**No. 01-963**

IN THE

# Supreme Court of the United States

NORFOLK & WESTERN RAILWAY COMPANY,
*Petitioner,*

v.

FREEMAN AYERS, *et al.,*
*Respondents.*

**On Writ of Certiorari to the Circuit Court of Kanawha County, West Virginia**

## BRIEF *AMICUS CURIAE* OF TRIAL LAWYERS FOR PUBLIC JUSTICE IN SUPPORT OF RESPONDENTS

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## INTEREST OF AMICUS CURIAE

Trial Lawyers for Public Justice ("TLPJ") is a national public interest law firm that specializes in precedent-setting and socially significant civil litigation designed to obtain justice for the victims of corporate and government abuses.[1] Litigating in federal and state courts, TLPJ prosecutes cases designed to advance consumers' and victims' rights, environmental protection and safety, civil rights and civil liberties, occupational health and employees' rights, the preservation and improvement of the civil justice system, and the protection of the poor and the powerless.

TLPJ has a particular interest in this case because of the vital role the Federal Employers Liability Act ("FELA") plays in compensating workers for their injuries and discouraging employers from using dangerous products and practices. As this Court's precedents make clear, FELA jurisprudence is supposed to be guided by the common law. Attempting to limit their liability, however, Petitioner and its amici in this case disregard important common-law precedents. The rule of law they advance is at odds with the common law and, if adopted, would undercut FELA's central injury prevention and compensation goals. We submit this brief to present a more complete and accurate history of the common law, specifically the common law's longstanding recognition of mental anguish damages for fear of cancer in cases involving physical injury.

## SUMMARY OF ARGUMENT

With respect to mental anguish damages, Petitioner's argument focuses on the exception and ignores the rule. While

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[1] The parties have consented to the filing of this brief, and their letters of consent have been filed with the Clerk. This brief was not authored in whole or in part by counsel for a party, and no person or entity other than the amicus, its members, or its counsel made a monetary contribution to the preparation or submission of the brief.

Petitioner and its amici are correct that the common law has carved out various exceptions to permit the recovery of mental anguish damages in the absence of bodily injury, the exceptions have no bearing on this case. This case falls squarely within the traditional common-law rule: in a case involving bodily injury, a plaintiff is entitled to recover all physical and mental damages, including mental anguish caused by the fear of future harm arising from the defendant's conduct. Such damages, including fear of cancer damages, have been recognized by courts throughout the country for decades. Petitioner simply ignores this case law and urges the Court to discard the common-law rule in FELA cases. There is no sound justification, in law, logic, or policy, for such a drastic step.

## ARGUMENT

### I. THE COMMON LAW HAS TRADITIONALLY AWARDED DAMAGES FOR ALL MENTAL ANGUISH ACCOMPANYING A BODILY INJURY AND HAS SPECIFICALLY RECOGNIZED "FEAR OF CANCER" DAMAGES FOR NEARLY A CENTURY.

Petitioner asserts that the common law permits recovery for emotional distress only when the plaintiff shows "physical manifestations of severe emotional injury." Pet. Br. 17. In reality, the "physical manifestations" requirement does not apply in cases in which the defendant's tortious conduct caused bodily injury to the plaintiff. To the contrary, the common law has readily awarded compensation for all mental anguish connected with a bodily injury, including fear of future cancer.

The common law long denied recovery for mental pain or anxiety "when the unlawful act causes that alone" but has always recognized that "where a material damage occurs, and is connected with it, it is impossible a jury, in estimating it, should altogether overlook the feelings of the party interested."

W. PROSSER & W. KEETON, THE LAW OF TORTS, § 12, at 55 & n.3 (5th ed. 1984) (quoting *Lynch v. Knight*, 1861, 9 H.L.C. 577, 598, 11 Eng. Rep. 854). In cases involving bodily injuries, "courts have not been reluctant to allow recovery for emotional distress, occurring contemporaneously with those personal injuries, as an additional element of damages. In these cases, recovery for emotional distress was allowed as a claim 'parasitic' to the 'host' claim of damages for negligently inflicted physical injuries." *Payton v. Abbott Labs*, 437 N.E.2d 171, 176 (Mass. 1982) (citations omitted); *see also* PROSSER & KEETON, *supra*, § 54, at 362-63 (5th ed. 1984) ("With a cause of action established by the physical harm, 'parasitic' damages are awarded, and it is considered that there is sufficient assurance that the mental injury is not feigned.").

