No. 01-963

IN THE

Supreme Court of the United States

NORFOLK & WESTERN RAILWAY COMPANY,
Petitioner,

v.

FREEMAN AYERS, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the Circuit Court of Kanawha County, West Virginia

BRIEF OF PETITIONER

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June 17, 2002

QUESTIONS PRESENTED

1. Whether a plaintiff who has asbestosis but not cancer can recover damages for fear of cancer under the Federal Employers Liability Act ("FELA") without proof of physical manifestations of the claimed emotional distress?

2. Where there is evidence that a plaintiff's injury and damages have non-railroad causes, does FELA permit reasonable apportionment so that the railroad is responsible only for those damages attributable to its own negligence?

LIST OF PARTIES

In addition to the parties listed in the caption, the following were plaintiffs below and are respondents in this case:

Carl Butler

Doyle Johnson

John Shirley

James Spangler

Clifford Vance

RULE 29.6 STATEMENT

Petitioner Norfolk & Western Railway Company no longer exists as a separate entity and has been merged into the Norfolk Southern Railway Company, the parent of which is the Norfolk Southern Corporation. No other publicly held corporation owns more than 10% of petitioner's stock.

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After a jury verdict for respondents, the Circuit Court of Kanawha County denied petitioner Norfolk & Western Railway Company's ("N&W") new trial motion on February 14, 2001 in an unpublished order. Pet. App. 3a-5a. The Supreme Court of Appeals of West Virginia denied N&W's Petition for Appeal on October 4, 2001. The supreme court's order is unpublished, and is reproduced at Pet. App. 1a-2a.

JURISDICTION

The order of the Supreme Court of Appeals of West Virginia was entered on October 4, 2001. N&W filed its petition for certiorari on January 2, 2002. This Court has jurisdiction under 28 U.S.C. § 1257(a).

STATUTORY PROVISIONS

The relevant provisions of the Federal Employers' Liability Act ("FELA"), 45 U.S.C. §§ 51, 53 and 56, are reproduced at Pet. App. 6a and 7a.

STATEMENT OF THE CASE

At issue in this case are two fundamental rulings arising under FELA, which if not corrected will expose railroads to enormous and wholly unwarranted liability for injuries claimed by their employees. The first ruling is that employees can recover virtually unlimited damages for emotional distress based on a claimed "fear of cancer" from contracting asbestosis even without showing any physical signs of an emotional injury. The second ruling deprives the railroad of the right of apportionment that would limit its liability to those injuries and damages it actually caused. The effect of these rulings was an enormous jury award totally out of proportion both to the employees' injuries and to the

railroad's responsibility. Accordingly, the Court should vacate the judgments and remand for a new trial.

Respondents are six former railroad employees who brought suit under FELA against their former employer N&W alleging negligent exposure to fine occupational dust, particularly asbestos. Claiming asbestosis, an asbestos-related lung disease, they sought damages for, among other things, a fear of contracting cancer in the future. Petitioner does not challenge the jury's implicit findings that respondents had contracted asbestos-related disease. However, in determining the legal standard for assessing the genuineness of emotional-distress claims, this Court must understand the minimal proof of disease that triggers staggering recoveries for relatively healthy plaintiffs like respondents.

1. Asbestos Disease And Litigation. For much of this century, asbestos was in common use in virtually every industry, especially to insulate high-temperature equipment. By the 1930s, there was a growing recognition that exposure at extremely high levels to asbestos and other fine occupational dusts could create health risks. See W. Morgan & A. Seaton, *Occupational Lung Diseases* 312-13 (3d ed. 1995); JA 366-69. Later scientific studies revealed that asbestos fibers were pathogenic at much lower levels than previously believed, leading eventually to the effective eradication of asbestos from the workplace. See A. Churg & F. Green, *Pathology of Occupational Lung Disease* 281-82 (2d ed. 1998).

