SUPREME COURT OF THE UNITED STATES

No. 10–879

GLORIA GAIL KURNS, EXECUTRIX OF THE ESTATE OF GEORGE M. CORSON, DECEASED, ET AL., PETITIONERS *v.* RAILROAD FRICTION PRODUCTS CORPORATION ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

[February 29, 2012]

JUSTICE SOTOMAYOR, with whom JUSTICE GINSBURG and JUSTICE BREYER join, concurring in part and dissenting in part.

I concur in the Court's holding that the Locomotive Inspection Act (LIA), 49 U. S. C. §20701 *et seq.*, pre-empts petitioners' tort claims for defective design, but I respectfully dissent from the Court's holding that the same is true of petitioners' claims for failure to warn. In my view, the latter escape pre-emption because they impose no state-law requirements in the field reserved for federal regulation: "the equipment of locomotives." *Napier* v. *Atlantic Coast Line R. Co.*, 272 U. S. 605, 612 (1926).

I

Statutory *stare decisis* compels me to agree that the LIA occupies "the field of regulating locomotive equipment used on a highway of interstate commerce." *Id.*, at 607. Perhaps this Court might decide *Napier* differently today. The LIA lacks an express pre-emption clause, and "our recent cases have frequently rejected field pre-emption in the absence of statutory language expressly requiring it." *Camps Newfound/Owatonna, Inc.* v. *Town of Harrison*, 520 U. S. 564, 617 (1997) (THOMAS, J., dissenting). The

LIA contains no substantive regulations, let alone a "scheme of federal regulation . . . so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it." *Rice* v. *Santa Fe Elevator Corp.*, 331 U. S. 218, 230 (1947). Instead of relying on such indications of Congress' intent to oust state law, *Napier* implied field pre-emption from the LIA's mere delegation of regulatory authority to the Interstate Commerce Commission. Compare 272 U. S., at 612–613, with, *e.g.*, *Hillsborough County* v. *Automated Medical Laboratories, Inc.*, 471 U. S. 707, 717 (1985), and *New York State Dept. of Social Servs.* v. *Dublino*, 413 U. S. 405, 415 (1973). Nonetheless, *Napier*'s construction of the LIA has been settled law for 85 years, and "'[c]onsiderations of *stare decisis* have special force in the area of statutory interpretation.'" *Hilton* v. *South Carolina Public Railways Comm'n*, 502 U. S. 197, 202 (1991).

Consistent with the values served by statutory *stare decisis*, however, it is important to be precise about what *Napier* held: *Napier* defined the pre-empted field as the physical composition of locomotive equipment. See 272 U. S., at 611 ("[T]he power delegated . . . by the [LIA] . . . extends to the design, the construction, and the material of every part of the locomotive and tender and of all appurtenances"); *id.*, at 612 ("The federal and the state statutes are directed to the same subject—the equipment of locomotives. They operate upon the same object"); see also Act of June 7, 1924, §2, 43 Stat. 659 (making the LIA's standard of care applicable to the "locomotive, its boiler, tender, and all parts and appurtenances thereof"). Petitioners' defective-design claims fall within the pre-empted field because they would impose state-law requirements on a locomotive's physical makeup. See *ante*, at 7–8.

II

Petitioners' failure-to-warn claims, by contrast, proceed on a fundamentally different theory of tort liability that does not implicate a product's physical composition at all. A failure-to-warn claim asks nothing of a product's design, but requires instead that a manufacturer caution of nonobvious dangers and provide instructions for safe use. Indeed, a product may be flawlessly designed and still subject its manufacturer or seller to liability for lack of adequate instructions or warnings. See, *e.g.*, Madden, The Duty To Warn in Products Liability: Contours and Criticism, 89 W. Va. L. Rev. 221 (1987) ("Although a product is unerringly designed, manufactured and assembled, injury or damage occasioned by its intended or reasonably foreseeable use may subject the seller to liability. Such liability may be found if the product has a potential for injury that is not readily apparent to the user" (cited in Restatement (Third) of Torts: Products Liability §2, Reporter's Note, Comment *i*, n. 1 (1997) (hereinafter Restatement)); see also Madden, 89 W. Va. L. Rev., at 221, n. 1 (collecting cases). Petitioners' complaint embodies just this conceptual distinction. Compare App. 22–23, ¶¶10(c)–(e), (g), with *id.*, at 25, ¶10(p).[1]

In the jurisdictions relevant to this suit, failure to warn is "a distinct cause of action under the theory of strict products liability." *Riley* v. *American Honda Motor Co.*, 259 Mont. 128, 132, 856 P. 2d 196, 198 (1993). Thus, "'a failure to warn of an injury[-]causing risk associated with the use of a technically pure and fit product can render such product unreasonably dangerous.'" *Ibid.*; see also, *e.g.*, *Jahnig* v. *Coisman*, 283 N. W. 2d 557, 560 (S. D. 1979)

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[1]Nor do petitioners' failure-to-warn claims allege that respondents' locomotive parts should have been altered, for example, by affixing warnings to the products themselves. See App. 22–23, ¶¶10(c)–(e), (g); *id.*, at 27, ¶12(d).

