No. 01-963

In the Supreme Court of the United States

NORFOLK & WESTERN RAILWAY COMPANY,
PETITIONER

v.

FREEMAN AYERS, ET AL.

ON WRIT OF CERTIORARI
TO THE CIRCUIT COURT OF KANAWHA COUNTY,
WEST VIRGINIA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

The brief of the United States will address the following question:

Whether the court below erred in awarding damages for emotional distress under the Federal Employers' Liability Act (FELA) to plaintiffs based on an asserted fear of developing asbestos-related cancer, where plaintiffs have not actually developed cancer or any symptoms related to cancer and presented no evidence of any corroborating physical manifestation of their emotional injury.

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INTEREST OF THE UNITED STATES

This case presents important questions arising under the Federal Employers' Liability Act (FELA) that involve the interpretation of evolving principles of federal common law concerning limitations on emotional distress damages. The United States has a substantial interest in the resolution of those questions because the Court's disposition of this case may impact the government's liability under federal statutes, most notably the Jones Act, 46 U.S.C. App. 688, which "adopts 'the entire judicially developed doctrine of liability' under [FELA]," *American Dredging Co.* v. *Miller*, 510 U.S. 443, 456 (1994) (quoting *Kernan* v. *American Dredging Co.*, 355 U.S. 426, 439 (1958), and general maritime law, see, *e.g.*, *White* v. *Mercury Marine, Div. of Brunswick*,

Inc., 129 F.3d 1428, 1432 (11th Cir. 1997) (noting the relevance of federal-law precedents in determining scope of liability in federal admiralty law). The Court's decision in this case may also substantially affect the government's liability in cases under the Federal Tort Claims Act, 28 U.S.C. 2671 *et seq.*, particularly in toxic-tort claims against the government. Although FTCA claims are based on state rather than federal law, courts have looked to FELA cases in determining when injuries accrue under the FTCA, see, *e.g.*, *United States* v. *Kubrick*, 444 U.S. 111, 121 n.7 (1979) (noting several courts of appeals had applied the accrual approach adopted under FELA in *Urie* v. *Thompson*, 337 U.S. 163 (1949), to FTCA cases), and, more broadly, have looked to this Court's FELA decisions in assessing liability under state law. See, *e.g.*, *Fulmore* v. *CSX Transp., Inc.*, 557 S.E.2d 64, 75 (Ga. Ct. App. 2001) (rejecting "fear of cancer" claim under FELA and state law where evidence only established asbestosis, because "[u]nder Georgia law, and the United States Supreme Court's ruling in [*Metro-North Commuter R.R.* v. *Buckley*, 521 U.S. 424 (1997)], a plaintiff may not recover for emotional distress arising from a fear of contracting a disease until he begins to manifest symptoms of the disease") *Temple-Inland Forest Prods. Corp.* v. *Carter*, 993 S.W.2d 88, 92-93 (Tex. 1999) (relying in part on *Buckley* to deny recovery under state law for emotional distress damages from mere exposure to asbestos); *Hinton* v. *Monsanto Co.*, 813 So. 2d 827, 830-831 (Ala. 2001) (relying on *Buckley* in rejecting medical monitoring claim under state law in the absence of injury or illness). In addition, the government has a general concern for the proper application of tort law principles under federal common law and for the proper application of FELA.

STATEMENT

1. Respondents, six retired employees of petitioner Norfolk & Western Railway Company, brought this action under FELA in West Virginia state court. They alleged that the railroad negligently failed to provide them with a reasonably safe workplace and thereby caused their exposure to asbestos and other dusts. As part of their damages, respondents sought recovery for emotional distress based upon their concern that their exposure to asbestos might cause them to contract cancer in the future.

At trial, the parties contested whether the railroad had been negligent and whether respondents had sustained an asbestos-related health condition. See J.A. 430-31, 449. There was also evidence that several of the respondents had been exposed to asbestos over extended time periods while working for other employers. See, *e.g.*, J.A. 257-259 (respondent Butler), 236-237 (respondent Ayers).

Petitioner also contested whether the respondents had suffered any compensable emotional distress based upon a fear of developing cancer in the future. In support of their claim for such damages, some of respondents testified that they were concerned about developing cancer based on their exposure to asbestos. No respondent testified that he sustained severe emotional distress or fear or that he had experienced any physical harm resulting from cancer-related concerns. See, *e.g.*, J.A. 277 (respondent Ayers), 298-299 (respondent Shirley), 255 (respondent Butler), 116-117 (respondent Vance), 332 (respondent Johnson).

The trial court instructed the jury that it could not "award damages * * * for cancer or for any increased risk of cancer" because no respondent presented evi-

dence that he "has cancer or that he will, with reasonable certainty develop cancer in the future." J.A. 573. Nevertheless, the court instructed the jury that it was free to award damages for fear of cancer:

> You have heard a great deal of testimony regarding cancer and increased risk of cancer. This testimony is relevant only to judge the genuineness of plaintiffs' claims of fear of developing cancer. As an integral part of damages for mental pain and suffering, any plaintiff who has demonstrated that he has developed a reasonable fear of cancer that is related to proven physical injury from asbestos is entitled to be compensated for that fear as a part of the damages you may award for pain and suffering.

Ibid. The jury returned a verdict in favor of respondents and awarded them a collective sum of $5,810,606 against the railroad. *Id.* at 486-508.

2. The trial court upheld the jury's verdict and entered an order for respondents on February 14, 2001. Petitioner sought discretionary review by the West Virginia Supreme Court, but its petition for review was denied without comment on October 4, 2001.