As a logical component of these "parasitic" damages, courts have allowed juries to consider the plaintiff's present fear and anxiety about future harm stemming from the defendant's negligence. In *Southern Kansas Railway Co. of Texas v. McSwain*, 118 S.W. 874 (Tex. Civ. App. 1909), a railroad employee whose foot was crushed in an accident was allowed to testify "that he suffered mental anguish by reason, among other things, of 'the fear that blood poison might set up and prove fatal.'" *Id*. at 875 (citing *M., K. & T. Ry. Co. of Tex. v. Miller*, 61 S.W. 978 (Tex. Civ. App. 1901)). In *Butts v. National Exch. Bank*, 72 S.W. 1083 (Mo. App. 1903), the court held that a plaintiff whose foot was pierced by sharp object "should have been permitted to show as an element of damage that he was in reasonable apprehension of blood poisoning as the possible, if not probable, consequence of his injury. Mental suffering, when a condition of mind produced by physical injury and attending it, is as proper an element of the damage sustained as the actual physical injury accompanying and causing it." *Id*. at 1084; *see also* Herbert F. Goodrich, *Emotional Disturbance as Legal Damage*, 20 MICH. L. REV. 497, 509 (1922) ("In connection with proved physical injury, wrongfully caused, [emotional distress] has long been an

element in recovery, not merely where undistiguishable from 'physical pain' but in further removed situations . . . .").

Applying similar reasoning, plaintiffs bitten by dogs have traditionally recovered damages not only for their bodily injuries but for their "apprehension" of developing hydrophobia or other diseases. *See, e.g.*, *Friedmann v. McGowan*, 42 A. 723, 724 (Del. Super. Ct. 1898); *Warner v. Chamberlain*, 30 A. 638, 639 (Del. Super. Ct. 1884); *Gowan v. Andrews*, 111 S.E.2d 640, 642 (Ga. Ct. App. 1959); *Buck v. Brady*, 73 A. 277, 279 (Md. 1909); *Heintz v. Caldwell*, 16 Ohio C.C. 630 (Ohio Cir. Ct. 1898); *Ayers v. Macoughtry*, 117 P. 1088, 1090 (Okla. 1911); *Gamer v. Winchester*, 110 S.W.2d 1190, 1193 (Tex. Civ. App. 1937); *Godeau v. Blood*, 52 Vt. 251 (1880). Pregnant women injured in traffic accidents have recovered damages for "grief and apprehension before the birth on account of what the probable or not unreasonable effect would be upon the child." *Prescott v. Robinson*, 69 A. 522, 523 (N.H. 1908); *see also Carter v. Public Serv. Coordinated Transport*, 136 A.2d 15, 22 (N.J. Super. 1957) (pregnant woman who sustained injuries to her foot, leg and shoulder was "also entitled to damages for the emotional upset caused by her anxiety over the possible injuries to the unborn child"). Drawing guidance from the common law, cases interpreting FELA have applied similar principles. *See, e.g.*, *Hayes v. New York Cent. R. Co.*, 311 F.2d 198, 201 (2d Cir. 1962) (in addition to compensating railroad worker for pain and suffering from frostbite, "the jury could also consider in its computation of damages the fear and anxiety which plaintiff experienced in knowing of the ever-present threat of amputation.").

Plaintiffs may recover damages for mental anguish even when their medical prognosis is uncertain. *See, e.g.*, *Potter v. Firestone Tire & Rubber Co.*, 863 P.2d 795, 805 (Cal. 1993) (in cases involving bodily injury, "the existence of a present physical injury, rather than the degree of probability that the disease may actually develop, is determinative."); *Figlar v. Gordon*, 53 A.2d 645, 648 (Conn. 1947) (although epilepsy was

only a "possible result" of accident, "the danger that it might ensue was a present fact and the jury were entitled to take into consideration anxiety resulting therefrom."); *Heider v. Employers Mut. Liability Ins. Co. of Wis*., 231 So.2d 438, 441-42 (La. Ct. App. 1970) (after recounting evidence that plaintiff had a 2 to 5 percent risk of being epileptic, court held that "[w]hile we agree . . . that Mrs. Heider has not proved the existence of epilepsy, we certainly concur with the trial judge in his conclusion that she has proved the existence of her fear of becoming an epileptic and its adverse effects on her."); *Baylor v. Tyrrell*, 131 N.W.2d 393, 402 (Neb. 1964) ("Medical science cannot in all cases predict the prognosis of an injury or disease. Advice by a physician of this fact may reasonably lead to anxiety.").

