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 OF THE CHAMBER OF COMMERCE OF THE UNITED STATES AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF THE *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States (the Chamber) is the world's largest business federation representing an underlying membership of more than 3,000,000 businesses and organizations of every size. Chamber members operate in every sector of the economy and transact business throughout the United States, as well as in a large number of countries around the world. A central function of the Chamber is to represent the interests of its members in important matters before the courts, Congress, and the Executive Branch. To that end, the Chamber has filed *amicus curiae* briefs in numerous cases that have raised issues of vital concern to the nation's business community.

The issues at stake in this case are of direct concern to the Chamber and its members. The Chamber's members are defendants in thousands of asbestos cases in federal and state court across the country. In these cases, many claimants who do not have cancer are seeking compensation for their alleged fear that they will develop an asbestos-related malignancy in the future. The routine recognition of such claims would inflate jury awards to asbestos claimants who have suffered little or no physical impairment and increase their settlement demands. Such a trend would make it even more difficult for companies such as the Chamber's members to

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[1] The parties have consented to the filing of this brief; the written consents 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 curiae*, its members, and its counsel made a monetary contribution to the preparation and submission of this brief.

respond to the "elephantine mass" of asbestos cases of which this Court spoke in *Ortiz* v. *Fibreboard Corp.*, 527 U.S. 815, 821 (1999). Payments to such individuals, moreover, would deplete the resources available to compensate individuals who actually have asbestos-related illnesses.

In determining whether respondents are entitled to seek damages for emotional distress under the Federal Employers' Liability Act (FELA), 42 U.S.C. § 51 *et seq.*, this Court will no doubt address the common-law principles that govern asbestos claims brought under state law. Courts throughout the country will be influenced by this Court's analysis.[2] The Chamber accordingly has a keen interest in the Court's decision.

INTRODUCTION AND SUMMARY OF ARGUMENT

As a general rule, the tort system does not afford recovery to individuals who have been negligently exposed to a *risk* of harm, but have not actually been injured. This is a crucial limitation in the litigation of mass torts. While tens of millions of people are exposed to potentially harmful products or substances at one point or another during their lives, only the relatively small number who are hurt by that exposure are entitled to sue for damages.

Claims for damages for fear of cancer and other future illnesses represent an effort to circumvent this fundamental

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[2] This Court's prior decisions addressing the scope of recovery under FELA for negligently inflicted emotional distress have influenced courts considering those issues under state law. See, *e.g.*, *Hinton* v. *Monsanto Co.*, 813 So. 2d 827, 830 (Ala. 2001) (citing *Metro-North Commuter R.R. Co.* v. *Buckley*, 521 U.S. 424 (1997)); *Temple-Inland Forest Prods. Corp.* v. *Carter*, 993 S.W. 2d 88, 92 (Tex. 1999) (same); *Dickerson* v. *International United Auto Workers Union*, 648 N.E.2d 40, 50 (Ohio Ct. App. 1994) (citing *Consolidated Rail Corp.* v. *Gottshall*, 512 U.S. 532 (1994)).

limitation on tort recovery. Such claims have been called (perhaps too optimistically) "the last possible ripple in the toxic tort/mass tort explosion that began in the early 1980s." M. Hultquist, *Fear of Cancer As a Compensable Cause of Action*, 30 BRIEF 8, 9 (Spring 2001). Although these claims purport to seek recovery for a present emotional harm rather than a possible future injury, they have the same effect as claims directly seeking compensation for the *risk* of harm: They allow recovery by individuals who have been subjected to a risk of physical harm, but have not suffered physical injury. The recognition of such claims has the potential to open wide the floodgates of toxic tort litigation.

Recognition of fear of cancer claims could have a resounding impact on asbestos litigation. It has been estimated that 21 million Americans were exposed to work-related asbestos in the 1930s and 1940s. *Metro-North Commuter R.R. Co.* v. *Buckley*, 521 U.S. 424, 434 (1997). Many people (although a small percentage of the millions exposed to asbestos) have developed asbestos-related cancer and other lung diseases. As this Court is aware, the effort to compensate such individuals for their injuries has burdened the courts and depleted the assets of many companies. Permitting recovery by individuals who do not have cancer, but fear that they may develop cancer in the future, would represent a dramatic expansion of liability that the system can ill afford.

