ALAN WILSON
ATTORNEY GENERAL

April 17, 2018

The Hon. Marlon Kimpson
The Hon. Paul G. Campbell, Jr.
South Carolina Senate
PO Box 142
Columbia, SC 29202

Dear Sen. Kimpson and Sen. Campbell:

We received your opinion requests dated March 16, 2018 from Sen. Kimpson and March 30, 2018 from Sen. Campbell, each of which seeks an opinion on the constitutionality of Senate Bill 970, which is under consideration by the Senate Committee on Transportation. The Solicitor General has exercised his discretion to expedite the issuance of this opinion in light of the scheduled meeting of the full Committee and the general public interest. The following opinion sets out our understanding of your question and our response.

Issue:

As written at the time of the issuance of this opinion, Senate Bill 970 (S.970) would require the Public Service Commission to "fine each passenger railroad company and each Class I freight railroad company that operates a locomotive that has not been equipped with positive train control technology two thousand five hundred dollars per locomotive per month."

Positive Train Control (PTC) essentially is a fail-safe system which requires equipment to be installed on a locomotive and is designed to prevent train collisions and derailments that result from human errors:

> PTC technology is capable of automatically controlling train speeds and movements should a train operator fail to take appropriate action for the conditions at hand. For example, PTC can enforce a train to a stop before it passes a signal displaying a stop indication, or before diverging on a switch improperly lined, thereby averting a potential collision.[1]

As described succinctly by the U.S. Department of Transportation, the U.S. Congress initially mandated broad implementation of PTC by December 31, 2015. However, "Congress extended the deadline by at least three years to December 31, 2018, with the possibility of an extension to

[1] https://www.fra.dot.gov/Page/P0358

a date no later than December 31, 2020, if a railroad completes certain statutory requirements that are necessary to obtain an extension."

Both of the letters communicate that the essential question here is whether the legislation proposed in S.970 is preempted by federal law, which regulates train operation extensively, or whether S.970 falls within the narrow authority of the South Carolina Public Service Commission to regulate local safety hazards, including railroad crossings. *See, e.g.*, S.C. Code Ann. § 58-17-10 (2015) *et seq.*

Law/Analysis:

As this Office has consistently opined, any act of the General Assembly is entitled to a presumption of constitutionality, and only a court may declare a legislative enactment unconstitutional. *Op. S.C. Att'y Gen.*, 2017 WL 4464415 (September 26, 2017). "In addition, we have consistently advised that a statute 'must continue to be enforced unless set aside by a court or repealed by the General Assembly.'" *Id.* (citing *Op. S.C. Att'y Gen.*, 2003 WL 20143494 (April 1, 2003)). "This Office, in its Opinion, may only comment upon potential constitutional issues which we see as possibly arising in a judicial proceeding." *Id.* Our Office has identified such a potential issue in this case.

It is the opinion of this Office that the statutory amendment set out in Senate Bill 970 is constitutionally suspect in that a court most likely would hold that it constitutes state regulation of locomotive equipment and is preempted by federal law. Specifically, we believe that a court would conclude that any state legislation which mandates the installation of PTC on a locomotive is preempted by the Locomotive Inspection Act, 49 USC 20701 *et seq.*, which the United States Supreme Court has construed to totally preempt the field of locomotive equipment regulation. *See Napier v. Atlantic Coast Line R. Co.*, 272 U.S. 605, 47 S.Ct. 207 (1926); *see also Kurns v. Railroad Friction Products Corp.*, 565 U.S. 625, 132 S.Ct. 1261 (2012).

At the outset, we note that "the powers of the General Assembly are plenary, unlike those of the federal Congress whose powers are enumerated." *Op. S.C. Att'y Gen.*, 2011 WL 6959373 (December 9, 2011). However, where the federal Congress exercises one of its enumerated powers and passes legislation, the Supremacy Clause of the United States Constitution operates such that federal law preempts state law to the contrary. *Id.* As this Office has opined previously:

> [D]ecisions of the United States Supreme Court establish that where federal and state law conflict, state law must yield pursuant to the Supremacy Clause. This

> principle is captured in Article VI of the Constitution, which reads: "This Constitution, and the Laws of the United States . . . shall be the supreme Law of the Land . . . , any Thing in the . . . Laws of any State to the Contrary notwithstanding." U.S. Const., art VI, cl. 2.