SUMMARY OF ARGUMENT

Respondents in this case, former railroad workers who were exposed to asbestos dust while employed by petitioner, were awarded substantial emotional distress damages based on an asserted (and unsubstantiated) concern that they might develop cancer at some point in the future. Although there was evidence that respondents had developed "asbestosis (or, in any event, some 'occupational pneumoconios[is]')," Br. in Opp. 21, a distinct and less threatening disease caused by exposure to asbestos than cancer, it is undisputed that *none* of

the respondents has cancer or has developed any symptoms related to cancer. See J.A. 573.

Under both established common-law principles and this Court's decisions in *Consolidated Rail Corp.* v. *Gottshall*, 512 U.S. 532 (1994), and *Metro-North Commuter Railroad* v. *Buckley*, 521 U.S. 424 (1997), respondents cannot recover emotional distress damages under FELA for the mere fear of developing cancer in the future. FELA permits recovery for emotional injuries associated with physical injuries actually suffered, but not for the anxiety associated with future injuries that the plaintiff may or may not suffer. Asbestosis, the only disease respondents claim to have at this time, is a distinct and entirely separate disease from cancer, and although both may stem from the same exposures to asbestos, asbestosis is not causally linked to cancer and does not evolve into cancer. Accordingly, any increased risk of cancer or associated fear is not related to the physical injury that permits respondents to sue. This does not mean that respondents cannot recover their damages, including emotional distress damages, in the event they develop cancer. Under established common law principles, a party can recover for any emotional injuries related to cancer in a separate action brought after the cancer actually develops. In other words, as in *Buckley*, the question is not *whether* damages for fear of cancer may be recovered, but *when*. And recovery for such damages in this suit, as in *Buckley*, is premature.

In addition, "fear" experienced long after the exposure based on what this Court has characterized as "controversial and uncertain" statistical information fails to satisfy the common law's requirements that emotional harm, to be recoverable, must be both "severe" and the result of "immediate trauma." Moreover,

at a minimum, any such fear would have to satisfy the common law's requirement that only severe emotional injuries with some corroborating physical manifestation (which respondents did not prove at trial) may be recoverable. Accordingly, the state court judgment awarding damages for respondents' asserted cancer-related fears should be reversed.[1]

ARGUMENT

RESPONDENTS MAY NOT RECOVER UNDER FELA FOR THEIR ASSERTED FEAR OF DEVELOPING CANCER IN THE FUTURE

Section 1 of FELA provides that every common carrier by railroad that engages in interstate commerce "shall be liable in damages to any person suffering injury while he is employed by such carrier * * * for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier." 45 U.S.C. 51. Congress enacted FELA in 1908 to "shift[] part of the 'human overhead' of doing business from employees to their employers," *Gottshall*, 512 U.S. at 542 (quoting *Tiller* v. *Atlantic Coast Line R.R.*, 318 U.S. 54, 58 (1943)), and thus in enacting the statute Congress was "focused primarily upon injuries and death resulting from accidents on interstate railroads," *ibid.* (quoting *Urie* v.

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[1] The United States will not address the second question on which the Court granted certiorari concerning whether apportionment or joint and several liability is proper under FELA. It notes, however, that the Court's resolution of that question in the FELA context need not apply to other federal statutes, such as CERCLA, where both the structure and purposes of the underlying statutory scheme may differ substantially from those of FELA in ways that may be directly relevant to the propriety of joint and several liability.

Thompson, 337 U.S. 163, 181 (1949)). In furtherance of those "humanitarian" purposes, "Congress did away with several common-law tort defenses that had effectively barred recovery by injured workers." *Ibid.* Most notably, FELA "abolished the fellow servant rule"; "rejected the doctrine of contributory negligence in favor of * * * comparative negligence"; "prohibited employers from exempting themselves from FELA through contract"; and, after a 1939 amendment, "abolished the assumption of risk defense." *Id.* at 542-543; see 45 U.S.C. 51, 53- 55.

"Only to the extent of these explicit statutory alterations," however, "is FELA 'an avowed departure from the rules of the common law." *Gottshall*, 512 U.S. at 544 (quoting *Sinkler* v. *Missouri Pac. R.R.*, 356 U.S. 326, 329 (1958)). Thus, "unless [common-law principles] are expressly rejected in the text of the statute, they are entitled to great weight in [the Court's] analysis." *Ibid.*; see also *ibid.* ("Because FELA is silent on the issue of negligent infliction of emotional distress, common-law principles must play a significant role in our decision."); *id.* at 551 ("[B]ecause negligent infliction of emotional distress is not explicitly addressed in the statute, the common-law background of this right of recovery must play a vital role in giving content to the scope of an employer's duty under FELA to avoid inflicting emotional injury."). Accordingly, notwithstanding FELA's general humanitarian purposes, Congress did not intend FELA to be "a workers' compensation statute," *id.* at 543, and FELA "does not make the employer the insurer of the safety of his employees while they are on duty," *ibid.* (quoting *Ellis* v. *Union Pac. R.R.*, 329 U.S. 649, 653 (1947)); see *St. Louis S.W. Ry.* v. *Dickerson*, 470 U.S. 409, 411 (1985).

A. FELA Does Not Allow Recovery Of Damages For Emotional Distress Stemming From The Mere "Fear" of Developing Cancer

1. This Court's Precedents Limit The Availability Of Emotional Distress Damages Under FELA

In *Gottshall*, this Court addressed whether (and if so, under what standard) recovery for negligent infliction of emotional distress is available under FELA. After finding the text of the statute silent on the question, the Court reviewed the common law rules governing recovery for negligently inflicted emotional distress, with particular emphasis on the common-law rules that existed in 1908, when FELA was enacted. See 512 U.S. at 546-548, 554-556. The Court emphasized that, because "recognition of a cause of action for negligent infliction of emotional distress holds out the very real possibility of nearly infinite and unpredictable liability for defendants," courts have placed "substantial limitations" both on "the class of plaintiffs that may recover for emotional injuries and on the injuries that may be compensable." *Id.* at 546 (citing authorities).