The plaintiffs below, who demonstrated no more than minor breathing impairments relating to asbestos, were permitted to seek emotional-distress damages based on their alleged fear that they would later develop cancer. There was no evidence that plaintiffs' claimed emotional disturbance was severe, physically manifested, or objectively verifiable. Accordingly, if these plaintiffs can obtain damages for fear of cancer, then any claimant who can show the most marginal asbestos-related injury also can recover such damages.

As this Court has recognized, however, "[t]he common law consistently has sought to place limits" on potential liability for negligently inflicted emotional distress "by restricting the class of plaintiffs who may recover and the types of harm for which plaintiffs may recover." *Consolidated Rail Corp.* v. *Gottshall*, 512 U.S. 532, 552 (1994). Common law principles, which inform this Court's interpretation of FELA, preclude recognition of claims for emotional distress arising from the fear that past exposure to a harmful substance may cause future disease.

ARGUMENT

A. Asbestos Litigation Is Not Winding Down, But Instead Is Expanding To Include Healthier Claimants Suing Less Culpable Defendants

According to a recent study by the RAND Institute for Civil Justice, more than 500,000 individuals have raised claims relating to asbestos exposure – and most have sued multiple defendants. D. Hensler, S. Carroll, M. White, & J. Gross, *Asbestos Litig. in the U.S.: A New Look At An Old Issue* 1, 3 (Rand 2001) (hereafter "*New Look*"). The cost of resolving these claims has been enormous. So far, U.S. insurers have expended an estimated $21 billion on asbestos claims. *Id.* at 8. At least 41 companies have been bankrupted by asbestos litigation since 1982 – eight of them since January 2000. *Id.* at 10. At this point, accordingly, there can be little doubt that "[t]he tort system * * * has succeeded in delivering society's punitive response to the events of the 1930s and 1940s." C. Edley, Jr. & P. Weiler, *Asbestos: A Multi-Billion-Dollar Crisis*, 30 HARVARD J. LEGIS. 383, 390 (1993).

Nevertheless, asbestos litigation "shows no sign of flagging." P. Hanlon, *Asbestos Legislation: A Pragmatic Approach*, SG057 ALI-ABA 321, 323 (2001). A recent study by the Rand Institute found that the number of asbestos

claims filed annually has "risen sharply" in recent years. D. Hensler, *New Look*, at 2. This increase is reflected in the growing backlog of cases pending in federal and state courts, which doubled from an estimated 100,000 in 1990 to more than 200,000 in 1999. H. Rep. 106-782, at 18 (2000).

Two trends appear to account for this increase in asbestos cases. First, the number of different companies facing substantial exposure to asbestos claims has multiplied. In the early 1980s, "traditional" defendants such as the manufacturers, distributors, and installers of asbestos insulation accounted for about three-quarters of expenditures on asbestos claims. D. Hensler, *New Look*, at 11. As litigation has depleted the resources of traditional defendants, however, plaintiffs have cast their nets more broadly. "As one defendant has followed another into chapter 11, plaintiff attorneys have turned to other defendants to substitute for those in bankruptcy (against whom litigation is stayed) and have increased their financial demands on those defendants." *Id.* at 25. Thus, "[b]y the late 1990s, nontraditional defendants accounted for about 60 percent of asbestos expenditures." *Id.* at 11. Many of these defendants were less directly involved with asbestos – and are less responsible for its harmful effects – than the companies that profited directly from the manufacture and distribution of asbestos products. See S. Warren, *Asbestos Suits Target Makers of Wine, Cars, Soups, Soaps*, WALL ST. J., Apr. 12, 2000, at B1.

Second, the average asbestos claimant today is healthier. "[U]p to one-half of asbestos claims are now being filed by people who have little or no physical impairment." Edley & Weiler, *supra*, at 393; see also *Amchem Prods., Inc.* v. *Windsor*, 521 U.S. 591, 631 (1997) (Breyer, J., concurring in part and dissenting in part) (observing that about half of asbestos claims involve "pleural thickening and plaques – the harm-

fulness of which is apparently controversial").[3] Because the marginal costs of pursuing additional claims alleging this mature tort is low, plaintiffs' lawyers have the incentive "to push forward not merely the claims of those who are physically impaired but also those of persons merely have been exposed to asbestos and may never become impaired." Hearings Before the Senate Judiciary Committee, Subcommittee on Administrative Oversight and the Courts on The Fairness In Asbestos Compensation Act of 1999, Prepared Statement of Richard A. Nagareda, at 3 (Oct. 5, 1999) (as reported in Federal News Service).