Asbestos is associated with several disease processes, including pneumoconiosis,[1] lung cancer (cancer of the lung

[1] "Pneumoconiosis" is a general term that refers to a number of lung diseases (asbestosis, coal workers' pneumoconiosis and silicosis being the most common) that arise from the inhalation of fine occupational dust. Pneumoconiosis occurs when inhaled particles not intercepted by the body's natural defense systems are permanently deposited in the lung and

tissue), and mesothelioma, which is a rare cancer of the pleura (the lining of the lung) or peritoneum (the lining of the abdominal cavity). See R. Doll & J. Peto, *Effects on Health of Exposure to Asbestos* 2 (1985). There is no established connection among these disorders—that is, asbestosis does not turn into cancer—and it is widely recognized in the medical literature (and in the courts) that asbestosis and asbestos-related cancers are separate diseases. See, *e.g.*, Churg & Green, *supra*, at 313 (asbestos-related diseases are a "disparate set of diseases with different epidemiologic, pathogenetic, pathologic, and prognostic features"); *Jackson* v. *Johns-Manville Sales Corp.*, 727 F.2d 506, 517 (5th Cir. 1984); *Pierce* v. *Johns-Manville Sales Corp.*, 464 A.2d 1020, 1025 (Md. 1983). Asbestosis (like other forms of pneumoconiosis) is dose-related; its development is tied directly to the intensity and duration of asbestos exposure. See F. Speizer, *Environmental Lung Diseases*, *in Harrison's Principles of Internal Medicine* 1176, 1178 (Isselbacher et al. eds., 1994); Morgan & Seaton, *supra*, at 328. Although pneumoconiosis can have severe effects, in many cases it results in virtually no impairment. See Churg & Green, *supra*, at 316; Morgan & Seaton, *supra*, at 149; see also, *infra*, at 8-9.

Asbestosis can be clearly identified by analysis of removed lung tissue, yet its clinical diagnosis in living patients requires expert judgment; misdiagnosis is thus common, even outside the litigation context.[2] First, the authoritative American Thoracic Society ("ATS") guidelines require "a reliable history of [asbestos] exposure" and a minimum latency period

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cause scar tissue to form, thereby interfering with the lungs' ability to function at their optimal capacity. *See* Morgan & Seaton, *supra*, at 321, 324.

[2] *See* R.B. Reger et al., *Cases of Alleged Asbestos-Related Disease: A Radiologic Re-Evaluation*, 32 J. Occ. Med., 1088, 1089 (1990); Morgan & Seaton, *supra*, at 323; Churg & Green, *supra*, at 325 (noting the tendency of medical personnel to regard as asbestotic any individual with diffuse lung disease where there is a reported history of asbestos exposure).

from first exposure of 20 years, and additionally "recognize[the] value" of four other factors.[3] Because of the vague wording of the guidelines (now under reconsideration), medical opinion varies as to what constellation of factors is necessary to support a diagnosis of asbestosis. JA 239, 456-57. Second, distinguishing asbestosis from other forms of pneumoconiosis is difficult, especially where, as here, an individual has been exposed to multiple occupational dusts. Although there are some distinctive patterns, signs of asbestosis as detected by chest x-ray resemble over 100 other lung disorders, including scores caused by other dusts, and are often confused with radiographic abnormalities attributable simply to smoking and old age.[4] Moreover, the breathing tests for the second and third ATS-recommended factors depend on patient effort and are therefore subject to inaccuracy. Morgan & Seaton, *supra*, at 323. Thus, many individuals diagnosed with asbestosis actually have far more benign conditions. See *Raymark Indus., Inc*. v. *Stemple*, No. 88-1014-K, 1990 WL 72588, at *6-*9, *29 n.11 (D. Kan. May 30, 1990). Indeed, in a 1990 study, independent academic researchers concluded that only 11 of 439 individuals previously diagnosed with an asbestos-related