The Court in *Gottshall* concluded that emotional distress damages were available under FELA. But it held that the common law "zone of danger" test, which limits emotional injury to those plaintiffs who either sustain a contemporaneous physical impact as a consequence of a defendant's negligence or "are placed in immediate risk of physical harm by that conduct," 512 U.S. at 547-548, "best reconciles the concerns of the common law with the principles underlying [the Court's] FELA jurisprudence," *id.* at 554. The Court reasoned that the zone of danger test "is consistent with FELA's central focus on *physical* perils," because it permits railroad employees "to recover for injuries—physical and emotional

—caused by the negligent conduct of their employers *that threatens them imminently with physical impact*." *Id.* at 555, 556 (emphases added). Thus, the Court concluded, the rule "will further Congress' goal in enacting the statute of alleviating the physical dangers of railroading." *Id.* at 556. The Court identified three "policy grounds" that led common-law courts to adopt the zone of interest test—namely, "the potential for a flood of trivial suits, the possibility of fraudulent claims that are difficult for judges and juries to detect, and the specter of unlimited and unpredictable liability." *Id.* at 557. The Court found these policy grounds "well founded" and sufficient to limit the scope of emotional distress damages under FELA. *Ibid.*

This Court further clarified the limitations on emotional distress claims under FELA in *Metro-North Commuter Railroad* v. *Buckley*, where it held that a railroad employee negligently exposed to asbestos but without symptoms of any disease could not recover under FELA for negligently inflicted emotional distress, including damages for fear of cancer. 521 U.S. at 427, 430. In evaluating facts substantially similar to those here, the Court concluded that the zone of danger test's "physical impact" requirement is not satisfied by "simple physical contact with a substance that might cause a disease at a substantially later time—where that substance, or related circumstance, threatens no harm other than that disease-related risk." *Id.* at 430; *id.* at 432 (*Gottshall*'s language and cited precedent "indicate that the words 'physical impact' * * * do not include a contact that amounts to no more than an exposure * * * to a substance that poses some future risk of disease and which contact causes emotional distress only because the worker learns that he may become ill after a substantial period of time.").

The Court emphasized that *Gottshall* had "cited many state cases in support of its adoption of the 'zone of danger' test," each of which "involved *a threatened physical contact that caused, or might have caused, immediate traumatic harm*." 521 U.S. at 430 (emphasis added). Moreover, the *Gottshall* Court repeatedly explained that its adoption of the zone of interest test was based in part on the appropriateness of limiting recovery to damages closely tied to immediate physical harms. *Id.* at 431-433 (quoting, *inter alia*, *Gottshall*, 512 U.S. at 555 ("zone of danger test * * * is consistent with FELA's central focus on physical perils"); *id.* at 556 (employer should be liable for "emotional injury caused by the apprehension of physical impact")). And while *Buckley* recognized that many courts "permit a plaintiff who suffers from a disease to recover for *related* negligently caused emotional distress," the Court also noted that those courts generally reject recovery for plaintiffs who "are disease and symptom free." *Id.* at 432 (emphasis added; citing cases).

In addition, the *Buckley* Court held that the three "general policy reasons to which *Gottshall* referred" all counseled against allowing recovery for the fear of cancer associated with mere exposure to asbestos. 521 U.S. at 433. In particular, the Court pointed to the "special 'difficult[y] for judges and juries' in separating valid, important claims from those that are invalid or 'trivial'"; "a threat of 'unlimited and unpredictable liability'"; and "the 'potential for a flood' of comparatively unimportant, or 'trivial,' claims." *Ibid.* (quoting *Gottshall*, 512 U.S. at 557).

The Court's reasoning in *Gottshall* and *Buckley* precludes recovery of emotional distress damages under FELA for the mere fear of contracting cancer, absent any evidence that the plaintiff has developed cancer or

a symptom related to cancer. *Buckley*, in particular, makes clear that fear of developing cancer in the future does not justify the recovery of emotional injury damages for that present fear. This case differs from *Buckley* only in that respondents here put forward some medical evidence, which the jury apparently credited, that in addition to being exposed to asbestos they had developed *asbestosis*. For several reasons, however, that distinction does not permit the current recovery of emotional distress damages under FELA for the fear of contracting *cancer* in the future.

2. FELA Does Not Permit "Fear Of Cancer" Claims Before A Plaintiff Has Developed Cancer

Asbestosis is a distinct disease from cancer, and the generally-accepted medical view is that asbestosis is not causally related to cancer and does not itself develop into cancer. See, *e.g.*, A. Churg & F. Green, *Pathology of Occupational Lung Disease* 312 (2d ed. 1998) (describing asbestos-related diseases as a "disparate set of diseases with different epidemiological, pathogenic, pathologic, and prognostic features"); R. Doll & J. Peto, *Effects on Health of Exposure to Asbestos* 2 (1985); see also *Kilpatrick* v. *Department of Labor*, 883 P.2d 1370, 1375 (1994), amended 915 P.2d 519 (Wash. 1995) ("Each asbestos-related disease involves a unique pathology * * * and is not, in fact, an aggravation or continuation of a different asbestos-related condition."); *Eagle-Picher Indus., Inc.* v. *Cox*, 481 So.2d 517, 522 n.7 (Fla. Dist. Ct. App. 1985) ("asbestosis and cancer can be * * * considered distinct sibling diseases parented by the same cause"); *Marinari* v. *Asbestos Corp., Ltd.*, 612 A.2d 1021, 1025 (Pa. Super. Ct. 1992) ("Each of the diseases, i.e., pulmonary asbestosis, asbestos-related pleural disease, lung cancer, and