As one pair of commentators has recognized, claims by individuals who have no substantial impairment often "produce substantial payments (and substantial costs)." Edley & Weiler, *supra*, at 393. In a widespread practice, "law firms refuse to settle the sick cases without substantial compensation for their unimpaired cases." Hearings Before the Senate Judiciary Committee, Subcommittee on Administrative Oversight and the Courts on The Fairness In Asbestos Compensation Act of 1999, Prepared Statement of Hon. Conrad Mallett, at 55-56 (July 1, 1999) (as reported in Federal News Service) ("Mallett Statement"). Moreover, particularly in a few notorious jurisdictions, juries have repeatedly awarded millions of dollars to relatively unimpaired claimants. See, *e.g.*, 2 No. 4 Andrews Tire Defect Litig. Reporter 6, *Miss. Jury Awards $150M To Workers Exposed To Asbestos* (2001). Although some judges are scrupulous in reducing excessive awards (see, *e.g.*, *Cain* v. *Armstrong World Indus.*,

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[3] There is one significant exception to this trend. Although today there are fewer claims by plaintiffs with severe asbestosis, there has been an unexpected increase in claims by plaintiffs with mesothelioma and lung cancer. See D. Hensler, *New Look* at 6-7. The fact that individuals exposed to asbestos decades ago are now developing cancer underscores the importance of preserving funds to compensate people who actually become seriously ill.

785 F. Supp. 1448, 1452-57 (S.D. Ala. 1992)), others refuse to remit even the most outlandish awards and instead pressure the defendants to settle. See, *e.g.*, Hearings Before The House Committee on the Judiciary on The Fairness in Asbestos Compensation Act, Jumbo Consolidations in Asbestos Litigation, Prepared Statement of William N. Eskridge, Jr., at 26 (July 1, 1999) (as reported in Federal News Service) ("Eskridge Statement") (after Mississippi jury returned verdict of $48.5 million for 12 plaintiffs, including several with no demonstrable injury, the court pressured defendants to settle the cases "on draconian terms").

Finally, courts in some jurisdictions (including West Virginia, where respondents' claims were tried) have allowed the mass consolidation of asbestos claims. See, *e.g.*, *State ex rel. Mobil Corp.* v. *Gaughan*, 2002 WL 745965 (W. Va. Apr. 25, 2002) (denying writ of prohibition challenging consolidation of several thousand asbestos personal injury claims). Such "non-traditional judicial management techniques" (*State ex rel. Appalachian Power Co.* v. *MacQueen*, 479 S.E.2d 300, 304 (W. Va. 1996)), which are designed to speed the resolution of cases, have only encouraged more filings of weak cases. See Hon. H. Freedman, *Product Liability Issues in Mass Tort – View From the Bench*, 15 TOURO L. REV. 685, 688 (1999) (acknowledging that aggressive case management has had the tendency to "encourage additional filings and provide an overly hospitable environment for weak cases"). The sheer volume of claims increases the risk to the defendants and, accordingly, the settlement value of relatively weak cases. See Eskridge Statement, at 28. The joinder of claims by impaired and unimpaired individuals also increases jury awards to healthier plaintiffs. See *id.* at 29 ("Plaintiffs' counsel can * * * exploit the sympathy effect by associating most-injured plaintiffs with less or least-injured plaintiffs in a consolidated action.").

Thus, there is ample justification for Justice Breyer's observation that "[t]he sickest of victims often go uncompen-

sated for years while valuable funds go to others who remain unimpaired by their mild asbestos disease." *Amchem*, 521 U.S. at 639 (Breyer, J., concurring in part and dissenting in part). The diversion of resources to pay marginal claims also raises valid concerns that there will remain insufficient funds to compensate plaintiffs who become seriously ill in the future.

