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 WASHINGTON LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*

The Washington Legal Foundation ("WLF") is a non-profit public interest law and policy center with supporters in all fifty States. WLF seeks to promote and protect the free enterprise system and the economic and civil liberties of individuals and businesses. In particular, WLF has devoted substantial resources to curbing abusive litigation practices, excessive punitive damage awards, excessive attorney's fees, and unwarranted expansion of tort liability by publishing monographs and similar educational materials on these subjects, and by filing *amicus curiae* briefs in appropriate cases. *See, e.g.*, *Metro-North Commuter R.R. Corp. v. Buckley*, 521 U.S. 424 (1997); *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 (1996); *Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532 (1994).

WLF believes that the decision below is a radical departure from the common law of tort liability and the law of liability under the Federal Employers' Liability Act ("FELA"). If left intact, this decision will impose significant costs on all businesses, both within the FELA context and without. These increased costs ultimately will be borne by consumers, workers, and society as a whole. WLF thus brings a broader perspective to the issues in this case than that presented by the parties.

WLF submits this brief as *amicus curiae* in support of petitioner Norfolk & Western Railway Company ("N&W").[1] For the reasons set forth below and in N&W's brief, WLF respectfully submits that this Court should hold that a valid claim for negligent infliction of emotional distress under the FELA requires that the plaintiff's distress be severe and that

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[1] Petitioner and all respondents have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no person or entity, other than *amicus curiae* and its counsel, made a monetary contribution to the preparation or submission of this brief.

the claimed distress be corroborated by objective, physical manifestations. This brief does not address the second question presented by N&W's petition.

SUMMARY OF ARGUMENT

Hundreds of thousands of people with no real injury have brought asbestos claims against a fast-growing cast of defendants. Many of these plaintiffs, including respondents here, have obtained large recoveries despite the absence of any serious physical impairment or economic injury. Respondents do not have cancer, and their odds of ever developing asbestos-related cancer are very low. Yet respondents have been awarded nearly one million dollars each for their "fear of cancer" -- a "fear" that respondents did not even contend caused them severe emotional distress and that respondents did not substantiate with any objective evidence.

This result was possible only because the court below failed to adhere to traditional common-law standards for recovery of emotional distress damages. More importantly, this result is symptomatic of the unprecedented economic and judicial crisis caused by asbestos litigation, as some courts' failure to adhere to traditional common-law standards has resulted in an incapacitating flood of claims brought on behalf of people who suffer no serious physical impairment. The consequent explosion of asbestos litigation already has exacted a terrible price: at least 55 U.S. companies have gone bankrupt, and untold numbers of employees and shareholders have suffered. The judicial system also has bent under the weight of this litigation, as some courts have allowed themselves to be transformed into claims-processing facilities, sacrificing fairness for the sake of perceived expediency. Indeed, more and more federal courts should intervene on due process and equal protection grounds as certain state courts fail to apply procedural rules in accordance with constitutional requirements.

If people who are not sick continue to collect damages that have little or no relationship to any real injury, our tort system will have failed to uphold its obligation to "distinguish between reliable and serious claims on the one hand, and unreliable and relatively trivial claims on the other." *Metro-North Commuter R.R. Corp. v. Buckley*, 521 U.S. 424, 443-44 (1997). Such judicial failures may be concentrated in certain localities, but the consequences fall on everyone with a stake in our national economy. This Court should adhere to traditional common-law standards for recovery of damages for emotional distress and should vacate the judgment below.