mesothelioma, is recognized as a separate, and distinct disease.") (citing authorities). Indeed, the majority of jurisdictions have adopted a "separate disease" rule in asbestos cases, which treats asbestosis and other non-malignant, asbestos-related diseases as separate and unrelated to later-developed malignant diseases such as lung cancer and mesothelioma for statute of limitations purposes. See, *e.g.*, *Simmons* v. *Pacor, Inc.*, 674 A.2d 232, 237 (Pa. 1996) (Pennsylvania follows "the majority of jurisdictions which ha[ve] adopted this 'two disease rule' or 'separate disease rule' in asbestos exposure cases") (citing *Marinari*, 612 A.2d at 1023) (collecting cases)); *Wilson* v. *Johns-Manville Sales Corp.*, 684 F.2d 111, 117 (D.C. Cir. 1982) (opinion by Ginsburg, J.) (rejecting notion that a plaintiff could sue "not only for asbestosis, but for consequences that might develop later, including separate and distinct illnesses such as mesothelioma or another form of cancer").[2] Under this separate disease rule, "recovery can be had in a first action only for a disease which has already manifested itself from the exposure to asbestos *and the natural, predictable progression, if any, of that disease.* If addi-

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[2] See also, *e.g.*, *Nelson* v. *Industrial Comm'n*, 656 P.2d 1230 (Ariz. 1982); *Hamilton* v. *Asbestos Corp.*, 998 P.2d 403 (Cal. 2000); *Miller* v. *Armstrong World Indus., Inc.*, 817 P.2d 111 (Colo. 1991); *Wilber* v. *Owens-Corning Fiberglas Corp.*, 476 N.W.2d 74 (Iowa 1991); *Carroll* v. *Owens-Corning Fiberglas Corp.*, 37 S.W.3d 699 (Ky. 2000); *Pierce* v. *Johns-Manville Sales Corp.*, 464 A.2d 1020 (Md. 1983); *Larson* v. *Johns-Manville Sales Corp.*, 399 N.W.2d 1 (Mich. 1986); *Stillson* v. *Peterson & Hede Co.*, 454 N.W.2d 430 (Minn. 1990); *Devlin* v. *Johns-Manville Corp.*, 495 A.2d 495 (N.J. Super. Law Div. 1985); *Fusaro* v. *Porter-Hayden Co.*, 548 N.Y.S.2d 856 (Sup. Ct. 1989); *Potts* v. *Celotex Corp.*, 796 S.W.2d 678 (Tenn. 1990); *Pustejovsky* v. *Rapid-American Corp.*, 35 S.W.3d 643 (Tex. 2000); *Kilpatrick*, 883 P.2d 1370 (Wash. 1994); *Sopha* v. *Owens-Corning Fiberglas Corp.*, 601 N.W.2d 627 (Wis. 1999).

tional injuries from a separate disease manifest themselves in the future, such injuries will support a second action." *Marinari*, 612 A.2d at 1023 (emphasis added); see 2 *Stein on Personal Injury Damages* § 9:16 (3d ed. 1997) ("With respect to non-malignant asbestos diseases and cancer caused by exposure to asbestos, a number of courts have adopted the 'two disease' rule," wherein "recovery is first available only for a disease that has already manifested itself from exposure to asbestos, plus the natural, predictable progression of that disease, and then if cancer develops in the future, a second action may be brought.").

Because there is no established causal relationship between asbestosis and cancer—i.e., because they are distinct diseases—the fact that respondents may have developed asbestosis from their exposure to asbestos dust does not entitle them to emotional damages for their fear of developing the separate and distinct disease of cancer. As this Court explained in *Buckley*, courts have permitted recovery for emotional injuries to a plaintiff who suffers from a *disease*, but such recovery must be limited to emotional injuries that are *related* to that disease. 521 U.S. at 432 (common-law courts "do permit a plaintiff who suffers from a disease to recover for *related* negligently caused emotional distress") (emphasis added). The only relationship between the asbestosis respondents claim they have now and the cancer they fear they may develop in the future is that both may stem from the same *exposure* to asbestos dust. But, that is not a clear enough relationship for a plaintiff to recover as part of his damages for the first disease his anxiety about the possibility of developing the second distinct disease in the future. *Buckley* makes clear that mere exposure is not a sufficient basis

to permit the recovery for emotional injuries related to diseases not yet suffered. *Id.* at 430, 432.

To be sure, the Court in *Buckley* confronted a case in which the plaintiffs had suffered only exposure to asbestos, and no disease resulting from that exposure had developed. In ruling that exposure alone did not entitle a plaintiff to recovery, the Court distinguished cases in which the plaintiffs had suffered some injury and even noted one state lower-court case that allowed recovery of emotional injuries related to asbestosis. See 521 U.S. at 437 (citing *Lavelle* v. *Owens-Corning Fiberglas Corp.*, 507 N.E.2d 476 (Ct. C.P., Cuyahoga Cty., Ohio 1987)).[3] But the language and logic of *Buckley* clearly preclude a rule allowing recovery for the fear of contracting a distinct disease in the future based only on the *actual* contraction of a different disease at present. In stating the common-law rule, the Court noted that courts permit "a plaintiff who suffers from a disease to recover for *related* negligently caused emotional distress." 521 U.S. at 532 (emphasis added). The relatedness requirement is critical because otherwise *any* physical injury, no matter how slight, would