B. Alleging Fear of Cancer Has Become A Popular Tactic to Enhance Recovery by Asbestos Plaintiffs

It should come as no surprise that asbestos plaintiffs' lawyers, and others representing plaintiffs in toxic tort cases, have looked for ways to enhance recovery by individuals who have been exposed to asbestos but are relatively healthy. See generally, *e.g.*, J. Henderson Jr. & Aaron Twerski, *Asbestos Litigation Gone Mad: Exposure-Based Recovery for Increased Risk, Mental Distress, and Medical Monitoring*, 53 S. C. L. REV. 815 (forthcoming 2002). Most courts have rebuffed efforts by plaintiffs to recover directly for their elevated cancer risk, recognizing that "'proof of damages in such cases would be highly speculative, likely resulting in windfalls for those who never take ill and insufficient compensation for those who do.'" *Amendola* v. *Kansas City S. Ry. Co.*, 699 F. Supp. 1401, 1407 (W. D. Mo. 1988) (quoting *Schweitzer* v. *Consolidated Rail Corp.,* 758 F.2d 936, 942 (3d Cir. 1985)); but see, *e.g., Jackson* v. *Johns-Manville Sales Corp.*, 781 F.2d 394, 411 (5th Cir. 1986) (applying Mississippi law to allow claimant with asbestosis to recover for the risk that he will develop cancer, but noting that "having recovered cancer damages, he cannot later recover more if and when he develops cancer"). "Fear of cancer" claims brought under the rubric of negligent infliction of emotional distress, however, have been more successful. See, *e.g.*, *Devlin* v. *Johns-Manville Corp.*, 495 A.2d 495 (N.J. Super. 1985) (refusing to recognize a cause of action for increased cancer risk, but recognizing claim for fear of cancer). See also A.

Klein, *Fear of Disease and the Puzzle of Future Cases in Tort*, 35 U.C. DAVIS L. REV. 965 (2002); J. Yearout, *Fear of Future Harm in Toxic Tort Litigation: The Appropriate Measure of Damages*, 22 AM. J. TRIAL ADVOC. 639 (1999); J. Smith, *Increasing Fear of Future Injury Claims: Where Speculation Carries the Day*, 64 DEF. COUNS. J. 547 (1997).

In fact, plaintiffs' attorneys, who "have honed the litigation of asbestos claims to the point of almost mechanical regularity" (*Ortiz*, 527 U.S. at 822), now bring "fear of cancer" claims routinely. A presenter at the 2001 Annual Convention of the Association of Trial Lawyers of America (ATLA), for example, stated unequivocally that "[a] FELA plaintiff claiming asbestos related disease should be alleged as a separate and distinct injury the increased 'fear of cancer." M. Doran, *Litigating Asbestos Cases Under the FELA*, 2 Ann. 2001 ATLA-CLE 2707 (2001). To the extent that fear of cancer claims are recognized, therefore, they will likely be made by *every* plaintiff who can possibly assert them.

This case is a good example. The plaintiffs here, who range in age from 60 to 77 (JA 99, 255, 263, 278, 302, 334), contended that they suffer in varying degrees from shortness of breath upon exertion. JA 114, 253, 275-276, 294-295, 330, 353-356. Each plaintiff except one was a long-term smoker; three plaintiffs smoked for close to 50 years. JA 100, 247, 265, 302, 336. Although the plaintiffs produced evidence of asbestosis, none showed any sign of developing asbestos-related cancer. Moreover, none substantiated his allegation that he was suffering emotional distress related to fear of cancer. Indeed, the only plaintiff who described his emotional state – he said that he was "a nervous wreck" and "depressed" – volunteered that he was "more afraid of the shortness of breath" than he was concerned about the risk of developing cancer. JA 298-299.

Nonetheless, over the defendants' objections, the plaintiffs were permitted to seek additional compensation for their fear that they might some day develop cancer. Plaintiffs' counsel elicited from the plaintiffs testimony that they were concerned about the possibility that they would develop cancer in the future. JA 116, 260, 277, 298-299, 331. Plaintiffs' expert gave graphic testimony about mesothelioma. JA 154-155 (witness states that mesothelioma is "almost * * * universally fatal" and "very painful" and that it is "well-documented" that family members who come into contact with a worker's asbestos-contaminated clothing can contract mesothelioma). Finally, the jury was instructed that "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." JA 573. This emphasis on cancer risk appears to have been successful. Although only one plaintiff testified that his daily activities were affected by his shortness of breath, each plaintiff was awarded (before discounting for contributory negligence) between $770,640 and $1,230,806 in damages. JA 579, 580, 583, 584, 587, 588.[4]