ARGUMENT

I. AN ASBESTOS PLAINTIFF SHOULD NOT RECEIVE DAMAGES FOR EMOTIONAL DISTRESS ABSENT PROOF OF PHYSICAL MANIFESTATIONS OF SEVERE DISTRESS

a. Respondents received verdicts of nearly a million dollars each, despite the fact that no respondent even claimed to suffer from any physical impairment beyond shortness of breath. *See* Cert. Opp. 6-9 (describing respondents' physical conditions). Respondents' FELA claims fall squarely within the growing ranks of the "up to one-half of asbestos claims [that] are now being filed by people who have little or no physical impairment." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 631 (1997) (Breyer, J., joined by Stevens, J., concurring in part and dissenting in part) (citation omitted). Even in an era of verdict inflation when a "mere" million-dollar award may no longer be newsworthy,[2] it is evident

[2] In Mississippi alone, a State with 1% of the Nation's population, juries have returned at least 20 verdicts of $9,000,000 or more since 1995, including seven that exceeded $100,000,000 each. *See* Roger Parloff, *The $200 Billion Miscarriage of Justice*, Fortune (Mar. 4, 2002); Robert

that respondents' recoveries bear no relation to their physical impairments. Respondents' shortness of breath has not caused them to lose significant income or to incur significant medical expenses, and such "pain and suffering" as might be caused by shortness of breath cannot plausibly account for the million-dollar verdicts here. *Cf. Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532, 544 (1994) (distinguishing "pain and suffering . . . 'stemming directly from a physical injury or condition'" from emotional distress "that is not directly brought about by a physical injury"). In short, the only way to explain these verdicts is to presume that the jury followed the trial court's instruction, and respondents' counsel's entreaties, *see* Pet. 9, to compensate respondents for their fear that they would develop cancer in the future.

More fundamentally, the only way to explain cases such as these is the perceived ease of recovering large amounts for claimed emotional injury. If respondents could have hoped only to recover damages commensurate with their minor physical ailments, these cases likely would not have been worth litigating. But if every person with a minor asbestos-related physical ailment stands to receive a large award for emotional distress -- without evidence of a physical manifestation of the claimed distress or any other objective evidence to corroborate it, and without even subjective evidence that the claimed distress is severe -- then every person ever exposed to asbestos and suffering from even mild shortness of breath should file suit.

Far from being hyperbole, this essentially describes the course of asbestos litigation over the past two decades. Hundreds of thousands of people allegedly exposed to asbestos have filed suit, despite the fact that most suffer from little or no physical impairment. The result, as this Court has noted with palpable concern, has been an unprecedented

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Pear, *Mississippi Gaining as Lawsuit Mecca*, N.Y. Times (Aug. 20, 2001) A1; Jerry Mitchell, *Out-of-state cases, in-state headaches*, Jackson Clarion-Ledger (June 17, 2001) A1.

crisis in judicial administration. *See Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 821 (1999) (stating that "the elephantine mass of asbestos cases . . . defies customary judicial administration and calls for national legislation"); *id.* at 865 (Rehnquist, C.J., joined by Scalia and Kennedy, JJ., concurring) (similar); *id.* at 866-67 (Breyer, J., joined by Stevens, J., dissenting) (similar); *see also Amchem Prods., Inc.*, 521 U.S. at 631 (Breyer, J., joined by Stevens, J., concurring in part and dissenting in part) (stating that "[a]bout half of the suits have involved claims for pleural thickening and plaques," while only 15 percent have involved claims for cancer).

Under the pressure of this onslaught of litigation, at least 55 American companies have declared bankruptcy and untold numbers of shareholders, employees, creditors, and other stakeholders have suffered tangibly. Auto parts maker Federal-Mogul Corporation, forced into bankruptcy in October 2001, provides a stark example of the economic fallout from asbestos litigation. In 1998, when Federal-Mogul acquired a company with asbestos liability, its 22,000 U.S. employees held in their 401(k) accounts company stock worth $85 million. By 2001, its employees' 401(k) holdings of company stock were worth only $15 million. *See* Doron Levin, *Asbestos Toll Includes Employee 401(k) Accounts*, Bloomberg News (Feb. 4, 2002); *see also* Roger Parloff, *The $200 Billion Miscarriage of Justice*, Fortune (Mar. 4, 2002) (stating that Federal-Mogul employees owned 16% of the company's stock, which lost 99% of its value from January 1999).