Since the early part of the 20th century, courts have applied these common-law guidelines to cases involving the fear of cancer. In *Alley v. Charlotte Pipe & Foundry Co.*, 74 S.E. 885 (N.C. 1912), the plaintiff was burned and his physician testified "that the character of the plaintiff's wound was such that a sarcoma, or eating cancer, was liable to ensue." *Id*. at 886. The court held that such evidence was relevant to show "acute mental suffering accompanying a physical injury. The liability to cancer must necessarily have a most depressing effect upon the injured person. Like the sword of Damocles, he knows not when it will fall." *Id*. In *Coover v. Painless Parker, Dentist*, 286 P. 1048 (Cal. Ct. App. 1930), a California appellate court held that a woman who received X-ray burns was entitled to compensation for her fear of cancer, concluding that "[t]he necessity of constantly watching and guarding against cancer, as testified to by the physician, is an obligation and a burden that the defendant had no right to inflict upon the plaintiff." *Id*. at 1050. New York's highest court approved such damages in *Ferrara v. Galluchio*, 152 N.E.2d 249 (N.Y. 1958). In *Ferrara*, the plaintiff received burns from an X-ray and was "referred by her attorney to a dermatologist," who "advised the plaintiff to have her shoulder checked every six months

inasmuch as the area of the burn might become cancerous." *Id*. at 251-52. The court upheld the plaintiff's recovery of damages, holding that "[i]t is entirely plausible, under such circumstances, that plaintiff would undergo exceptional mental suffering over the possibility of developing cancer." *Id*. at 253. In *Anderson v. Welding Testing Laboratory, Inc*., 304 So.2d 351, 354 (La. 1974), the Louisiana Supreme Court upheld fear of cancer damages for a worker who received radiation burns, observing that the accident left him with "a disabled and sometimes painful hand to remind him of his fear." *Id*. at 354.

As the health hazards of asbestos came to light, courts applied these firmly established common-law principles in asbestos cases. Courts in Delaware, Florida, Iowa, Louisiana, New Jersey, Ohio, and Washington have affirmed the right of plaintiffs with asbestosis to seek damages for mental anguish from their fear of cancer. The principles underlying the earlier fear of cancer cases proved even more appropriate in cases involving asbestosis, in which the plaintiff's physical injury establishes sustained and substantial exposure to a potent carcinogen.

In *Eagle-Picher Industries, Inc. v. Cox*, 481 So.2d 517 (Fla. Dist. Ct. App. 1985), the court considered damages for fear of cancer in the asbestos context. Citing *Alley*, *supra*, the court recognized that claims for fear of cancer "have long been permitted." *Id*. at 527. Balancing the relevant policy considerations, the court concluded that only plaintiffs with an existing physical injury, such as asbestosis, should be permitted to seek such damages:

> Imposing a requirement that there be a physical injury as a predicate to recovery for mental distress arising from a fear of cancer is not an arbitrary act. First, although asbestosis and cancer are not medically linked in that asbestosis does not cause cancer, the fact that a plaintiff has asbestosis may increase the chances that he will contract cancer. As such,

> the physical injury requirement for a mental distress from fear of cancer claim is linked to the merits of the claim, since plaintiffs with asbestosis may have a well-founded greater reason to fear contracting cancer than those who do not have asbestosis. In short, the physical injury requirement will insure that the claims permitted are only the most genuine.

*Id*. at 529 (citations omitted). Even if the plaintiff never actually develops cancer, "his present asbestosis certainly provide[s] him with a chronic, painful and concrete reminder that he has been injuriously exposed to a substantial amount of asbestos, a reminder which may both qualitatively and quantitatively intensify his fear." *Id*.

In *Devlin v. Johns-Manville Corp*., 495 A.2d 495 (N.J. Super. Ct. Law Div. 1985), the court held that plaintiffs with existing asbestos-related injuries were entitled to compensation for fear of cancer, which "stems from the substantial bodily harm they have already suffered as a result of ingesting asbestos over an extended period of time." *Id*. at 499. Citing *Devlin*, the Third Circuit predicted that the New Jersey Supreme Court would reach the same result in *Herber v. Johns-Manville Corp*., 785 F.2d 79 (3d Cir. 1986). The New Jersey Supreme Court validated that prediction, holding that a "claim for emotional-distress damages based on a reasonable fear of future disease" is "clearly cognizable where, as here, plaintiff's exposure to asbestos has resulted in physical injury." *Mauro v. Raymark Industries, Inc*., 561 A.2d 257, 263 (N.J. 1989).