Id. In certain rare cases, the United States Supreme Court has concluded "that Congress intended federal law to occupy a field exclusively" such that the states retain no power to pass legislation on the same subject. *Kurns v. Railroad Friction Products Corp.*, 565 U.S. 625, 132 S.Ct. 1261 (2012). This practice is called "field preemption."[2] *Id.* As more fully described below, long-standing jurisprudence of the United States Supreme Court establishes that federal law has totally preempted the field of locomotive equipment regulation through the Locomotive Inspection Act (the "LIA"), and that preemption appears to be dispositive in this case. *See id.*

The Locomotive Inspection Act, codified at 49 U.S.C. 20701, reads in relevant part:

> A railroad carrier may use or allow to be used a locomotive or tender on its railroad line only when the locomotive or tender and its parts and appurtenances--
>
> (1) are in proper condition and safe to operate without unnecessary danger of personal injury;
>
> (2) have been inspected as required under this chapter and regulations prescribed by the Secretary of Transportation under this chapter; and
>
> (3) can withstand every test prescribed by the Secretary under this chapter.

49 U.S.C. 20701. The LIA originally was passed in 1911 as the Boiler Inspection Act, and amended in 1915 and 1924 to "include the entire locomotive and tender and all parts and appurtenances thereof." *See Napier v. Atlantic Coast Line R. Co.*, 272 U.S. 605, 608, 47 S.Ct. 207, 208 (1926). At the time of the original Act, authority to determine required safety equipment was vested in the Interstate Commerce Commission (the "ICC"). *Kurns v. Railroad Friction Products Corp.*, 565 US 625, 631, 132 S.Ct. 1261, 1266 (2012). The ICC was subsequently abolished and that authority vested in the Secretary of Transportation. *Id.*at 632, 132 S.Ct. at 1267.

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[2] This opinion omits a fuller discussion of the doctrine of preemption both in the interests of time and because, as more fully described later in this opinion, the US Supreme Court in *Kurns* affirmed *Napier* under the principles of *stare decisis*, notwithstanding more recent jurisprudence which would have controlled if the question had been presented *de novo*.

Early in the twentieth century, the United State Supreme Court considered a challenge to multiple state laws which purported to require the installation of safety equipment in addition to the equipment mandated by the ICC. *Napier v. Atlantic Coast Line R. Co.*, 272 U.S. 605, 47 S.Ct. 207 (1926). In the 1926 case of *Napier v. Atlantic Coast Line Railroad Company*, our country's highest Court considered a Georgia state statute which required that locomotives be equipped with an automatic fire door, and a Wisconsin statute which prohibited the use locomotives during winter months without cab curtains sufficient to keep snow out. *Id.* at 609-10, 47 S.Ct. at 208-09. Each of these statutes imposed requirements beyond those of the federal authority, which neither required nor prohibited the devices. *Id.* Justice Brandeis, writing for the Court, opined that

> Each device was prescribed by the state primarily to promote the health and comfort of engineers and firemen. Each state requirement may be assumed to be a proper exercise of its police power, unless the measure violates the commerce clause. It may be assumed, also, that there is no physical conflict between the devices required by the state and those specifically prescribed by Congress or the Interstate Commerce Commission, and that the interference with commerce resulting from the state legislation would be incidental only.

Id. at 610, 47 S.Ct. at 209. Nevertheless, the Court in *Napier* concluded that "[t]he federal [BIA, predecessor to the LIA] and the state statutes are directed to the same subject-the equipment of locomotives," and held that the state statutes were preempted by federal law, "however commendable or however different their purpose." *Id.* at 612-13, 47 S.Ct. at 210. Moreover, the Court in *Napier* held that "the Boiler Inspection Act, as we construe it, was intended to occupy the field." *Id.* at 613, 47 S.Ct. at 210.