As traditional asbestos defendants have gone bankrupt, plaintiffs' lawyers have widened the net. In 2001, a RAND study found that over 1000 corporations had been sued, and predicted that the list of defendants "will ultimately number several times that." Deborah Hensler, et al., *Asbestos Litigation in the U.S.: A New Look at an Old Issue* (Inst. for Civ. Justice, RAND Corp., Aug. 2001) 11. The study also

noted that participants on both sides of the litigation "said that they expect all of the traditional asbestos defendants to be in bankruptcy within the next two years." *Id.* at 25.

b. To be sure, the relaxation or disregard of traditional common-law standards for emotional injury is part and parcel of the broader phenomenon of the relaxation or disregard of traditional requirements of injury and causation more generally. The basic problem is that people who are not sick are being paid large sums of money, at the expense not only of an ever-expanding roster of defendants, but also at the expense of people who are sick or who will become sick in the future. *See Amchem Prods., Inc.*, 521 U.S. at 598 ("'exhaustion of assets threatens and distorts the process; and future claimants may lose altogether'") (quoting Report of the Judicial Conference Ad Hoc Committee on Asbestos Litigation 3 (Mar. 1991)).

Nonetheless, these cases highlight the particular importance of preserving sensible limitations on claims for emotional injury: as explained above, the motivation for basically healthy people to bring suit is the promise of easy and generous recovery for claimed emotional distress. And because the supply of basically healthy people who may have experienced some emotional distress is practically inexhaustible, this phenomenon has enabled the asbestos litigation to reach its current state. *Cf. Buckley*, 521 U.S. at 434 (stating that "contacts, even extensive contacts, with serious carcinogens are common" and citing an estimate that "21 million Americans have been exposed to work-related asbestos"); *Gottshall*, 512 U.S. at 552 (describing the danger of even "*genuine* claims from the essentially infinite number of persons, in an infinite variety of situations, who might suffer real emotional harm as a result of a single instance of negligent conduct") (emphasis in original). By adhering to traditional standards for emotional injury, this Court thus can take a very important step towards ameliorating the excesses of asbestos litigation.

This Court repeatedly has warned that claims for emotional injury pose unique dangers, including "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." *Gottshall*, 512 U.S. at 557; *accord Buckley*, 521 U.S. at 443-46; *see also Gottshall*, 512 U.S. at 545-46 & n.4, 551-53. Because of these dangers, the law traditionally has "placed substantial limitations on the class of plaintiffs that may recover for emotional injuries and on the injuries that may be compensable." *Id*. at 546.

In the context of asbestos litigation, these dangers threaten not only defendants such as N&W, but also the judicial system more generally and -- perhaps most poignantly of all -- current and future plaintiffs who really do suffer from serious injuries. Five years ago, in *Buckley*, this Court posed this very question: "In a world of limited resources, would a rule permitting immediate large-scale recoveries for widespread emotional distress caused by fear of future disease diminish the likelihood of recovery by those who later suffer from the disease?" 521 U.S. at 435-36.

Events have answered the Court's question. After at least 55 asbestos-related bankruptcies (including at least 16 just since January 2000[3]), it should be apparent that the U.S. economy, while enviably resilient, does not have endless capacity to endure the mass reallocation of resources from productive uses to pay people who are not sick. There are only so many million-dollar recoveries to go around. If plaintiffs who have no serious physical injury are permitted to recover large judgments for fear of cancer, current and especially future plaintiffs who actually get cancer may be unable to recover. *Cf. Buckley*, 521 U.S. at 443-44 (stating that courts must consider the "interests of other potential

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[3] *See* Roger Parloff, *The $200 Billion Miscarriage of Justice*, Fortune (Mar. 4, 2002).