In *Cantrell v. GAF Corp*., 999 F.2d 1007 (6th Cir. 1993), the Sixth Circuit approved the admission of evidence relating to the increased risk of cancer and an instruction "that the jury may award, as an element of compensatory or actual damages, damages proved for emotional distress suffered as a result of demonstrated fear of developing an asbestos-related cancer. ...

The question of whether plaintiffs' apprehensions of developing cancer are reasonable is for you the jury to determine. The probability of plaintiffs developing cancer is but one factor to be considered in making this determination." *Id*. at 1012 (ellipses in original). The Sixth Circuit relied on an earlier decision, *Lavelle v. Owens-Corning Fiberglas Corp*., 507 N.E.2d 476 (Ohio Ct. Com. Pl. 1987), in which the court held that fear of cancer is compensable when "an asbestosis-afflicted plaintiff is aware that he in fact possesses an increased statistical likelihood of developing cancer, and that from this knowledge springs a reasonable apprehension which manifests itself in mental distress." *Id*. at 481. The reasonableness of the plaintiff's fear "is not equivalent to probability or certainty but is for a fact-finder to determine." *Id*.

The year after *Lavelle* was decided, a Washington court held that a plaintiff with an existing asbestos-related injury was entitled to recover "for his reasonable fear of contracting cancer as an element of his damages." *Sorenson v. Raymark Industries, Inc*., 756 P.2d 740, 742 (Wash. Ct. App. 1988). Applying Louisiana law, the Fifth Circuit held that a plaintiff with an asbestos-related injury could recover damages for fear of future illness even though "the plaintiff may not presently suffer from the feared condition at the time he or she is seeking damages or does not ever develop the condition in the future.... [T]he compensable injury is not the feared condition; instead, the compensable injury is the mental anxiety resulting from fear of developing that condition which the plaintiff endures on a daily basis." *Smith v. A.C. & S., Inc*., 843 F.2d 854, 858 (5th Cir. 1988). Courts in Delaware drew the same distinction, barring claims for increased risk of cancer while allowing plaintiffs with asbestosis to seek damages for "their present fear of getting cancer." *Farrall v. A.C. & S. Co., Inc*., 558 A.2d 1078, 1080 (Del. Super. Ct. 1989); *see also Celotex Corp. v. Wilson*, 607 A.2d 1223, 1230 (Del. Super. Ct. 1992).

More recently, the Iowa Supreme Court adopted this prevailing view in *Beeman v. Manville Corp. Asbestos Disease Compensation Fund*, 496 N.W.2d 247 (Iowa 1993). The court explained that such a claim "is for the present fear of cancer, not for a future loss resulting from cancer. . . . Beeman's fear is happening now; it is not contingent upon developing cancer. Whether Beeman will probably develop cancer is thus irrelevant to proving his present, concrete fear of developing cancer." *Id*. at 252.

These cases demonstrate a broad consensus in both results and reasoning, and they cast doubt on the assertion that state and federal courts are in a state of "considerable confusion" on this issue. United States Br. 17 n.5. As demonstrated above, the majority of state and federal courts considering the issue have held that plaintiffs with asbestosis may seek damages for their fear of cancer. The handful of contrary cases cited by the United States represents, to put it mildly, a minority view. In fact, the Pennsylvania Supreme Court is the only state court in the nation to hold that plaintiffs with asbestosis cannot seek damages for fear of cancer. *See Simmons v. Pacor, Inc.*, 674 A.2d 232 (Pa. 1996). Contrary to the United States' characterization, Delaware does allow plaintiffs who have asbestosis to seek damages for "their present fear of getting cancer." *Farrall v. A.C. & S. Co., Inc*., 558 A.2d 1078, 1080 (Del. Super. Ct. 1989); *see also Celotex Corp. v. Wilson*, 607 A.2d 1223, 1230 (Del. Super. Ct. 1992). The case cited by the United States, *Nutt v. A.C. & S., Inc*., 466 A.2d 18 (Del. Super. 1983), *aff'd sub nom. Mergenthaler v. Asbestos Corp. of America*, 480 A.2d 647 (Del. 1984), involved claims for mental distress by the spouses of plaintiffs with asbestosis. The spouses "concede[d] that they have suffered no physical injury due to wrongful asbestos exposure," and that concession was "dispositive of this case." *Mergenthaler*, 480 A. 2d at 651 (distinguishing cases in which plaintiffs "had suffered an underlying injury").