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[3] *See* Am. Thoracic Soc'y, *The Diagnosis of Nonmalignant Diseases Related to Asbestos*, 134 Am. Rev. Respir. Dis. 363, 368 (Official Statement of the American Thoracic Society 1986), JA 525. The four factors are (1) radiographic evidence of specified kinds of irregular opacities on the lung of a "profusion" of 1/1 or greater (on a continuous scale of lung clarity from 0/- (clear), 0/0, 0/1, etc. to 3/3, 3/+ (clouded)); (2) a restrictive pattern of lung impairment with abnormally low "forced vital capacity" (*i.e*., the total volume of air expired after a deep breath); (3) abnormally low diffusing capacity (a measure of exhalation); and (4) bilateral crackles at the posterior lung base not cleared by cough. *Id.*

[4] *See* R. Parloff, *The $200 Billion Miscarriage of Justice*, Fortune, Mar. 4, 2002, at 162; Morgan & Seaton, *supra*, at 317, 324 (citing W. Weiss, *Cigarette Smoke, Asbestos and Small Irregular Opacities*, 130 Am. Rev. Respir. Dis. 293 (1984) & J. Dick et al., *The Significance of Small Irregular Opacities in The Chest Radiograph*, Chest 102, 251 (1992)); Churg & Green, *supra*, at 325; JA 418.

disease (*i.e*, under 3%) had been correctly diagnosed. Reger et al., *supra*, at 1089. Significantly, many conditions similar to asbestosis (including other forms of pneumoconiosis, such as silicosis) are not associated with as great an increased risk of lung cancer. Morgan & Seaton, *supra*, at 239.

These difficulties are compounded and exploited in asbestos litigation, as has been well documented by the national press.[5] Claims of the truly sick against (now mostly bankrupt) asbestos manufacturers have been supplanted by claims against product users, like petitioner, by minimally impaired individuals, absorbing both available funds and judicial resources. See Parloff, *supra*, at 164 (47 to 1 ratio of noncancer to cancer cases). The plaintiffs' bar generates potential plaintiffs with mass solicitations and free x-ray screenings, and medical experts in the hire of the plaintiffs' bar commonly diagnose those who manifest even the slightest lung scarring as asbestotic. See, *e.g.*, *Raymark Indus.*, 1990 WL 72588, at *5; Warren, *supra*; Parloff, *supra*, at 164.

Liberal venue rules (including FELA's, see 45 U.S.C. § 56) enable lawyers to file claims in plaintiff-friendly jurisdictions like West Virginia. Parloff, *supra*, at 162, 164; Pet. at 25. At trial, because the ATS guidelines "recognize[the] value" of (but do not explicitly require) the four medical-evidence factors noted above, see *supra* note 3, the plaintiff's expert (as respondents' expert did here) will commonly diagnose asbestosis from any claimed medical evidence of scarring so long as the two required patient-history factors are satisfied. Those factors, a reliable history of exposure to asbestos and a sufficient period from first exposure, rely entirely on the

[5] The leading articles documenting these practices have been reproduced in the Lodging of Petitioner filed with the Court: S. Warren, *As Asbestos Mess Spreads, Sickest See Payouts Shrink*, Wall St. J., Apr. 24, 2002, at A1; B. Richards & B. Meier, *Widening Horizons: Lawyers Lead Hunt for New Groups of Asbestos Victims*, Wall St. J., Feb. 18, 1998, at 1; Parloff, *supra*; A. Berenson, *A Surge in Asbestos Suits, Many by Healthy Plaintiffs*, N.Y. Times, Apr. 10, 2002, at A1.

subjective accounts of the plaintiffs and are accepted at face value by the clinician. JA 220, 431-32. If medical evidence is put at issue, there exists a surreal situation in which the jury decides the meaning of chest x-rays—which cannot be read except with extensive training, JA 412-14—based on experts' warring accounts of the proper identification and classification of opacities and their profusion in the lung. Plaintiffs' lawyers stoke the passions of jurors with arguments regarding an asbestotic's risk of deadly cancers. The common results, even for those with scant evidence of asbestosis, are massive verdicts for relatively healthy plaintiffs. See Parloff, *supra*, at 157 ($25 million FELA verdict in Mississippi for healthy railroad employee who claimed asbestosis).