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[3] Respondents' reliance on the *Buckley* Court's citation to *Lavelle* (Br. in Opp. 21) is misplaced. The *Buckley* Court referred to *Lavelle* only to demonstrate that courts generally had not extended emotional distress damages to plaintiffs, like those in *Buckley*, who had suffered *no* disease or other injury at all. That reference should not be read as an endorsement of *Lavelle*'s reasoning, which in fact is flatly contrary to the Court's holdings in *Buckley* and *Gottshall*. See 507 N.E.2d at 479-481 (permitting fear of cancer evidence on alternative grounds that (1) "[m]odern tort law" permits recovery for emotional damages without any proof of physical injury (a proposition rejected in *Gottshall*), and (2) that any requirement of a "physical impact" was satisfied by the exposure to asbestos fibers (a proposition rejected in *Buckley*)).

serve as a gateway for the recovery of fear stemming from *any* increased risks associated with the exposure. However, the whole thrust of *Buckley* is that exposure is an insufficient basis for allowing recovery for fears stemming from exposure and that compensation should be directed to the few who actually contract the disease, rather than the many who fear they will contract it. Moreover, all the policy concerns that led the Court in *Buckley* to reject fear of cancer claims based on mere exposure also support rejecting fear of cancer claims based on the present suffering of a distinct injury. See Part A.3., *infra*.

The distinction between damages for the fear of contracting cancer in the future and the emotional injuries from a present case of asbestosis draws support from FELA's text. FELA authorizes suit by "any person *suffering injury*." 45 U.S.C. 51 (emphasis added). The text clearly focuses on present injuries, rather than on risks of future injuries. It does not permit suits by "any person at risk of suffering injury" or "any person who fears they will suffer an injury." Indeed, Congress targeted the railroad industry in FELA, in part, based on a recognition of the risks inherent in the industry. Nonetheless, Congress developed a scheme to compensate only those for whom the risks became a reality in the form of *actual* injuries.

FELA's preference for compensating injuries that have been suffered underscores that this case, like *Buckley*, involves *when*, not *whether*, individuals who actually contract cancer should recover for their cancer-related emotional injuries. Plaintiffs who currently suffer asbestosis can recover their damages from that disease, including their emotional injuries. If they later contract asbestos-related cancer, they can then recover

for their damages from that distinct disease, once again including their emotional injuries.[4]

Moreover, the well-established "separate disease rule" strongly supports limiting recovery for fear of developing cancer to cases where cancer actually develops. As the Pennsylvania Supreme Court explained in *Simmons* v. *Pacor, Inc.*, a case this Court relied upon in *Buckley*: "It is in [a later action for cancer] that [plaintiffs] can assert their emotional distress or mental anguish claims [related to cancer]. To allow the asbestos plaintiff in a non-cancer claim to recover for any part of the damages relating to cancer, including the fear of contracting cancer, erodes the integrity of and purpose behind the two disease rule." 674 A.2d at 239; see *Cleveland* v. *Johns-Manville Corp.*, 690 A.2d 1146, 1150 n.10 (Pa. 1997) ("If cancer later develops, a plaintiff can bring a second action to recover for the cancer and all of the past, present and future emotional distress or mental anguish associated with the cancer, including fear of contracting cancer.").[5]

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[4] Whatever difficulties there may be in determining the precise scope of the emotional injuries stemming from the disease of asbestosis, one thing that clearly does not flow from the injury of the disease of asbestosis is the fear of suffering a distinct disease at a future date.

[5] Notably, although the Court in *Buckley* held that a disease (or symptoms of a disease) is a prerequisite for *any* recovery for emotional injuries stemming from an alleged exposure to a disease-causing substance, it did not address application of tort rules governing *how* such injuries might be recovered when a disease in fact manifests. Thus, the Court did not address whether fear of cancer is only recoverable as an element of pain and suffering from the cancer itself, or whether it may also be recoverable through a separate action for negligent infliction of emotional distress based on diseases or symptoms unrelated to cancer. That question has caused considerable confusion in the lower federal and state courts.

3. Recognition Of Fear Of Cancer Damages Where No Cancer Has Developed Is Inconsistent With Important Common-Law Policy Concerns And The Purposes Of FELA

The three principal policy considerations identified by this Court in *Gottshall* and *Buckley*—"special 'difficult[y] for judges and juries' in separating valid, important claims from those that are invalid or 'trivial'; "a threat of 'unlimited and unpredictable liability'"; and "the 'potential for a flood' of comparatively unimportant, or 'trivial,' claims," *Buckley*, 521 U.S. at 433 (quoting *Gottshall*, 512 U.S. at 557)—militate strongly in favor of permitting recovery under FELA for the "fear" of developing cancer *only* in connection with an action based on the *actual* development of cancer.

First, permitting recovery for such emotional injuries in the absence of an actual instance of cancer (or even a

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While some courts have permitted recovery based on the existence of a distinct injury other than cancer, see, *e.g.*, *Cox*, 481 So. 2d at 526 (permitting recovery for fear of cancer for plaintiff diagnosed with asbestosis); *Jackson* v. *Johns-Manville Sales Corp.*, 781 F.2d 394, 413-415 (5th Cir.) (en banc) (same), cert. denied, 478 U.S. 1022 (1986); *Herber* v. *Johns-Manville Corp.*, 785 F.2d 79, 83-85 (3d Cir. 1986) (same for plaintiff with pleural thickening), others have rejected such claims as speculative and inconsistent with the zone of danger test, see, *e.g.*, *Simmons* v. *Pacor, Inc.*, 674 A.2d 232, 237 (Pa. 1996) (limiting fear of cancer claims, regardless of existence of other distinct asbestos-related diseases, to cases in which cancer actually manifests); *Nutt* v. *A.C. & S., Inc.*, 466 A.2d 18, 24 (Super. Ct. 1983), aff'd, 480 A.2d 647 (Del. 1984) (holding "nature of asbestos related injury * * * is clearly incompatible with the traumatic event requirement for recovery of mental anguish"); *O'Banion* v. *Owens-Corning Fiberglas Corp.*, 968 F.2d 1011, 1013 (10th Cir. 1992) (rejecting fear of cancer claim as "speculative" under Oklahoma law). For the reasons set forth herein, fear of cancer claims should only be recoverable under FELA as an element of pain and suffering for the cancer itself.