As *Mergenthaler* indicates, the common law is capable of screening out claimants who do not have actual injuries. In *Capital Holding Corp. v. Bailey*, 873 S.W.2d 187 (Ky. 1994), the Kentucky Supreme Court held that plaintiffs who had no physical injury could not recover for "the potential consequences of a negligent act where no harmful change was yet made manifest." *Id*. at 193. Citing the *Eagle-Picher* case, the court reasoned that a plaintiff with asbestosis would have a viable claim for mental anguish damages but that "until such time as the plaintiff can prove some harmful result from the exposure, **albeit he need not prove he is already suffering from cancer**, his cause of action has yet to accrue." *Id*. at 194-95 (emphasis added); *see also Wolff v. A-One Oil, Inc*., 627 N.Y.S.2d 788, 789-90 (N.Y. App. Div. 1995) ("Under the prevailing case law, in order to maintain a cause of action for 'fear of [developing] cancer' following exposure to a toxic substance like asbestos, a plaintiff must establish . . . the clinically demonstrable presence of asbestos fibers in the plaintiff's body, or some indication of asbestos-induced disease.").

The cases underscore the ability to screen out trivial or invalid claims without sacrificing the rights of injured parties. The requirement that plaintiffs show a physical injury was designed to assist this screening process. *See, e.g., Molien v. Kaiser Foundation Hospitals*, 616 P.2d 813, 818 (Cal. 1980) ("The primary justification for the requirement of physical injury appears to be that it serves as a screening device to minimize a presumed risk of feigned injuries and false claims."); *Orlo v. Connecticut Co.*, 21 A.2d 402, 405 (Conn. 1941) ("The real basis for the requirement that there shall be a contemporaneous bodily injury or battery, is that this guarantees the reality of the damage claimed."); *Deutsch v. Shein*, 597 S.W.2d 141, 146 (Ky. 1980) (explaining the "corroborating purpose" of the physical injury requirement)*; Homans v. Boston Elevated Ry. Co.*, 62 N.E. 737, 737 (Mass. 1902) ("[W]hen the reality of the cause is guarantied by proof

of a substantial battery of the person there is no occasion to press further the exception to general rules."); *see also* PROSSER & KEETON, *supra*, § 54, at 362-63 (5th ed. 1984) ("With a cause of action established by the physical harm, 'parasitic' damages are awarded, and it is considered that there is sufficient assurance that the mental injury is not feigned.").

Petitioner's insistence that plaintiffs with asbestosis must show a "physical manifestation of fear" is simply incorrect. This requirement has never been applied to cases in which the plaintiff alleges an existing physical injury caused by the defendant's conduct. *See, e.g., Herber v. Johns-Manville Corp*., 785 F.2d 79, 85 (3d Cir. 1986) (applying New Jersey law); *Mauro v. Raymark Industries*, *Inc*., 561 A.2d 257, 263 (N.J. 1989) ("[P]roof that emotional distress has resulted in 'substantial bodily injury or sickness' is not required when plaintiff suffers from a present physical disease attributable to defendant's tortious conduct.") (quoting *Devlin v. Johns-Manville Corp.,* 495 A.2d 495, 499 (N.J. Super. Ct. Law Div. 1985)); *see also City of Tyler v. Likes*, 962 S.W.2d 489, 495 (Tex. 1997) (citing *Krishnan v. Sepulveda*, 916 S.W.2d 478, 481 (Tex.1995), and *Brown v. Sullivan*, 10 S.W. 288, 290 (Tex. 1888)). The cases cited by Petitioner to support the "physical manifestation" requirement involve claims of purely emotional distress, unconnected with any physical injury.

Petitioner's reliance on the "bystander" cases is equally misplaced. The analysis in the bystander cases is "inapt in the context of claims for injuries from exposure to toxic substances. The analysis to determine whether bystanders should recover damages for mental anguish caused by viewing accidents involving third parties is inappropriate in the toxic tort context because the victim is not a bystander – his mental anguish results from physical involvement in the principal tortious act." J. Joseph Reina, *Recovery for Fear of Cancer and Increased Risk of Cancer: Problems with* Gideon *and a Proposed Solution*, 7 REV. LITIG. 39, 49 (1987). Based on its flawed analogy with the bystander cases, Petitioner concludes that the