2. Proceedings Below. Respondents' suits are consistent with the national pattern. Most of the respondents were parties to mass complaints of hundreds of plaintiffs, many from out of state. JA 4-10, 41-46. For the most part, respondents did not rely on evidence from treating physicians, but instead on the diagnoses of the expert retained by their lawyer. JA 167.

At trial it was contested whether any of the respondents had an asbestos-related disease. N&W's medical expert testified that *none* did, JA 426-55, and indeed only two of them had even one of the ATS-recommended factors; his evaluations were consistent with prior qualified readings of certain respondents' chest x-rays. JA 430-31, 449. Moreover, all but one of the respondents were long-term, heavy smokers, each smoking one or two packs per day for anywhere from 10 to 50 years. JA 426, 433, 437, 442, 451. Smoking and respondents' various medical and physical conditions had effects on their lungs that resembled the markers of asbestosis. JA 429, 439, 441-42.

Respondents' expert disputed the proper standards for evaluating breathing tests and the classification of the x-rays, JA 162-67, 240 (even though he conceded that two of the

respondents' x-rays did not meet the ATS-recommended standard, classifying them at the minimum level of abnormality, JA 198-99, 229). Moreover, all but one of his diagnoses of asbestosis were based on the thinnest of evidence. For Ayers, he conceded the absence of ATS-recommended criteria.[6] For Shirley, the expert conceded that the x-ray opacities were not typically associated with asbestosis, and thus stated he was unable to make a straight diagnosis of asbestosis. JA 224-25. Nonetheless, he diagnosed "mixed dust pneumoconiosis" consistent with asbestosis because he purported to find scarring, and because Shirley (who worked principally as an office clerk for 25 years but claimed to have moved bags of asbestos occasionally during his "on and off" work as a car supply man from 1947-1951) reported exposure to asbestos. JA 192-93, 221-25, 284-86.

Respondents' accounts of railroad asbestos exposure were riddled with vagueness and imprecision, often lacking in details about specific periods or direct exposure. See, *e.g.*, JA 250, 269, 286. Some testified that they could see dust at times, see, *e.g.*, JA 250-51, 286, even though health risks depend not on visibility but respirability. See JA 85. The

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[6] Respondents' expert gave the following testimony about his examination of Ayers:

> Q: "[W]ere his lungs clear . . . ?"
>
> A: "Yes, sir. . ."
>
> Q: "What was the chest x-ray reading on him, sir?"
>
> A: "1/0" [lower than the ATS recommended figure of 1/1, *see supra* note 3].
>
> Q: "Did you find a restrictive pattern of lung impairment? Was the forced vital capacity below the lower limit of normal?"
>
> A: "No, sir, I did not."
>
> Q: "Did you find a diffusing capacity . . . when correct[ed] . . . [that] would be normal, isn't that true, Doctor?"
>
> A: "Yes, sir."
>
> Q: "Did you find any bilateral laked or pin crackles?"
>
> A: "No, sir, it was normal . . ."

JA 229.

exposures to which most respondents testified were sporadic at best. The most striking testimony, besides that of Shirley the office clerk, came from Respondent Butler. He testified that of the 23 months he worked for the railroad, he might have been exposed to asbestos over a three-month period but he "couldn't say" for sure. JA 250, 251. Even respondents' medical expert stated that Butler's railroad exposure made only a "minimal" contribution to his claimed asbestosis. JA 237.

Respondents also testified about direct asbestos exposure while employed in other industries. In contrast to his two months of employment and three months of possible exposure as a railroad employee, Butler was employed for 33 years as a pipefitter in chemical plants and paper mills, during which time he reported "significant" exposure to asbestos. See JA 252. Respondent Ayers recalled actually mixing asbestos during the course of his decades of employment at an auto bodyshop. See JA 274-75; see also JA 205 (Spangler).