plaintiffs who are not before the court and who depend on a tort system that can distinguish between reliable and serious claims on the one hand, and unreliable and relatively trivial claims on the other").[4]

Nor can the judicial system withstand a continued onslaught of asbestos claims. Some courts already have allowed concern with managing their dockets to take precedence over litigants' rights to fair procedures. It is perhaps understandable that the magnitude of the crisis has transformed some courts into claims-processing facilities more focused on disposing of cases than on dispensing justice,[5] but it should go without saying that perceived needs of the moment cannot justify derogations from fair procedures. *See, e.g.*, *Maryland v. Craig*, 497 U.S. 836, 861 (1990) (Scalia, J., joined by Brennan, Marshall, and Stevens, JJ., dissenting) ("the Constitution is meant to protect against,

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[4] The Supreme Court of Pennsylvania has set a good example of judicial leadership in defending the ability of the tort system to focus on first things first. That court held in *Simmons v. Pacor, Inc.*, 543 Pa. 664, 674 A.2d 232 (Pa. 1996), that a person with "asymptomatic pleural thickening" has no claim for damages, either for the "mere physical change" that is detectable by x-ray but is "unaccompanied by any detrimental effect," *id*. at 237, or for fear of cancer, *id.* at 238-39. At the same time, however, the court made clear that such a person may recover emotional distress damages if and when she develops cancer, even if she may have developed asbestosis at an earlier time. *See id*. at 239. This sensible "two-disease" rule, *see id*. at 237, 239, benefits plaintiffs as well as defendants and the judicial system, by reducing litigation in the absence of serious injury in order to preserve recovery in the event that serious injury later occurs.

[5] *See, e.g.*, Statement of Hon. Conrad L. Mallett, Jr., *The Fairness in Asbestos Compensation Act of 1999: Hearings on H.R. 1283 Before the House Comm. on the Judiciary*, 106th Cong., 1st Sess. (July 1, 1999) 155: "Think about a county circuit judge who has dropped on her 5,000 cases all at the same time. . . . The judge's first thought then is 'How do I handle these cases quickly and efficiently?' The judge does not purposely ignore fairness and truth, but the demands of the system require speed and dictate case consolidation . . . ."

rather than conform to, current 'widespread belief'"); *United States v. Leon*, 468 U.S. 897, 980 (1984) (opinion of Stevens, J.) ("it is the very purpose of a Bill of Rights to identify values that may not be sacrificed to expediency").

The law always has viewed claims for emotional distress with skepticism, and the scale and economic realities of asbestos litigation make such healthy skepticism even more important now.

c. It also is important to emphasize that because of the interconnected nature of our economy, the burdens of asbestos litigation are borne by the entire Nation, even if certain excesses are localized in certain judicial systems. When a West Virginia court upholds large judgments even in the absence of any serious injury, the court does not merely impose adverse consequences upon West Virginians (apart from those few West Virginians who receive attorney's fees or damages out of those judgments) while the rest of the Nation escapes those adverse consequences. To the contrary, a defendant like N&W has employees in many States and, in all likelihood, shareholders in all 50 States, all of whom will suffer from the failure of the court below to enforce traditional limitations on recovery for emotional distress. *Cf. Zazu Designs v. L'Oreal, S.A.*, 979 F.2d 499, 508 (7th Cir. 1992) ("Pension trusts and mutual funds, aggregating the investments of millions of average persons, own the bulk of many large corporations. Seeing the corporation as wealthy is an illusion . . . .").