common law does not permit "knowledge-based claims." *See* Petitioner's Brief at 21-22 & n. 15. The common law has in fact long compensated mental anguish based on a plaintiff's knowledge of his or her own potential for future disease. In *Ferrara v. Galluchio*, *supra*, the plaintiff who received X-ray burns was told of her increased risk of cancer by her doctor, who "advised the plaintiff to have her shoulder checked every six months inasmuch as the area of the burn might become cancerous." *Id*. at 251-52. As discussed above, the court found it "entirely plausible, under such circumstances, that plaintiff would undergo exceptional mental suffering over the possibility of developing cancer." *Id*. at 253; *see also Baylor v. Tyrrell*, 131 N.W.2d 393, 402 (Neb. 1964) ("Disclosure by a physician that a wound 'might' develop into cancer is a reasonable basis for a patient to have anxiety about the possibility of developing cancer, and is recoverable in damages."); *Devlin v. Johns-Manville Corp*., 495 A.2d 495, 498 (N.J. Super. Ct. Law Div. 1985) (holding that plaintiffs with asbestosis had reasonable fear of cancer and noting that "[p]laintiffs have been told by their doctors of the increased risk and the need for medical surveillance to monitor for potential cancerous developments."). Whether a plaintiff had taken reasonable steps "to control his apprehension" can be considered "on the principle of mitigation of damages." *Smith v. Boston & M.R.R.*, 177 A. 729, 738 (N.H. 1937).

## II. THE COURT'S FELA DECISIONS AUTHORIZE AWARDS BASED IN PART ON FEAR OF CANCER TO PERSONS WHO HAVE SUSTAINED NONMALIGNANT PHYSICAL INJURY.

In keeping with the common law, this Court's FELA jurisprudence has acknowledged that plaintiffs with a physical injury may seek damages for accompanying mental anguish. Petitioner accuses the courts below of "turning a blind eye to

this Court's FELA jurisprudence" in permitting workers with nonmalignant asbestos-related diseases to recover damages for their fear of contracting an asbestos-related cancer, Pet. Br. 15, and several amici argue flatly that "*Buckley* [*v. Metro-North R.R. Co.*, 521 U.S. 424 (1997)] precludes an award for 'fear of cancer' as recovery for emotional distress under FELA." American Insurance Association ("AIA") Br. 7; *see also* United States Br. 14 ("the language and logic of *Buckley* clearly preclude" the recovery in this case). But if anything, the language in *Buckley* supports the trial court's instruction allowing the jury to consider the plaintiffs' fear of contracting an asbestos-related cancer in awarding emotional distress damages.

In *Buckley*, the Court held that a plaintiff who had merely been exposed to asbestos could not recover damages for his fear of contracting an asbestos-related cancer. But the Court expressly distinguished cases in which plaintiffs with asbestosis recovered damages for fear of cancer. *Id.* at 432, 437. Moreover, the Court recognized broadly that "the common law permits emotional distress recovery for that category of plaintiffs who suffer from disease (or exhibit a physical symptom)," based perhaps on its "desire to make a physically injured victim whole or because the parties are likely to be in court in any event." 521 U.S. at 436-37. Its recognition of these policy interests underlying the common law rule indicates that the Court fully understood that the common law permits recovery of damages for fear of a *different injury* than that which brought the plaintiff into court. And although the only anguish of plaintiff Buckley described in the opinion was his fear of contracting cancer, the Court pointedly held that Buckley could not recover for his emotional distress "unless, and until, he manifests symptoms of *a disease*." *Id.* at 427 (emphasis added). The Court could easily have articulated the "no recovery for fear of cancer without proof of cancer" rule sought by Petitioner, but it did not. The assertion that the language of *Buckley* prohibits the trial court's restrained and

qualified instruction permitting an award for fear of cancer – an instruction entirely consistent with the holdings of the overwhelming majority of courts that have considered the precise issue – is wildly overstated.

The American Insurance Association and Association of American Railroads downplay the significance of the proof in this case that each of the plaintiffs has a clinically significant asbestos-related injury, pointing out that "this case differs from *Buckley* only in that plaintiffs have produced evidence that they have asbestosis." AIA Br. 4; *see also* Association of American Railroads ("AAR") Br. 5 (the "alleged fears" of plaintiffs here "are no less based on speculation than those of asymptomatic plaintiffs like Buckley"). But in *Buckley*, both these organizations filed amicus curiae briefs citing the absence of disease in the plaintiff as a critical fact distinguishing the case from other cases in which the courts permitted recovery of damages for fear of cancer. Brief of Amicus Curiae American Insurance Association in *Buckley v. Metro-North Railroad Co.*, 521 U.S. 424 (1997) (No. 96-320), at 13 & n.5 (pointing out that "courts have required, at a minimum, a showing that the plaintiff suffers asbestosis before permitting a recovery for fear of cancer," and that "the courts have not equated the physical injury requirement with physical impact, but have required a physical injury sufficient to bring an independent tort"); Brief of Amicus Curiae Association of American Railroads in *Buckley v. Metro-North Railroad Co.*, 521 U.S. 424 (1997) (No 96-320), at 9 (stating that two cases permitting recovery for fear of cancer are "clearly distinguishable because the plaintiff suffered a physical injury"). The amici in *Buckley* assured the Court that "if respondent does, in fact, suffer a physical injury from his exposure to asbestos, he will be able to bring a cause of action to recover not only for his physical injuries, but also for *any* emotional injury. In that event, he will be compensated for *all his injuries arising from his exposure*." AIA Br. in *Buckley* at 14 (emphasis added); see also Brief of Amicus Curiae Washington Legal Foundation ("WLF") in *Buckley v.*