Respondents did not testify to any economic damages resulting from asbestos exposures. Nor did they testify to any severe impairment. Rather, each alleged only experiencing shortness of breath. See JA 294 (Shirley), 275-76 (Ayers), 253-54 (Butler), 114-15 (Vance), 353 (Spangler), 330 (Johnson).[7] In fact, respondents' medical expert testified that Butler and Vance were not precluded from taking part in any normal activities for men their age. See JA 219-20 (Vance), 238 (Butler), 186 (Butler's disease is "very mild"). Butler

[7] Notably, several respondents have medical conditions, altogether independent of asbestos-related disorders, that contribute to their impairments. Butler pointed to rheumatism and arthritis as additional causes of his shortness of breath, *see* JA 256; Shirley testified that he recently underwent heart surgery, JA 297, and had arthritis, JA 296; Spangler had emphysema, JA 427; and Vance had chronic bronchitis, JA 217. Testimony at trial also established that shortness of breath could be caused by obesity and heart problems, two conditions afflicting certain respondents in this case. *See* JA 448, 454.

continued to farm over one hundred acres, and Spangler testified that he continued to actively manage two dozen rental properties. See JA 358 (Spangler), 454 (Butler).

It was also contested whether any respondent suffered any emotional distress over the possibility of developing asbestos-related cancer. Respondents presented no objective evidence of a fear of cancer. While some testified to varying degrees of "concern" over developing the disease, JA 277 (Ayers), 298-99 (Shirley), 255 (Butler), 116-17 (Vance), others did not provide even this level of subjective testimony: Spangler did not testify to having any concern about cancer. Shirley testified that he was more concerned about shortness of breath than developing cancer. JA 298-99. When plaintiffs' counsel asked Johnson if he was worried about developing cancer, he replied, "No, sir. I just have to . . . " at which point he was cut short by his attorney. JA 332. None testified to any physical manifestation of emotional distress.

Because it was uncontroverted that respondents had neither cancer nor a reasonable likelihood of developing cancer, or any physical manifestation of emotional injury related to cancer that would be required to prevail on a claim of negligent infliction of emotional distress, N&W moved prior to trial to exclude all evidence regarding cancer as irrelevant and highly prejudicial. JA 52-53. The court denied the motion, Trial Tr. at 251 (Apr. 14, 1998), and respondents' expert testified in detail about the "very painful" nature of mesothelioma and its deadliness for workers and exposed family members. JA 154. The court later rejected N&W's proposed jury instruction that would have required jurors to find some physical manifestation of fear before awarding damages to respondents. JA 547-48. Instead, the court instructed the jury 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," and that damages may be awarded for emotional "pain and suffering" related to

physical injury without any requirement of objective corroboration. JA 573. Given the minimal physical harms suffered, during summation respondents' counsel repeatedly urged the jury to compensate them for their cancer fears. JA 576-77.

The jury returned a verdict in favor of the six respondents, awarding them $5,810,606 in the aggregate. The court had instructed the jury to assign a percentage of fault attributable to certain respondents' contributory negligence, see 45 U.S.C. § 53, and after verdict it entered judgments reflecting these reductions and settlement offsets. JA 590-613. The trial court denied without opinion N&W's new trial motion challenging, *inter alia*, respondents' entitlement to recover fear-of-cancer damages and the court's instruction on apportionment among causes. The West Virginia Supreme Court denied N&W's petition for review without comment. Pet. App. 1a-2a.

SUMMARY OF ARGUMENT

The judgments rendered below offend fundamental limitations on railroad liability under FELA. Both independently require a new trial.

1. The court below erroneously allowed respondents to recover for purported fear of cancer as pain-and-suffering damages arising from asbestosis. But this Court made clear in *Consolidated Rail Corp.* v. *Gottshall*, 512 U.S. 532 (1994), that pain-and-suffering damages are limited to emotional distress stemming directly from physical injury, and this Court held in *Buckley* v. *Metro-North Commuter Railroad*, 521 U.S. 424 (1997), that fear-of-cancer damages in the absence of cancer may be awarded (if at all) only if the requisites of the independent tort of negligent infliction of emotional distress are met.