C. Application of Traditional Common Law Principles Precludes Respondents' Claims For Fear Of Cancer

If respondents may recover damages for fear of cancer, then any claimant who experiences even minimal impairment from an asbestos-related disease may do so. In fact, however, the traditional common law principles applied by the Court in *Gottshall* and *Buckley* preclude recovery for the type of emotional distress at issue here – that is, anxiety or fear

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[4] The plaintiff who received the lowest award, $770,640, was 77 years old. JA 99. A smoker for close to 50 years (JA 100), he testified that he suffered from moderate shortness of breath. JA 114. He testified that the knowledge that he has asbestosis and might develop cancer makes him "think occasionally." JA 121.

that is rooted in the claimant's understanding that past exposure to a toxic substance may someday, in some cases, result in illness. Under the traditional rules, moreover, recovery for an emotional disturbance is impermissible unless the distress results in an injury or other physical manifestation. Even if fear of cancer claims are sometimes cognizable, respondents' claims should not have been submitted to the jury because respondents exhibited no such symptoms.

1. As the Eleventh Circuit recently observed, "[a]ny attempt at a consistent exegesis of the authorities" on recovery for negligently inflicted emotional distress "is likely to break down in embarrassed perplexity." *Jones* v. *CSX Transp.*, 287 F.3d 1341, 1347 (11th Cir. 2002) (quoting *Hunsley* v. *Giard*, 553 P.2d 1096, 1098 (Wash. 1976)). Notwithstanding the confusing inconsistencies among the cases, it is possible to identify three significant lines of authority in which courts have allowed recovery for negligently inflicted emotional distress.

First, where plaintiffs have suffered a physical injury from a traumatic event, courts have allowed them to recover for the emotional injuries that flow proximately from the same event. See generally W. Page Keeton, *et al.*, PROSSER AND KEETON ON THE LAW OF TORTS § 54 (4th ed. 1984). This ground for recovery is generally embodied in Section 456(a) of the RESTATEMENT (SECOND) OF TORTS, the relevant provision of which states that an actor whose negligent conduct causes bodily harm is also subject to liability for "fright, shock, or other emotional disturbance resulting from the bodily harm or from the conduct which causes it." See *id.* § 456(a). The paradigm example of this principle is described in the RESTATEMENT, which explains that "one who is struck by a negligently driven automobile and suffers a broken leg may recover not only for his pain, grief, or worry resulting from the broken leg, but also for his fright at seeing the car about to hit him." *Id.*, Cmt. e; see also, *e.g.*, *Vance* v. *Vance*, 408 A.2d 728, 731 (Md. 1979) (the physical impact rule de-

nies recovery unless "there was impact upon the plaintiff coincident in time and place with the occasion producing the emotional distress").

Second, "[p]erhaps based on the realization that a near miss may be as frightening as a direct hit" (*Gottshall*, 512 U.S. at 547 (citation and internal quotation marks omitted)), many courts have expanded the right to recover for emotional injury to plaintiffs who either experience physical contact *or* are placed in an "immediate risk of physical harm" by the defendant's negligent conduct (*id.* at 548). This approach has come to be known as the "zone of danger" test. *Id.* at 547-548. The zone of danger test originated from a desire to soften the harsh results yielded by strict application of the physical impact rule and to allow recovery by those whose proximity to negligently dangerous conduct resulted in the infliction of an immediate and substantial emotional injury. See *D'Ambra* v. *United States*, 354 F. Supp. 810, 816 (D.R.I. 1973), citing *Mitchell* v. *Rochester Ry. Co.*, 45 N.E. 354 (N.Y. 1896) (applying physical impact rule to deny recovery to a woman who, after nearly being run over by a negligently-driven horse carriage, passed out from fright and suffered a miscarriage).

Finally, in what has been called the "relative bystander" test, a number of courts have allowed certain plaintiffs who are outside the zone of danger but are so situated that they are extremely likely to suffer emotional distress from a particular sort of negligent conduct (for example, because of their close relationship to the one injured) to recover damages for their substantial emotional injuries. See, *e.g.*, *Dillon* v. *Legg*, 441 P.2d 912 (Cal. 1968) (allowing recovery by plaintiffs who witness a close relation's death or injury or arrive on the scene soon thereafter).