*Metro-North Railroad Co.*, 521 U.S. 424 (1997) (No. 96-320), at 9 ("if Mr. Buckley, in fact, suffers a *physical impairment* as a result of his exposure to asbestos, he will be allowed to pursue a claim for that physical injury and the accompanying, if any, emotional distress.") (emphasis added).

Contrary to the implications of Petitioner and its amici, nothing in the Court's FELA decisions prior to *Buckley* suggests that the Court would depart from the common law consensus permitting damages for fear of future injury caused by tortious conduct that caused a physical injury. In *Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532 (1994), the Court limited recovery for negligently inflicted emotional distress to persons who were in the "zone of danger" caused by the defendant's tortious conduct, but was careful to clarify that its analysis did not apply to claims of emotional distress which accompanied physical injuries, which has long been permitted: "The injury we deal with here is mental or emotional harm (such as fright or anxiety) that is caused by the negligence of another *and that is not directly brought about by a physical injury*." *Id.* at 544 (emphasis added). In *Gottshall*, neither of the plaintiffs had suffered any physical injury or arguable impact as a result of the tortious conduct. In *Atchison, Topeka & Santa Fe Ry. v. Buell*, 480 U.S. 557 (1987), the Court did not reach the issue of the scope of compensation available for emotional distress under FELA. Nothing in the Court's opinion, however, casts doubt on the observation of the lower court that "damages for emotional distress *accompanying physical injuries* are recoverable in traditional FELA actions." *Buell v. Atchison, Topeka & Santa Fe Ry.*, 771 F.2d 1320, 1324 (9th Cir. 1985) (emphasis added), citing *Erie R. Co. v. Collins*, 253 U.S. 77, 87 (1920) and *Bullard v. Central Vermont Ry.*, 565 F.2d 193, 197 (1st Cir.1977).

The trial court's instruction in this case permitting plaintiffs to recover damages for fear of cancer associated with their asbestos-related injuries is fully consistent not only with the common law as described by the commentators and the

state and federal courts, but also with the Court's language in *Buckley* and with its prior FELA jurisprudence. It is Petitioner and its amici, not Respondents, who seek a departure from precedent.

## III. DEPARTING FROM THE COMMON-LAW RECOGNITION OF FEAR OF CANCER DAMAGES WOULD DO NOTHING TO AMELIORATE THE ALLEGED PROBLEMS IN ASBESTOS LITIGATION.

Petitioner and its amici air numerous concerns about the state of asbestos litigation, but there is no indication that Petitioner's proposed departure from common-law rules would address those underlying problems in any meaningful way. Citing newspaper and magazine articles, Petitioner warns that "[c]laims of the truly sick" have been supplanted by "minimally impaired individuals." Pet. Br. 5. The Association of American Railroads argues that asbestos lawsuits have "exploded, resulting in widespread bankruptcies. Allowing recovery for fear of cancer no doubt contributed to this disaster." AAR Br. 9. The United States warns that "'fear of cancer' liability unfettered from actual instances of cancer would present the problem of 'unlimited and unpredictable liability'" and produce a "flood of relatively trivial claims." United States Br. 18-19.

Assuming, for the sake of argument, that this bleak assessment of asbestos litigation is completely true, prohibiting damages for fear of cancer does virtually nothing to make the potential liability any more definite or reduce the number of claims filed. All of the parties acknowledge that plaintiffs with asbestosis are still entitled to file claims and may still recover damages, including damages for past and future mental anguish. Indeed, one of the reasons that the common law has always permitted mental anguish damages in cases involving bodily injury is that "the parties are likely to be in court in any

event." *Buckley*, 521 U.S. at 436-37. Even if asbestos litigation truly is a "flood," Petitioner's proposed abandonment of the common law would not leave the courts any drier.