Respondents are precluded from recovering such damages based solely on evidence of asbestosis. The standards

governing negligent-infliction claims under FELA are informed by the historical and evolving common law, which have always imposed two types of restrictions on recovery for emotional distress. First, the common law limited the class of plaintiffs eligible to bring such claims. Accordingly, this Court in *Gottshall* held that only plaintiffs who were in the zone of danger—who had either suffered a "physical impact" or had been at immediate risk thereof—could seek recovery, and ruled in *Buckley* that mere asbestos exposure did not qualify as a "physical impact."

This case implicates the second common-law restriction that was not at issue in either *Gottshall* or *Buckley* but that must be recognized under FELA: *viz.*, the requirement that plaintiffs prove severe emotional injury from trauma that is corroborated by physical manifestations of the emotional injury. Severe emotional injury is a baseline requirement for recovery, common to both intentional and negligent infliction of emotional distress, and is required in virtually every jurisdiction; moreover, it must be objectively reasonable for the plaintiff to have suffered severe emotional injury from the defendant's tortious conduct.

The compensable-injury requirement is fatal to respondents' claims for recovery. First, the common law has traditionally permitted negligent-infliction claims only from immediate trauma, and there is no warrant for extending this cause of action to knowledge-based fears generated by information about incremental statistical risk of cancer. Even if FELA were to allow recovery for knowledge-based distress, a plaintiff still could not recover if he was misinformed. The law would have to impose a duty on the plaintiff to assess his own personal risk based on current epidemiology, an unworkable rule given the incomprehensibility of epidemiology to the ordinary person; the uncertainty and flux in the scientific understanding of asbestos cancer risks; and the intrinsic complexity of translating any statistical data into personal risk.

Second, the most recent studies show that asbestos-related cancer risks are much smaller than previously thought, and may add little incremental risk except in occupations where exposures are particularly heavy. Especially when measured against the high background cancer risks every individual faces, and the special risks faced by long-term smokers (like most respondents), as a matter of law this is not the kind of information that reasonably causes severe emotional injury to the normally constituted person.

Moreover, FELA requires not only that emotional injury be severe, but also that the distress be physically manifest in bodily harm or illness. That was the rule at the time FELA was enacted and is the prevailing modern rule, and it serves the longstanding policies against feigned and trivial claims. Such a requirement is not obsolete, or inconsistent with, advances in the science of mental health. Medical evidence will generally be required to establish severe emotional injury, and the physical-manifestations requirement serves to prevent false diagnoses based on a plaintiff's subjective and self-serving testimony regarding recognized diagnostic criteria and on generous assessments by their experts.

2. The court below unlawfully instructed the jury not to consider non-railroad causes of respondents' asbestos-related injuries, and permitted recovery even though railroad exposure was concededly a "minimal" factor in certain respondents' injuries. The text of FELA expressly limits railroad liability to injury attributable to railroad employment, and does not make a railroad the lifetime insurer of a former employee's occupational risks. Moreover, contrary to the broad rule of joint and several liability imposed by the court below, the dominant common-law rule at the time of FELA's enactment was several liability with injuries apportioned among causes on any reasonable basis; indeed, plaintiffs could not recover if they could not apportion injury among successive causes. The common law accordingly developed rules to liberalize recovery, allowing any reasonable factor to

serve as a basis for apportionment, and those rules govern today. There is no question that asbestos-related diseases, which are dose-related, can be apportioned over different occupational exposures based on factors such as duration and intensity of exposure, which are consistent with the standards applied to toxic torts under the historical and evolving common law. The federal common law, too, has embraced apportionment by causation. Moreover, the majority of States have now expressly rejected the broad theory of joint and several liability that the court below adopted and that held sway for part of the past century, developing rules of apportionment even for indivisible injuries. Accordingly, this Court should adopt the rule that injuries and damages must be apportioned by causation whenever reasonably possible, in accord with the common-law tradition; and by principles of comparative responsibility when a defendant is a legal cause of all or part of an injury that is indivisible by causation.