The holding in *Napier* that federal law preempted state regulation of locomotive equipment was affirmed by the U.S. Supreme Court in the 2012 case addressing state-law tort claims. *Kurns v. Railroad Friction Products Corporation*, 565 U.S. 625, 132 S.Ct. 1261 (2012). In *Kurns v. Railroad Friction Products Corporation*, the Court weighed the lower court's dismissal of state-law defective design and failure to warn claims where the plaintiff, "a welder and machinist for a railroad carrier," contracted mesothelioma after working with locomotive brake pads containing asbestos. The Supreme Court affirmed the dismissal of all claims as preempted by the Locomotive Inspection Act, with all nine justices affirming the holding in

Napier that the LIA preempted state regulation of locomotive equipment.[3] Justice Thomas, writing for the majority, opined that "*Napier* defined the field pre-empted by the LIA on the basis of the physical elements regulated – "the equipment of locomotives" – not on the basis of the entity directly subject to regulation. Because petitioners' claims are directed at the equipment of locomotives, they fall within the pre-empted field." *Id.* at 636, 132 S.Ct. at 1269 (internal citation omitted). The majority in *Kurns* also held that this preemption extended beyond statutory regulation (where a state's police power to regulate often is exercised) to state common-law duties:

> Napier, however, held that the LIA "occup[ied] the entire field of regulating locomotive equipment" to the exclusion of state regulation. 272 U.S., at 611–612, 47 S.Ct. 207. That categorical conclusion admits of no exception for state common-law duties and standards of care. As we have recognized, state "regulation can be . . . effectively exerted through an award of damages," and "[t]he obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy." *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 247, 79 S.Ct. 773, 3 L.Ed.2d 775 (1959). *Cf. Riegel v. Medtronic, Inc.*, 552 U.S. 312, 324, 128 S.Ct. 999, 169 L.Ed.2d 892 (2008) ("Absent other indication, reference to a State's 'requirements' [in a federal express pre-emption provision] includes its common-law duties"). We therefore conclude that state common-law duties and standards of care directed to the subject of locomotive equipment are pre-empted by the LIA.

Id. at 637, 132 S.Ct. at 1269.

Some members of the Court in *Kurns* did speculate that if the *Napier* case had been decided as a matter of first impression at the time of the *Kurns* decision in 2012, the result may have been different. *See id.* (Kagan., J., concurring) ("I doubt this Court would decide [*Napier*] in the same way today. . . . Viewed through the lens of modern preemption law, *Napier* is an anachronism.") However, all nine justices of the United States Supreme Court concurred that the principle of *stare decisis* compelled the Court to construe the Locomotive Inspection Act in the context of the 1926 *Napier* decision such that the LIA totally preempts state law on questions of "the physical composition of locomotive equipment." *See id.* (Sotomayor, J., concurring in part

[3] Justice Sotomayor, Justice Ginsburg, and Justice Breyer dissented on the dismissal of the failure to warn claim on the grounds that requiring a warning would "impose no state-law requirements in the field reserved for federal regulation: 'the equipment of locomotives.'" *Kurns v. Railroad Friction Products Corporation,* 565 U.S. at 640, 132 S.Ct. at 1271 (internal citation omitted).

and dissenting in part) (opining that state-law claims are preempted where "they would impose state-law requirements on a locomotive's physical makeup).

Turning to the text of Senate Bill 970, we note that the title of the Bill is:

> A BILL TO AMEND ARTICLE 15, CHAPTER 15, TITLE 58 OF THE 1976 CODE, RELATING TO THE PUBLIC SERVICE COMMISSION'S REGULATION OF RAILROAD CROSSINGS, BY ADDING SECTION 58-15-1555, TO PROVIDE THAT IT IS NOT CONDUCIVE TO THE PUBLIC SAFETY FOR CERTAIN RAILROAD COMPANIES TO OPERATE LOCOMOTIVES IN THIS STATE THAT HAVE NOT BEEN EQUIPPED WITH POSITIVE TRAIN CONTROL TECHNOLOGY; TO PROVIDE FOR FINES FOR VIOLATIONS OF THIS SECTION; AND TO PROVIDE THAT FINES COLLECTED SHALL BE USED TO FUND RAILROAD SAFETY INSPECTIONS AND PROGRAMS.

S.970 (emphasis added). The effect of Bill would be to add Section 58-15-1555 to the South Carolina Code of Laws, reading:

> (A) The operation of a locomotive that has not been equipped with positive train control technology by a passenger railroad company or a Class I freight railroad company on railroad tracks that are not equipped with positive train control technology, whether owned by a passenger railroad company or a Class I freight railroad company, and that are crossed by a public highway is not conducive to the public safety.
>
> (B) The Public Service Commission shall fine each passenger railroad company and each Class I freight railroad company that operates a locomotive that has not been equipped with positive train control technology two thousand five hundred dollars per locomotive per month for each month that the railroad company operates in a manner not conducive to the public safety as identified in subsection (A).
>
> (C) All funds collected pursuant to subsection (B) shall be used for railroad safety inspections and programs.