symptom of cancer) presents the same "special [evidentiary] 'difficult[ies] for judges and juries'" that led the Court in *Buckley* to reject fear of cancer claims in the absence of any asbestos-related disease. 521 U.S. at 433. Such claims "are far less susceptible to objective medical proof" and are based on subjective emotional reactions to questionable statistical information concerning the *increased* likelihood of developing cancer, which itself is further complicated by the fact that "contacts, even extensive contacts, with serious carcinogens are common" in our society. *Id.* at 434-435 (citations omitted). Moreover, it is virtually impossible to "determine from the external circumstance of exposure whether, or when, a claimed strong emotional reaction to an *increased* mortality risk * * * is reasonable and genuine, rather than overstated—particularly when the relevant statistics themselves are controversial and uncertain * * *, and particularly since neither those exposed nor judges or juries are experts in statistics." *Id.* at 435. The external circumstance of suffering a distinct disease (which simply corroborates the exposure), in addition to exposure, does not solve these difficulties.

Second, "fear of cancer" liability unfettered from actual instances of cancer would present the problem of "unlimited and unpredictable liability" that concerned the Court in *Buckley*. 521 U.S. at 435-436; see *Gottshall*, 512 U.S. at 557. Judges and juries have substantial experience ascertaining damages for actual injuries already suffered. Although damages for emotional injuries are more difficult to estimate, the extent of such damages is a historical fact that can be assessed and given some measure of predictability. But, as this Court noted in *Buckley*, juries would be almost wholly unguided in assessing the damages

caused by a slight increase in the risk of contracting cancer in the future associated with contracting a distinct disease.

Third, fear of cancer liability could likewise produce a flood of relatively trivial cases. Although not every exposure to asbestos results in asbestosis, it is a much more common disease than asbestos-related cancer. Moreover, the logic of allowing recovery for a fear of a distinct disease any time there is some injury would suggest that any time a plaintiff could show an injury beyond mere exposure, that injury would serve as a gateway for fear of cancer claims. Consequently, such liability could impose unreasonable costs on the public and divert increasingly scarce resources away from more deserving plaintiffs, thereby "diminish[ing] the likelihood of recovery by those who later suffer from the disease." *Buckley*, 521 U.S. at 435-436; see *Simmons* v. *Pacor*, 674 A.2d at 238 ("[D]amages for fear of cancer * * * would lead to inequitable results since those who never contract cancer would obtain damages even though the disease never came into fruition. The actual compensation due to the plaintiff can be more accurately assessed when the disease has manifested."). Nothing in either the text or purposes of FELA warrants adoption of such a novel and potentially harmful liability rule. See *Buckley*, 521 U.S. at 438 ("[I]f the common law concludes that a legal rule permitting recovery * * * would on balance cause more harm than good, and if we find that judgment reasonable, we cannot find that conclusion inconsistent with the FELA's humanitarian purpose.").

4. Fears Based On Controversial Statistical Information About Uncertain Increased Cancer Risks Are Neither "Severe" Nor The Product Of "Immediate Trauma" As The Zone Of Danger Test Requires

Both *Buckley* and *Gottshall* recognized that common-law courts permitted recovery of emotional distress damages only where a plaintiff established a *severe* emotional injury stemming from an *immediate trauma.* Those requirements are not satisfied by an increased fear of developing cancer in the future, even when accompanied by a distinct injury at present.

This Court has recognized the common-law requirement that emotional injury must be "severe" in order to be recoverable. "[S]evere emotional injury * * * has generally been required to establish liability for purely emotional injury." *Atchison, Topeka & Santa Fe Ry.* v. *Buell*, 480 U.S. 557, 566-567 n.13 (1987); see *id.* at 568-69 & nn.18 & 19; see also D. Dobbs, *The Law of Torts* § 308, at 836-37 (2000) ("most courts hold that the plaintiff can recover only if a normally constituted person would suffer, and the plaintiff in fact suffered *severe* distress") (emphasis added); *Prosser on Torts* § 12, at 57 (5th ed. 1984) (same); cf. Restatement (Second) of Torts § 46(2) & cmt. d (1965) (requiring that emotional injury for intentional infliction claims must be "extreme" and "severe"); *Prosser on Torts*, *supra*, § 54, at 360 (common law's skepticism of emotional distress claims "has of course been more pronounced where the defendant's conduct is merely negligent"). Thus, in *Gottshall*, the Court held that negligent infliction of emotional distress claims were cognizable under FELA in part because "*severe* emotional injuries can be just as debilitating as physical injuries." 512 U.S. at 550

(emphasis added; citation omitted); see also *id.* at 538 (noting court of appeals had determined that plaintiff's emotional injuries were "genuine and severe"); *id.* at 562-564 (Ginsburg, J., dissenting) (describing plaintiffs' emotional distress as "unquestionably genuine and severe"). Similarly, in *Buckley*, the Court noted that FELA's purposes militate in favor of recovery for "a *serious* and negligently caused emotional harm." 521 U.S. at 438 (emphasis added); see *id.* at 435 (mere contacts with carcinogens should not lead to recovery because "they may occur without causing *serious* emotional distress") (emphasis added).

