this State from using
10 asbestos. It can't happen, even though Federal
11 regulations said you could. That's the main part of
12 their claim. They have a secondary claim, which is
13 failure to warn and which we submit is essentially a
14 type of design defect claim that says if you're going to
15 use asbestos, then you have to warn.

16 And we don't even know -- as Ms. Harrington
17 was describing, there's a lot -- there would be a lot to
18 be determined if conflict pre-emption applies to failure
19 to warn in a given case. That's the whole problem, Your
20 Honors, is that the LIA was saying we don't want to
21 expose manufacturers to the potential of future State
22 court litigation.

23 JUSTICE KENNEDY: Well, do we have to reach
24 this failure-to-warn problem in this case?

25 MR. HACKER: I think it's presented here. I

1 mean, we think it's completely caught up in the design
2 defect issue, but the other side is -- is trying to
3 defend by saying we have a design defect claim, but we
4 also have a failure-to-warn claim. But we submit the
5 two are bound up together.

6 JUSTICE SOTOMAYOR: I -- if I'm
7 understanding your argument correctly, you're saying
8 that if Napier controls the design of -- and a
9 locomotive part, that includes any design defect that's
10 encompassed by State law, whether it's design in its
11 traditional sense or failure to warn.

12 MR. HACKER: That's correct.

13 JUSTICE SOTOMAYOR: That's basically what
14 the court below said.

15 MR. HACKER: That's correct, and that's what
16 Judge Kozinski said in the Law case, and Judge Winter
17 said in Oglesby.

18 JUSTICE SOTOMAYOR: Just as a practical
19 matter, I'm assuming that some railroad repair yards are
20 owned by the railroad itself, so the railroad repair
21 people are railroad employees, correct?

22 MR. HACKER: I -- I think that's right, yes.

23 JUSTICE SOTOMAYOR: Are there some that are
24 not?

25 MR. HACKER: Well, they might --

1 JUSTICE SOTOMAYOR: They are not considered
2 railroad employees, but they're considered something
3 else?

4 MR. HACKER: I don't -- two things I would
5 say. I don't know the answer for sure, but I think they
6 probably are, but there are also repair shops that then
7 -- that are owned by other railroads, and that's part of
8 a problem that manufacturers have, is you don't know,
9 when you sell the -- the locomotive to a railroad, who
10 is going to be --

11 JUSTICE SOTOMAYOR: Just to be --

12 MR. HACKER: -- repairing under what
13 conditions.

14 JUSTICE SOTOMAYOR: Just to be clear, under
15 your view of the LIA, there could be other laws that
16 pre-empt it or prohibit it? States can tell railroad
17 yards put signs up, wear protective equipment, do
18 whatever it is to protect the worker from this repair.

19 MR. HACKER: Yes.

20 JUSTICE SOTOMAYOR: They just can't tell
21 them --

22 MR. HACKER: Yes.

23 JUSTICE SOTOMAYOR: -- include a warning on
24 the brake, or to --

25 MR. HACKER: Specific to the equipment

1 itself.

2 What we would say is the State has to take
3 the locomotive equipment as a given. It is what it is.
4 And then if that locomotive equipment creates risks for
5 workers, the employer may have to do things to account
6 for those risks, but the equipment can't be regulated by
7 the State. The equipment itself can't be regulated by
8 the State in any respect.

9 JUSTICE KAGAN: Mr. Hacker, do you think we
10 would decide Napier the same way if it came to us today?

11 MR. HACKER: I do think so, Your Honor. Of
12 course, I don't think that matters because Napier is
13 what it is and has been relied upon for 85 years. But I
14 think there would be a very good argument that it would
15 be decided the same way today under the Ray case that
16 Justice Sotomayor mentioned. That was a very similar
17 kind of delegation of regulatory authority, and the
18 Court held that there was the same kind of field
19 pre-emption. There are some differences one could
20 discuss, but Napier is what it is, as I say.