In *Gottshall*, this Court stated that "Congress intended the scope of the duty to avoid inflicting emotional distress under FELA to be coextensive with that established under the zone

of danger test." *Id.* at 555. Under that test, "[r]ailroad employees" may "recover for injuries – physical and emotional – caused by the negligent conduct of their employers that threatens them imminently with physical impact." *Id.* at 556.[5] The Court decided *not* to adopt the more expansive "relative bystander" test, as it "discern[ed] from FELA and its emphasis on protecting employees from physical harms no basis to extend recovery to bystanders outside the zone of danger." *Id.* at 557.

2. "For many breaches of legal duties, even tortious ones, the law affords no right to recover for resulting mental anguish." *Temple-Inland Forest Prods. Corp.* v. *Carter*, 993 S.W. 2d 88, 91 (Tex. 1999) (citation and internal quotation marks omitted). This Court's reasoning in *Gottshall* and *Buckley* precludes recognition under FELA of fear of cancer claims in the typical asbestos case. In such cases, the claimant's emotional distress arises long after the exposure, when he or she learns that the exposure may cause disease in the future. Thus, it is an entirely different type of injury from the emotional distress arising from a contemporaneous traumatic event, which has, in some circumstances, been deemed compensable at common law.

As the Court observed in *Buckley*, the "zone of danger" test adopted in *Gottshall* for FELA cases permits damages for emotional distress only when it is attributable to "a threatened physical contact that caused, or might have caused, *immediate traumatic harm*." 521 U.S. at 430 (emphasis added); see also, *e.g.*, *Dziokonski* v. *Babineau*, 380 N.E.2d 1295, 1300 (Mass. 1978) (zone of danger test allows recovery by those who were at risk of "contemporaneous bodily

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[5] The Court expressly rejected the physical impact test, as it saw "no reason * * * to allow an employer to escape liability for emotional injury caused by the apprehension of physical impact simply because of the fortuity that the impact did not occur." *Id*.

bodily harm"). That test, the Court concluded, comports with FELA's focus on protecting workers from "physical invasions" and "emotional injury caused by the apprehension of physical impact." 521 U.S. at 431 (citations and internal quotation marks omitted). Thus, the Court opined, FELA does not cover emotional injuries from "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." *Id.* at 432.

Unlike the *Buckley* plaintiffs, the respondents here were found to suffer from a physical injury related to asbestos. But, under the reasoning of *Gottshall* and *Buckley*, that fact does not make them eligible to recover damages for fear of cancer. As the Court concluded, FELA compensates emotional distress only when it arises from contact that causes or threatens "immediate traumatic harm." 521 U.S. at 430. See also RESTATEMENT (SECOND) OF TORTS § 436, Cmt. c (explaining that recovery for physical harm resulting from emotional disturbance is unavailable unless "the emotional disturbance [is] the immediate result of the actor's negligent conduct"); Henderson & Twerski, *supra*, at 829 (the law allows "recovery for serious and immediate emotional distress arising from conduct that was either violent or traumatic in nature"). Exposure that leads only to a risk of long-delayed future disease, and which causes concern only when the claimant learns of the risk, plainly does not satisfy that description. See RESTATEMENT (SECOND) OF TORTS § 436, Cmt. c ("Subsequent brooding over the actor's misconduct or the danger in which it had put the other is not enough to make the negligent actor liable for an illness so brought on."); Henderson & Twerski, *supra*, at 829 ("general malaise that follows upon the heels of negligent conduct" is not com-

pensable). This remains the case even if the exposure eventually results in another illness.[6]

As a practical matter, moreover, the mere fact that a plaintiff can point to a minor breathing impairment related to asbestos "does not seem to offer much help in separating valid from invalid emotional distress claims." *Buckley*, 521 U.S. at 434. True, the presence of lung disease *can* show objectively that asbestos has entered the lungs.[7] But the same can be said of the vast number of claimants who have asymptomatic pleural thickening, but who generally are denied any tort recovery. See, *e.g.*, *Simmons* v. *Pacor, Inc.*, 674 A.2d 232, 240 (Pa. 1996) (acknowledging "that the specter of cancer weighs heavily on the minds of those diagnosed with pleural thickening" but holding "that awarding damages for the increased risk and fear of cancer is contrary to the established jurisprudence of this Commonwealth").

Thus, the "general policy concerns of a kind that have led common-law courts to deny recovery for certain classes of negligently caused harms are present in this case as well." *Buckley*, 521 U.S. at 436. This Court should rule, as a matter of law, that fear of cancer claims are not compensable under FELA, even if the claimant has developed another asbestos-related injury.