ARGUMENT

I. RESPONDENTS CANNOT RECOVER FEAR-OF-CANCER DAMAGES.

Section 1 of FELA makes "[e]very common carrier by railroad . . . liable in damages to any person suffering injury while . . . employed" by the carrier if the "injury" results in whole or in part from carrier "negligence." 45 U.S.C. § 51. Absent an express statutory departure, the requisite elements of negligence and injury are determined by the common law "as established and applied in the federal courts." *Urie* v. *Thompson*, 337 U.S. 163, 174 (1949). In *Consolidated Rail Corp.* v. *Gottshall*, 512 U.S. 532 (1994), this Court held that the common-law tort of negligent infliction of emotional distress is actionable under Section 1 of FELA. See *id.* at 550. Because the statute is silent on recovery for such claims, common-law restrictions play a "vital role" in determining whether, or when, an employee can recover, *id.* at 544, 551;

FELA does not make employers "insurers of the emotional well being and mental health of their employees," *id.* at 554.

The common law long forbade recovery for emotional distress, *S. Express Co.* v. *Byers*, 240 U.S. 612, 615 (1916), out of concern that courts would be flooded with trivial or invalid claims and defendants would face infinite and unpredictable liability for remote consequences of their acts. W. Keeton et al., *Prosser and Keeton on the Law of Torts* § 54, at 360-61 (5th ed. 1984) ("*Prosser on Torts* (5th ed.)"); *Gottshall*, 512 U.S. at 545-46. One branch of the law developed to permit recovery for certain mental harms from intentional wrongs. See R. Pearson, *Liability to Bystanders for Negligently Inflicted Emotional Harm—A Comment on the Nature of Arbitrary Rules*, 34 U. Fla. L. Rev. 477, 485-86 (1982). For mere negligence, however, courts only granted damages for emotional distress caused by physical impact, what is now known as "pain and suffering," *id.* at 486: "'sensations stemming directly from a physical injury or condition.'" *Gottshall*, 512 U.S. at 544 (quoting Pearson, *supra*, at 485 n.45); see, *e.g.*, *Morse* v. *Auburn & Syracuse Ry.*, 10 Barb. 621 (N.Y. Gen. Term 1851).

Courts then gradually recognized "fright" (fear of immediate physical injury to oneself, see *Gottshall*, 512 U.S. at 556) as a distinct compensable harm, but only when it was concurrent with a physical impact. See *Mitchell* v. *Rochester Ry.*, 45 N.E. 354, 354 (N.Y. 1896); Pearson, *supra*, at 487 & n.62; see also *Gottshall*, 512 U.S. at 546-47 & n.6. A physical impact thus came to be required as a liability rule in actions for fright, rather than simply a factual predicate for recovery for pain and suffering. See Pearson, *supra*, at 487.

In time, most courts found the physical-impact rule to be highly arbitrary, realizing that "'a near miss may be as frightening as a direct hit.'" *Gottshall*, 512 U.S. at 547 (quoting Pearson, *supra*, at 488). Those courts began to allow recovery for emotional distress by "plaintiffs who sustain a physical impact as a result of a defendant's negligent conduct,

or who are placed in immediate risk of physical harm by that conduct." *Id.* at 547-48 (emphasis added). These disjunctives therefore became two alternative prongs of a single liability rule—the "zone-of-danger" test, which this Court in *Gottshall* adopted as the appropriate standard for FELA, eschewing a broader "bystander" standard. *Id.* at 554-57. In *Buckley* v. *Metro-North Commuter Railroad*, 521 U.S. 424, 429 (1997), this Court applied the first alternative prong of the zone-of-danger test, and held that mere asbestos exposure does not constitute a "physical impact" that could potentially lead to recovery for fear of future disease. *Id.* at 432.