It is equally clear that the common law only permitted recovery of emotional injuries that were the result of immediate traumatic harm. See Restatement (Second) of Torts § 436 cmt. c. (1965) ("the emotional disturbance must be the *immediate* result of the actor's negligent conduct") (emphasis added); *ibid.* ("Subsequent brooding over the actor's misconduct or the danger in which it had put the [plaintiff] is not enough."); see also *id.* § 436(2). Thus, after surveying the cases relied upon in *Gottshall* for the adoption of the zone of danger test, the Court in *Buckley* explained that "in each case where recovery for emotional distress was permitted, the case involved a threatened physical contact that caused, or might have caused, *immediate traumatic harm*." 521 U.S. at 430-431 (emphasis added; citing cases).[6] Indeed, the Court in *Gottshall* adopted

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[6] See, *e.g.*, *Garcia* v. *Burlington N. R.R.*, 904 P.2d 1085 (Or. Ct. App. 1995) ("The zone of danger is a location in which the plaintiff is at 'immediate risk of physical harm.'") (quoting *Gottshall*); *McMillan* v. *National R.R. Passenger Corp.*, 648 A.2d 428, 434 (D.C. 1994) (zone of danger rule requires plaintiff to show that his physical safety was "imminently endangered"); *Falzone* v. *Busch*, 214 A.2d 12, 17 (N.J. 1965) (zone of danger test limits recovery to

the zone of danger test in large part because it limited recovery to "injuries—physical and emotional—caused by the negligent conduct of their employers *that threatens them imminently with physical impact*." 512 U.S. at 556 (emphasis added).

Emotional concern over developing cancer, even where the plaintiff has developed some lesser asbestos-related condition, fails to satisfy either the severity or immediacy requirements. As the Court explained in *Buckley*, the common law did not recognize emotional distress damages stemming from "an exposure * * * to a substance that poses some future risk of disease and which contact causes emotional distress only because the worker learns that he may become ill after a substantial period of time." 521 U.S. at 432. Such claims generally do not rise to the level of "severe" emotional harm. Among other things, as the Court noted in *Buckley*, "the relevant statistics [regarding *increased* cancer risks] are controversial and uncertain," "extensive contacts" with "serious carcinogens are common," and "those exposed * * * are [not] experts in statistics." *Id.* at 435.

Moreover, because the asserted emotional injury is dependent upon after-acquired (and "controversial and uncertain") statistical information concerning the nature and degree of the purported increased risk of mortality, rather than a natural reaction to an *immediate* traumatic event, fear of cancer claims have no antecedent at common law. Thus, courts—even those applying the more liberal "relative bystander" test rejected for FELA purposes by this Court in *Gottshall*—have universally distinguished between plaintiffs

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situations in which "negligence causes fright from a reasonable fear of immediate personal injury").

experiencing serious emotional injury from immediate traumatic harm and those that experience similar emotional injury based only on later-acquired knowledge. See, *e.g.*, *Dillon* v. *Legg*, 441 P.2d 912, 920 (Cal. 1968) (requiring "direct emotional impact upon the plaintiff from the sensory and contemporaneous observance" of death or serious injury of close relative, in contrast to learning "from others after its occurrence"); *Asaro* v. *Cardinal Glennon Mem'l Hosp.*, 799 S.W.2d 595, 599-600 (Mo. 1990) (requiring that plaintiff be "at the scene of an injury producing sudden[] event"); cf. *Jansen* v. *Children's Hosp. Med. Ctr.*, 31 Cal. App. 3d 22, 24 (Ct. App. 1973) (rejecting emotional distress claim based on witnessing daughter's slow, painful death because there was no trauma from a "sudden and brief event").

The Court in *Buckley* clearly recognized that fear of cancer from exposure does not satisfy the common law's severity and immediacy requirements. The development of a distinct disease from the exposure does not alter that conclusion. The diagnosis of asbestosis may confirm the exposure, but it does not create an imminent risk of cancer. Asbestosis does not itself cause cancer; rather, the exposure remains the potential cause of any future cancer. Accordingly, the development of asbestosis does not make the fear of cancer any more immediate, nor does it convert a probabilistic risk of future cancer into a current, severe physical trauma.

B. FELA Requires Corroborating Physical Manifestations Of Negligently Inflicted Emotional Distress

At a minimum, the Court should hold that, consistent with settled common-law principles, FELA requires a plaintiff to show corroborating physical manifestations of a negligently inflicted emotional injury. This Court

has already recognized that many courts apply a physical manifestation requirement for emotional injuries. In *Gottshall*, for example, the Court observed that "[m]any jurisdictions that follow the zone of danger or relative bystander tests also require that a plaintiff demonstrate a 'physical manifestation' of an alleged emotional injury, that is, a physical injury or effect that is the direct result of the emotional injury, in order to recover." 512 U.S. at 549 n.11; see also *id.* at 564 (Ginsburg, J., dissenting); cf. *Buell*, 480 U.S. at 567-570 n.22 (recognizing substantial difference between FELA claims for "pure emotional injury" and those involving "physical symptoms in addition to * * * severe psychological illness").