("In products liability suits based upon strict liability, . . . the product itself need not be defective. Where a manufacturer or seller has reason to anticipate that danger may result from a particular use of his product, and he fails to give adequate warning of such a danger, the product sold without such warning is in a defective condition within the strict liability doctrine"); *Greiner* v. *Volkswagenwerk Aktiengeselleschaft*, 540 F. 2d 85, 92–93 (CA3 1976) (finding that "failure to adequately warn of inherent or latent limitations in a product, which do not necessarily amount to a design defect" is "an independent basis of liability" under Pennsylvania law).[2]

Similarly, this Court has explained that a failure-to-warn claim is "narrower" than a claim that alleges a defect in the underlying product. *Wyeth* v. *Levine*, 555 U. S. 555, 565 (2009). Thus in *Wyeth*, this Court affirmed a state damages award based on a drug manufacturer's failure to provide sufficient warnings to clinicians against intravenous administration of the drug, but noted that it was unnecessary to decide "whether a state rule proscribing intravenous administration would be pre-empted." *Ibid.* Cf. *Bates* v. *Dow Agrosciences LLC*, 544 U. S. 431, 444 (2005) ("Rules that require manufacturers to design reasonably safe products . . . plainly do not qualify as requirements for 'labeling or packaging.' None of these common-law rules requires that manufacturers label or package their products in any particular way").

The majority treats defective-design and failure-to-warn claims as congruent, reasoning that each asserts a product defect. See *ante*, at 8–9 (citing Restatement §2(c) and

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[2]Petitioners brought suit in Pennsylvania, but alleged that their decedent, George Corson, was exposed to asbestos at railroad maintenance and repair shops in Montana and South Dakota. *Id.*, at 42, ¶¶6–7. Because the District Court granted summary judgment on the issue of pre-emption, it performed no choice-of-law analysis to identify the applicable substantive state law. See App. to Pet. for Cert. 22a–39a.

Comment *l*). That may be true at a high level of generality, but "[d]esign and failure-to-warn claims . . . rest on different factual allegations and distinct legal concepts." Restatement §2, at 35, Comment *n*. For example, a manufacturer or seller cannot escape liability for an unreasonably unsafe design merely by issuing a warning. See *id.*, at 33, Comment *l* ("Warnings are not . . . a substitute for the provision of a reasonably safe design"). In a fundamental sense, therefore, a failure-to-warn claim proceeds by taking a product's physical design as a given. A failure-to-warn claim alleges a "defect" by asserting that a product, as designed, is safe for use only when accompanied by a warning—not that a product must be designed differently.

The majority further conflates defective-design and failure-to-warn claims by noting that each is "directed at" locomotive equipment. *Ante*, at 9. That is insufficient. Not every state law that "could be said to affect tangentially" matters within the regulated field is pre-empted. *English* v. *General Elec. Co.*, 496 U. S. 72, 85 (1990). Rather, "for a state law to fall within the pre-empted zone, it must have some direct and substantial effect" on the primary conduct of entities subject to federal regulation. *Ibid.* As explained above, the LIA regulates the physical equipment of locomotives. But petitioners' failure-to-warn claims, if successful, would have no necessary effect on the physical equipment of locomotives at all, as respondents themselves acknowledge. See Brief for Respondents 55 (petitioners' failure-to-warn claims "may not themselves literally mandate physical alteration of the locomotive's design or construction").

In the majority's view, a "duty to warn and the accompanying threat of liability will inevitably influence" a manufacturer's design choices. *Ante*, at 9, n. 4. But an "influence" is not the same as an "effect," and not every state law with some imaginable impact on matters within a federally regulated field is, for that reason alone, pre-

empted. See *English*, 496 U. S., at 85–86; *Silkwood* v. *Kerr-McGee Corp.*, 464 U. S. 238, 256 (1984). Indeed, the majority elides the distinction between indirect and direct regulation, even though this Court has explained that the two are not equivalent for pre-emption purposes. See *Goodyear Atomic Corp.* v. *Miller*, 486 U. S. 174, 186 (1988) ("Congress may reasonably determine that incidental regulatory pressure is acceptable, whereas direct regulatory authority is not"). State wage-and-hour laws, workplace safety standards, or tax credits for green technology, for example, could all "influence" the means and materials of locomotive equipment manufacture without imposing direct obligations. Nor does the majority substantiate its assertion that the "influence" exerted by a duty to warn need be "inevitabl[e]" or "substantial." *Ante,* at 9, n. 4. To the contrary, the requirements imposed by such a duty could be light, and the corresponding liability negligible, in comparison to the commercial value of retaining an existing design.