Nor would the elimination of fear of cancer damages bring predictability or certainty to asbestos litigation. Claims of asbestosis necessarily involve the assessment of past and future damages for physical pain and mental anguish. None of these elements of damages lend themselves to precise measurement. *See Jones v. United R.R. of San Francisco*, 202 P. 919, 923 (Cal. Ct. App 1921) ("Mental suffering, like physical suffering, is incapable of exact measurement in dollars and cents, but the jury, nevertheless, may place its estimate upon it."); *Smith v. Boston & M.R.R.*, 177 A. 729, 738 (N.H. 1937) ("Complaints of mental pain, when in issue, stand on the same ground as complaints of physical pain when that is in issue.").

Petitioner's quarrel is not with the uncertainty of asbestos litigation but with the uncertainty inherent in a jury system. Petitioner argues that FELA should not be interpreted to "grant juries free rein to make inherently subjective awards of damages for emotional distress" based on "manipulable" diagnoses of asbestosis and on the "claimed emotional reaction of the plaintiff." Pet. Br. 24; *see also* WLF Br. 6 (complaining that our justice system extends "the promise of easy and generous recovery for claimed emotional distress."). But the Framers fully intended to give civil juries "free rein" to make damage awards, *especially* in cases in which the damage alleged is unliquidated, subjective, or uncertain. As the Court recently noted, "the common law rule as it existed at the time of the adoption of the Constitution was that in cases where the amount of damages was uncertain, their assessment was a matter so peculiarly within the province of the jury that the Court should not alter it." *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340, 353 (1998) (internal quotations marks and citations omitted). More than 80 years ago, the

Court rejected a challenge to an emotional distress award in an FELA case similar to that urged here:

> It is asserted against the verdict that it is 'outrageously excessive,' caused by the instruction of the court that plaintiff could recover 'for shame and humiliation.' Counsel's argument is not easy to represent or estimate. They say that 'mental pain' of the designated character, 'the suffering from feelings, is intangible, incapable of test or trial,' might vary in individuals, 'rests entirely in the belief of the sufferer, and is not susceptible of contradiction or rebuttal.' *If all that be granted, it was for the consideration of the jury*.

*Erie R. Co. v. Collins*, 253 U.S. 77, 85 (1920), *overruled on other grounds*, *Chicago & E.I.R. Co. v. Industrial Comm'n of Illinois*, 284 U.S. 296 (1932) (emphasis added); *see also Gallick v. Baltimore & O. R. Co.*, 372 U.S. 108, 115 (1963) (reaffirming that in a FELA case "[i]t is the jury, not the court, which is the fact-finding body. . . . The very essence of its function is to select from among conflicting inferences and conclusions that which it considers most reasonable. That conclusion, whether it relates to negligence, causation or any other factual matter, cannot be ignored. Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable.") (citations omitted).

Petitioner describes the fact that the jury must weigh conflicting expert testimony as a "surreal situation." Pet. Br. 6. What Petitioner calls a "surreal situation" is simply the operation of the adversarial process. *See, e.g., United States v. Kubrick*, 444 U.S. 111, 124 (1979) ("[D]etermining negligence or not is often complicated and hotly disputed, so much so that

judge or jury must decide the issue after listening to a barrage of conflicting expert testimony."). As this Court has explained, the assumption that "befuddled juries" will be "confounded" by expert testimony is "overly pessimistic about the capabilities of the jury and of the adversary system generally." *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 595-96 (1993).

This Court has recognized that asbestos litigation presents serious problems and urged Congress to enact a comprehensive system for resolving asbestos claims. *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 628-29 (1997). At the same time, this Court has acknowledged that solutions to the asbestos problem cannot simply be read into existing rules and statutes. *Id*. at 629 ("Rule 23 . . . cannot carry the large load . . . heaped upon it."). Nor should the Court make arbitrary changes in the common law in order to strike a symbolic blow at the perceived shortcomings of asbestos litigation.

## CONCLUSION

Petitioner's interpretation of FELA requires the Court to abandon the common law's longstanding recognition of damages for fear of cancer and repudiate the consensus of state and federal courts in asbestos cases. This abrupt departure from precedent would yield no appreciable gain in efficiency or fairness. In the absence of any compelling reason, the Court should not overturn the well-established case law on parastic mental anguish damages in general, and fear of cancer damages in particular.

Respectfully submitted,

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