What is more, the present case is but one among many, and -- with verdicts of "only" *one* million dollars -- far from the most egregious example. *See, e.g., Curry, et al. v. ACandS Inc., et al.*, Civ. No. 2000-181 (Miss. Cir. Ct., Holmes Cty.) ($150,000,000 given to six plaintiffs who collectively claimed zero lost days of work and zero medical expenses, and who alleged only non-impairing pleural conditions or slight asbestosis). Similar scenarios have been and are being repeated in numerous other cases, as certain

courts favor local plaintiffs at the expense of the national economy. *Cf. Blankenship v. General Motors Corp.*, 185 W. Va. 350, 406 S.E.2d 781, 786 (1991) (in a crashworthiness case, declaring that the court systematically will "adopt the rule that is most liberal to the plaintiff" because "simple self-defense" requires ensuring that West Virginia plaintiffs do not lose out to residents of States with more plaintiff-friendly tort rules).[6]

For these reasons, the excesses of asbestos litigation pose a truly national problem necessitating this Court's intervention to protect the national economy. *Cf. BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 585 (1996) (stating that defendant's "status as an active participant in the national economy implicates the federal interest in preventing individual States from imposing undue burdens on interstate commerce"); *id*. at 571-73; *Healy v. Beer Institute*, 491 U.S. 324, 335-40 (1989). By adhering to traditional common-law requirements for recovery of damages for emotional distress, this Court will help ensure that compensation remains available for the minority of asbestos plaintiffs who are sick. At the same time, this Court will help protect the interests of the judicial system and of the employees, shareholders, and creditors of the ever-growing ranks of asbestos defendants -- in short, the interests of everyone with a stake in the national economy. *Cf. Ortiz*, 527 U.S. at 883 (Breyer, J., joined by Stevens, J., dissenting) ("[O]f course, not only is it better for the injured plaintiffs, it is far better for Fibreboard, its employees, its creditors, and the communities where it is

[6] It bears emphasis that the fact that the FELA generally was intended to benefit workers does not mean that the FELA should be interpreted to embrace every worker's claim. *See Rodriguez v. United States*, 480 U.S. 522, 525-26 (1987) (per curiam) ("[N]o legislation pursues its purposes at all costs. Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice -- and it frustrates rather than effectuates legislative intent simplistically to assume that whatever furthers the statute's primary objective must be the law.").

located for Fibreboard to remain a working enterprise, rather than slowly forcing it into bankruptcy while most of its money is spent on asbestos lawyers and expert witnesses.").

It is true that the present case arises under the FELA and this Court's decision may not bind courts applying state law. Nonetheless, as a practical matter, many courts will look for guidance to this Court's views on the proper standards for recovery for emotional distress. *See, e.g., Temple-Inland Forest Prods. Corp. v. Carter*, 993 S.W.2d 88, 93 (Tex. 1999) (following *Buckley* on question of Texas law). Indeed, the Supreme Court of Appeals of West Virginia has all but pleaded with this Court to "establish national uniformity on personal injury matters" by articulating "clear, bright line rules of national application." *Blankenship*, 406 S.E.2d at 786 (quotation omitted). Proclaiming that "no court would welcome such rules more hospitably than we," *id.*, the court suggested that this Court's guidance would help to counter the "inevitabl[e] . . . temptation to redistribute wealth in the direction of residents," *id*. at 787 n.11.[7]

This Court should make the most of the opportunity afforded by this case to restore order and fairness in asbestos litigation.

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[7] The *Blankenship* court openly confessed that it was attempting to advance the interests of West Virginia residents. The court disavowed any "claim that our adoption of rules liberal to plaintiffs comports, necessarily, with some Platonic ideal of perfect justice." *Id*. at 786. "Rather," the court explained, "for a tiny state incapable of controlling the direction of the national law in terms of appropriate trade-offs among employment, research, development, and compensation for the injured users of products, the adoption of rules liberal to plaintiffs is simple self-defense." *Id*. The court's candor in favoring its own citizens may be novel, but that practice is all too familiar. *Cf.* 3 Debates on the Federal Constitution 583 (J. Elliot ed. 1876) (Madison: "We well know, sir, that foreigners cannot get justice done them in these courts . . . .").

CONCLUSION

For the foregoing reasons, and those expressed by petitioner, this Court should vacate the judgment below.

Respectfully submitted,

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