3. Even if the Court is unwilling to preclude all fear of cancer claims by asbestosis sufferers, however, it should reverse the decision below. Because respondents demonstrated no physical manifestation of their alleged emotional distress, they would not have been entitled to any damages under the

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[6] Of course, the plaintiff can recover damages for any emotional injury he suffers as a result of the illness that he does develop.

[7] The fact that many asbestos claimants were also heavy smokers, however, can make it impossible to ascertain the source of impairment with any certainty.

traditional rule. The Court should apply that rule in cases brought under FELA.

"Until 1970, almost every state * * * require[d] a showing that the plaintiff [seeking damages for negligently inflicted emotional distress] ha[d] suffered bodily injuries as a result of the emotional distress." N. Bagdasarian, *A Prescription For Mental Distress: The Principles of Psychosomatic Medicine with the Physical Manifestation Requirement in N.I.E.D. Cases*, 26 AM. J. L. & M. 401, 402 (2000). The Court in *Gottshall* acknowledged that many states follow this rule (512 U.S. at 549 n.11), and "both of the plaintiffs in *Gottshall* demonstrated objective manifestations of their distress." *Jones*, 287 F.3d at 1346; see W. Krizner, *Is There a Better Standard Than the Zone of Danger Test for Negligent Emotional Distress Claims Under the Federal Employer's Liability Act?*, 34 TORT & INS. L.J. 907, 917 (1999) (opining that the Court in *Gottshall* "did indeed intend a physical manifestation requirement").

The physical manifestations requirement arose from judicial recognition of the need "to place some boundaries on the indefinable and unmeasurable psychic claims." *Champion* v. *Gray*, 478 So. 2d 17, 20 (Fla. 1985). It is also rooted in the notion that, to be compensable, an emotional injury must be severe. See RESTATEMENT (SECOND) OF TORTS § 436A, Cmt. b. ("emotional disturbance which is not so severe and serious as to have physical consequences is normally in the realm of the trivial, and * * * the law does not concern itself with trifles"). As emotional injury is easily feigned, the physical manifestations requirement also has been deemed "necessary to curb the potential of fraudulent claims." *Champion*, 437 So. 2d at 17. Moreover, the physical manifestations requirement "is relatively easy to administer," and "has the virtue of predictable application." *Reilly* v. *United States*, 547 A.2d 894, 895-897 (R.I. 1988).

Some courts have abolished the physical manifestations rule, requiring instead that the plaintiff's injury satisfy some qualitative or quantitative standard. See generally Bagdasarian, *supra*, at 412-416. Hawaii, for example, permits recover "where a reasonable man, normally constituted, would be unable to adequately cope with the mental distress engendered by the circumstances of the case." *Rodrigues* v. *State*, 472 P.2d 509, 520 (Haw. 1970). Maine permits recovery for "serious" mental injury. *Culbert* v. *Sampson's Supermarkets, Inc.*, 444 A.2d 433, 437 (Me. 1982). California allows recovery where the negligent conduct "foreseeably elicited serious emotional responses in the plaintiff." *Molien* v. *Kaiser Found. Hosp.*, 616 P.2d 813, 821 (Cal. 1980). Such standards, however, are too vague and subjective to be useful in "separating valid from invalid emotional distress claims" (*Buckley*, 521 U.S. at 434) – and their adoption would only encourage the filing of fear of cancer claims under FELA.

In the event the Court concludes that FELA permits "fear of cancer claims" by individuals with asbestosis, therefore, it should require that claimants demonstrate physical manifestations of their emotional injury. As the Eleventh Circuit has concluded, the requirement is "well-grounded in the common law" and accords with "the common law's cautious approach to recovery for mental and emotional injuries." *Jones*, 287 F.3d at 1347, 1349. Adhering to the requirement also will help to minimize "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 1349 (quoting *Gottshall*, 513 U.S. at 557).

That "specter" is very real where asbestos claims are concerned. Indeed, if the right to recover for fear of cancer is recognized, "[c]laims based on marginal fault that result in damages based on fear created by tiny increments of increased risk will come to dominate the asbestos litigation scene." Henderson & Twerski, *supra*, at 839.

CONCLUSION

The judgment of the Circuit Court should be reversed.

Respectfully submitted.

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