21 If The Court has no further questions, I'll
22 cede the balance of my time.

23 CHIEF JUSTICE ROBERTS: Thank you, counsel.

24 Mr. Frederick, you have 4 minutes.

25 REBUTTAL ARGUMENT BY DAVID C. FREDERICK

1 ON BEHALF OF THE PETITIONERS

2 MR. FREDERICK: Manufacturers clearly have
3 the best information about the dangerous aspects of
4 their products, and they issue warnings and instructions
5 in manuals and provide all kinds of information so that
6 persons working on their equipment are going to know the
7 special hazards. It doesn't make sense to inoculate
8 those manufacturers from liability where they have the
9 best information to ensure that repair workers are not
10 going to be exposed to risks.

11 With respect to the point about being on the
12 line, the whole idea behind the Locomotive Inspection
13 Act was not just for use, Justice Kennedy, but also safe
14 to operate on the railroad line. Under the
15 regulations -- and this is well established -- yard
16 limits are drawn outside the bowl where switching
17 operations and repair operations occur, so that
18 everybody knows where the Federal LIA standard applies
19 and where it doesn't.

20 And the reason why the LIA has had this kind
21 of history with respect to repair work goes to the
22 history of -- behind this Court's recognition of the
23 commerce power. Up until the New Deal era, it was well
24 settled that Congress could not legislate on intrastate
25 activities, which are peculiar to repair yards. And so,

1 this Court when it decided the Shanks case in the mid
2 1910s held that a railroad worker could not bring an
3 FELA claim because his work was not in interstate
4 commerce; it was only in intrastate commerce. And that
5 is why the ICC throughout this entire period never
6 devoted regulations to repair yards, because this
7 Court's Commerce Clause jurisprudence precluded Federal
8 regulatory activity for that.

9 So, if you look at this case from an
10 historical perspective, Justice Kagan, it's not clear
11 that the full parameters of the way the Court would
12 explain Napier would be the same, because its approach
13 to field pre-emption is so different after the New Deal
14 era than it was before the New Deal era. And that is
15 also why when this Court looks at regulatory
16 implications of common law claims, it has had no problem
17 allowing State law to have design defect claims with
18 respect to planes, cars, motorboats, and trucks, even
19 though the implications of a State law claim might find
20 liability for the insufficiency of the design imposing
21 an unreasonable risk to the person who is exposed to
22 that risk with respect to that interstate modality.

23 There's no reason why you have to have a
24 broad and expansive view of the field here because
25 Congress subsequently has enacted in this very area to

1 give the Federal agency pre-emptive authority when it
2 deems that authority appropriate. And as the Federal
3 Government says --

4 CHIEF JUSTICE ROBERTS: And it knows -- it
5 knows about Napier and what's been going on for 85
6 years, and if it wants to pull back on the pre-emptive
7 effect of the provisions interpreted in Napier, it's
8 free to do that, too.

9 MR. FREDERICK: It did so, though, Your
10 Honor in 49 U.S.C. 20106, where it said that unless and
11 until the Federal Government issues a regulation in a
12 particular field, the States are allowed to have their
13 rule be in effect.

14 JUSTICE GINSBURG: But that was -- that was
15 the Safety Act, and they didn't amend the Locomotive
16 Act. The Locomotive Act is what it was, and they didn't
17 put that clause in it.

18 MR. FREDERICK: But that's why, Justice
19 Ginsburg, the point here is how broadly do you define
20 the scope of the field, and Napier defined it in an
21 historical context that we just don't live in anymore.
22 And there's no reason to give manufacturers a complete
23 pass from liability when they have the best information
24 to advise railroad -- railroads and railroad workers how
25 to work on their equipment in a safe way without

1 exposing their workers to unnecessary risks.

2 Thank you.

3 CHIEF JUSTICE ROBERTS: Thank you, counsel.

4 The case is submitted.

5 (Whereupon, 11:53 a.m., the case in the
6 above-entitled matter was submitted.)

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