Respondents could have complied with state-law duties to warn by providing instructions for the safe maintenance of asbestos-containing locomotive parts in equipment manuals. See, *e.g.*, Baldwin-Lima-Hamilton Corp., Engine Manual for 600 Series Diesel Engines (1951), online at http://www.rr-fallenflags.org/manual/blh-6em.html (last visited Feb. 27, 2012, and available in Clerk of Court's case file). Or respondents could have ensured that repair shops posted signs. See Restatement §2, at 29–30, Comment *i* (duty to warn "may require that instructions and warnings be given not only to purchasers, users, and consumers, but also to others who a reasonable seller should know will be in a position to reduce or avoid the risk of harm"); see also, *e.g.*, *Patch* v. *Hillerich & Bradsby Co.*, 361 Mont. 241, 246, 257 P. 3d 383, 388 (2011) ("While placing a warning directly on a product is one method of warning, other methods of warning exist, including, but

not limited to, issuing oral warnings and placing warnings in advertisements, posters, and media releases"). Neither step would encroach on the pre-empted field of locomotives' "physical elements." *Napier*, 272 U. S., at 612. The majority is therefore wrong to say that "the 'gravamen' of petitioners' failure-to-warn claims 'is still that [Corson] suffered harmful consequences as a result of his exposure to asbestos contained in locomotive parts and appurtenances.'" *Ante*, at 8–9 (quoting *Kurns* v. *A. W. Chesteron, Inc.*, 620 F. 3d 392, 398, n. 8 (CA3 2010)). Rather, the "gravamen" of these claims is that petitioners' decedent George Corson could have avoided the harmful consequences of exposure to asbestos while repairing precisely the same locomotive parts had respondents cautioned him, for example, to wear a mask.

Finally, preserving petitioners' failure-to-warn claims coheres with the LIA's regulatory regime. Neither the Interstate Commerce Commission, to which Congress first delegated authority under the LIA, nor the Federal Railroad Administration (FRA), to whom that authority now belongs, has ever regulated locomotive repair and maintenance. To the contrary, the FRA takes the position that it lacks power under the LIA to regulate within locomotive maintenance and repair facilities. Brief for United States as *Amicus Curiae* in *John Crane, Inc.* v. *Atwell*, O. T. 2010, No. 10–272, p. 10 ("[T]he field covered by the LIA does not include requirements concerning the repair of locomotives that are not in use"); Brief for United States as *Amicus Curiae* 13 ("The preempted field . . . does not include tort claims based on injuries arising when locomotives are not in use"). The FRA has determined that the Occupational Safety and Health Administration, not itself, bears primary responsibility for workplace safety, including with respect to hazardous materials. 43 Fed. Reg. 10583–10590 (1978); cf., *e.g.*, *English*, 496 U. S., at 83, and n. 6. And the FRA has not promulgated regulations that

address warnings specific to maintenance and repair. Because the pre-empted field is congruent with the regulated field, see, *e.g.*, *United States* v. *Locke*, 529 U. S. 89, 112 (2000), the majority's decision sweeps far too broadly.[3]

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In short, the majority affords the LIA field-pre-emptive effect well beyond what *Napier* requires, leaving petitioners without a remedy for what they allege was fatal exposure to asbestos in repair facilities. "It is difficult to believe that Congress would, without comment, remove all means of judicial recourse for those injured by illegal conduct." *Silkwood*, 464 U. S., at 251. That is doubly true in light of the LIA's "purpose . . . of facilitating employee recovery, not of restricting such recovery or making it impossible." *Urie* v. *Thompson*, 337 U. S. 163, 189 (1949).

I therefore concur in part and dissent in part.

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[3]Disagreeing with the agency's interpretation, JUSTICE KAGAN concludes that the LIA empowers the FRA to require warnings as an incident of the authority to prescribe locomotive design. Compare *ante*, 2–3 (concurring opinion), with, *e.g.*, Tr. of Oral Arg. 22–23. Such power, if it exists, must be limited to warnings that impose direct requirements on the physical composition of locomotive equipment. Cf. n. 1, *supra*; 49 CFR §§229.85, 229.113 (2010). That may be a formal line, but it is the line that this Court drew in describing the scope of the authority conferred by the LIA, and therefore the pre-empted field. See *Napier* v. *Atlantic Coast Line R. Co.*, 272 U. S. 605, 611–612 (1926). And it is the line that separates petitioners' design-defect claims from their claims for failure to warn.