Id. Essentially, S0970 provides for mandatory fines in cases where certain locomotives do not have Positive Train Control technology installed. That purpose is stated in the title and it is the sum total of the effect of the legislation.

We believe that a court would conclude that the legislation set out in S.970 is an attempt by the state to compel or incentivize through the imposition of fines the implementation of Positive Train Control technology, which we understand would necessarily require the installation of PTC equipment on locomotives. The plain reading of the contemplated legislation would require the Public Service Commission, a South Carolina regulatory agency, to impose a fine upon the use of locomotives not equipped with certain equipment, while any locomotive so equipped would be exempt. The statute apparently is "directed at the equipment of locomotives." *Kurns.* at 636, 132 S.Ct. at 1269. We also believe that a court would conclude such state regulation is precisely the sort of state regulation that the United States Supreme Court has held to be preempted by the Locomotive Inspection Act as construed in *Napier* and *Kurns*, "however commendable or however different their purpose." *Napier v. Atlantic Coast Line R. Co.*, 272 US 605, 612-13, 47 S.Ct. 207, 210 (1926).

We note in closing that the questions raised in the letter appear to be concerned with whether Senate Bill 970 is preempted by the Federal Railroad Safety Act (the "FRSA") which expressly permits some state regulation in very limited circumstances and where there is not a federal rule in place. *See* 49 USC § 20105. However, the United States Supreme Court in *Kurns* held that the FRSA left the LIA and its field preemption intact:

> Petitioners' reliance on the FRSA is misplaced. The FRSA instructs that "[t]he Secretary of Transportation, as necessary, shall prescribe regulations and issue orders for every area of railroad safety supplementing laws and regulations in effect on October 16, 1970." § 20103(a) (2006 ed.) (emphasis added). By its terms, the FRSA does not alter pre-existing federal statutes on railroad safety. "Rather, it leaves existing statutes intact, . . . and authorizes the Secretary to fill interstitial areas of railroad safety with supplemental regulation." *Marshall v. Burlington Northern, Inc.*, 720 F.2d 1149, 1152–1153 (C.A.9 1983) (Kennedy, J.). Because the LIA was already in effect when the FRSA was enacted, we conclude that the FRSA left the LIA, and its pre-emptive scope as defined by Napier, intact.

Kurns v. Railroad Friction Products Corp., 565 U.S. 625, 633, 132 S.Ct. 1261, 1267 (2012). We believe that a court would conclude that the analysis in this case is controlled by the LIA as interpreted in *Napier* and affirmed in *Kurns*, and therefore we do not reach the question of the application of the FRSA in this expedited response.

Conclusion:

In conclusion, we reiterate that any act of the General Assembly is entitled to a presumption of constitutionality, and only a court may declare a legislative enactment unconstitutional. *Op. S.C. Att'y Gen.*, 2017 WL 4464415 (September 26, 2017). "In addition, we have consistently advised that a statute 'must continue to be enforced unless set aside by a court or repealed by the General Assembly.'" *Id.* (citing Op. S.C. Att'y Gen., 2003 WL 20143494 (April 1, 2003)). "This Office, in its Opinion, may only comment upon potential constitutional issues which we see as possibly arising in a judicial proceeding." *Id.* Our Office has identified such a potential issue in this case, which is that a court most likely would hold that Senate Bill 970 constitutes state regulation of locomotive equipment and is preempted by the federal Locomotive Inspection Act, 49 U.S.C. 20701, as interpreted by the United States Supreme Court in *Napier v. Atlantic Coast Line R. Co.*, 272 U.S. 605, 47 S.Ct. 207, 210 (1926) and affirmed in *Kurns v. Railroad Friction Products Corp.*, 565 U.S. 625, 132 S.Ct. 1261 (2012). Based upon this established U.S. Supreme Court precedent, we have no choice but to advise that Senate Bill 970 is constitutionally suspect as currently written. We also advise that the General Assembly may push for full and timely implementation of the existing federal legislation mandating the adoption of Positive Train Control systems nationwide. *See* 49 U.S.C. 20156 ("[T]he Secretary shall ensure that . . . each railroad carrier required to submit such a plan implements a positive train control system pursuant to such plan by December 31, 2018."). Congress may be the appropriate avenue for a remedy here.

Sincerely,

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REVIEWED AND APPROVED BY:

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