In fact, at the time of FELA's enactment in 1908, the requirement of corroborating physical manifestations for emotional injuries was firmly established.[7] And the majority of zone-of-danger and relative-bystander States, as well as the Second Restatement, still adhere to that requirement. See Restatement (Second) of Torts, *supra*, § 436A (requiring "bodily harm or other compensable damage" to corroborate emotional injury); *id.*, cmt. c (emotional injury must result in "substantial bodily harm," such as "long continued nausea" or "repeated hysterical attacks"); *Prosser on Torts*, *supra*, § 54, at 364 & n.55 (citing cases and noting "the great majority of courts" require "that the mental distress be

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[7] See *Gulf, Colorado & Santa Fe Ry.* v. *Hayter*, 54 S.W. 944, 945 (Tex. 1900); *Mack* v. *South-Bound R.R.*, 29 S.E. 905, 908, 911 (S.C. 1898); *Kimberly* v. *Howland*, 55 S.E. 778, 780-781 (N.C. 1906); *Pankopf* v. *Hinkley*, 123 N.W. 625, 627 (Wis. 1909); *Purcell* v. *St. Paul City Ry.*, 50 N.W. 1034, 1035 (Minn. 1892); *Simone* v. *Rhode Island Co.*, 66 A. 202, 203-04 (R.I. 1907); *Stewart* v. *Arkansas S. R.R.*, 36 So. 676, 677 (La. 1904); *Watson* v. *Dilts*, 89 N.W. 1068, 1069 (Iowa 1902).

certified by some physical injury, illness or other objective physical manifestation"); *Jones* v. *CSX Transp. Corp.*, 287 F.3d 1341, 1347-1349 (11th Cir. 2002) (citing cases).[8] In addition, as the Eleventh Circuit recently noted, the physical manifestation requirement is also supported by "the weight of authority" among federal courts in FELA, Jones Act (which incorporates and makes applicable to seamen the substantive recovery provisions of FELA), and general maritime cases. *Jones*, 287 F.3d at 1349-1350 (citing cases); accord *Martinez* v. *Bally's Louisiana, Inc.*, 244 F.3d 474, 477-478 (5th Cir. 2001) (Jones Act).

Thus, although the physical manifestation requirement, like the zone of danger standard adopted in *Buckley*, has not been followed in all jurisdictions, it is well-grounded in the common law and is consistent with

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[8] See *Hancock* v. *Northcutt*, 808 P.2d 251, 257-258 (Alaska 1991); *Villareal* v. *State*, 774 P.2d 213, 220 (Ariz. 1989); *Towns* v. *Anderson*, 579 P.2d 1163, 1164-1165 (Colo. 1978) (en banc); *Mergenthaler* v. *Asbestos Corp. of Am.*, 480 A.2d 647, 651 (Del. 1984); *Champion* v. *Gray*, 478 So. 2d 17, 20 (Fla. 1985); *Czaplicki* v. *Gooding Jt. Sch. Dist.*, 775 P.2d 640 (Idaho 1989); *Barnhill* v. *Davis*, 300 N.W.2d 104, 108 (Iowa 1981); *Anderson* v. *Scheffler*, 752 P.2d 667, 669 (Kan. 1988); *Beynon* v. *Montgomery Cablevision L.P.*, 718 A.2d 1161, 1163 (Md. 1998); *Daley* v. *LaCroix*, 179 N.W.2d 390, 395 (Mich. 1970); *Leaon* v. *Washington County*, 397 N.W.2d 867, 875 (Minn. 1986); *Olivero* v. *Lowe*, 995 P.2d 1023, 1026 (Nev. 2000); *Thorpe* v. *State*, 575 A.2d 351, 353 (N.H. 1990); *Muchow* v. *Lindblad*, 435 N.W.2d 918, 922 (N.D. 1989); *McMeakin* v. *Roofing & Sheet Metal Supply Co.*, 807 P.2d 288, 290 (Ct. App. 1990), cert. denied, No. 72,580 (Okla. Mar. 19, 1991); *Houston* v. *Texaco, Inc.*, 538 A.2d 502, 505 (Pa. Super. Ct. 1988); *Swerdlick* v. *Koch*, 721 A.2d 849, 864 (R.I. 1998); *Kinard* v. *Augusta Sash & Door Co.*, 336 S.E.2d 465 (S.C. 1985); *Maryott* v. *First Nat'l Bank of Eden*, 624 N.W.2d 96 (S.D. 2001); *Hansen* v. *Mountain Fuel Supply Co.*, 858 P.2d 970, 975 (Utah 1993); *Myseros* v. *Sissler*, 387 S.E.2d 463 (Va. 1990).

the goals of FELA and the common-law policy concerns that underlay this Court's decisions in *Gottshall* and *Buckley*. See *Jones*, 287 F.3d at 1348-1350. Most notably, the physical manifestation requirement will help minimize the danger posed by the "unlimited and unpredictable liability" associated with emotional distress claims and will assist judges and juries in making the "highly subjective determinations" necessary to "separat[e] valid, important claims from those that are invalid or trivial," and thereby ensure that the limited available resources are directed first to the most deserving claims. *Buckley*, 521 U.S. at 433-434 (citations omitted).

Here, the application of this test would require judgment for petitioner as a matter of law. Respondents offered no evidence of physical impairment to substantiate that they sustained any emotional harm based on fear that they would get cancer in the future. Indeed, in their own testimony, which appears to comprise the only evidence they presented on this point, respondents never even stated that they experienced fear or even anxiety about developing cancer but only a generalized concern. See J.A. 277, 298-299, 255, 116-117, 332; Pet. 8-9. Such a sparse showing does not begin to satisfy the physical manifestation requirement (or the other well-established common-law limitations on such damages discussed above).

CONCLUSION

The judgment of the circuit court of Kanawha County, West Virginia should be reversed and remanded.

Respectfully submitted.

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JUNE 2002

APPENDIX

STATUTORY PROVISIONS INVOLVED

45 U.S.C. 51. **Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence; employee defined**

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter.

45 U.S.C. 53. **Contributory negligence; diminution of damages**

In all actions on and after April 22, 1908 brought against any such common carrier by railroad under or by virtue of any of the provisions of this chapter to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: *Provided*, That no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.

45 U.S.C. 56. **Actions; limitation; concurrent jurisdiction of courts**

No action shall be maintained under this chapter unless commenced within three years from the day the cause of action accrued.

Under this chapter an action may be brought in a district court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several States.