A. Cancer Fears Are Not Compensable As Pain-And-Suffering From Asbestosis.

As an initial matter, the court below turned a blind eye to this Court's FELA jurisprudence and long-settled common-law distinctions in allowing recovery for negligent infliction of emotional distress as traditional "pain and suffering." The *Gottshall* Court could not have been clearer in declaring that "[t]he injury we contemplate when considering negligent infliction of emotional distress is mental or emotional injury *apart from* the tort law concepts of pain and suffering." 512 U.S. at 544 (citation omitted) (emphasis added).

> Although pain and suffering technically are mental harms, these terms traditionally have been used to describe sensations stemming directly from a physical injury or condition. The injury we deal with here is mental or emotional harm (such as fright or *anxiety*) that is caused by the negligence of another and that is *not directly* brought about by a physical injury . . . .

Id. (internal quotation marks and citations omitted) (emphasis added); *Hargis* v. *Knoxville Power Co.*, 94 S.E. 702, 703 (N.C. 1917) (pain and suffering damages are for "immediate and necessary consequences" of the harm).

Asbestosis and cancer are separate diseases, *supra* at 3, and although asbestosis and fear of cancer may arise from the

same prior asbestos exposure, fear of cancer is not a "sensation[] stemming directly" from the physical condition of asbestosis. *Gottshall*, 512 U.S. at 554. Thus, the court below only could have awarded damages for fear of cancer (if at all) as stand-alone negligently inflicted emotional distress, which is the framework in which *Buckley* addressed fear-of-cancer claims. 521 U.S. at 428-29; *accord Potter* v. *Firestone Tire & Rubber Co.*, 863 P.2d 795, 805, 807-08 (Cal. 1993) (pain-and-suffering damages are "parasitic damages" which compensate "a reasonable fear of a future harm *attributable to* the injury"; distinguishing nonparasitic damages for emotional distress from asbestos exposure recoverable under a negligent-infliction claim). This instructional error alone requires reversal of the entire judgment. *Fillippon* v. *Albion Vein Slate Co.*, 250 U.S. 76, 83 (1919). Regardless, the common-law restrictions on recovery for emotional injury that are consonant with the overarching purposes of FELA must be observed. See *Gottshall*, 512 U.S. at 557; *Jones* v. *CSX Transp.*, 287 F.3d 1341, 1348 (11th Cir. 2002); *Smith* v. *Union Pac. R.R.*, 236 F.3d 1168, 1171 (10th Cir. 2000).

B. The Court Should Adhere To The Common-Law Rule Requiring Physical Manifestations Of Severe Emotional Injury From Trauma.

In adopting the zone-of-danger test in *Gottshall*, this Court emphasized that the common law dealt with the "specter of unlimited and unpredictable liability," *Gottshall*, 512 U.S. at 557, not only by "plac[ing] substantial limitations on the class of plaintiffs that may recover" for emotional distress, but also "on the injuries that may be compensable," *id.* at 546.

"[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 n.13 (1987); see *id.* at 568-69 & nn.18 & 19. For intentional infliction of emotional distress, recovery is permitted only if (1) the defendant's intentional conduct is "extreme and outrageous," *Restatement (Second) of Torts* § 46(1) & cmt. d

(1977) ("*Restatement (Second)*"), and (2) the emotional injury is "severe." *Id.* § 46(1). Severity is an objective standard: "the law intervenes only where the distress inflicted is so severe that no reasonable man could be expected to endure it." *Id.* cmt. j. Such emotional injury is normally "accompanied or followed by shock, illness, or other bodily harm," though it is not an essential element of the tort in most States. *Id.* cmt. k; see also *id.* §§ 306, 312, 313.

The common law's reluctance to compensate emotional distress "has of course been more pronounced where the defendant's conduct is merely negligent." *Prosser on Torts* § 54, at 360 (5th ed.). As with intentional torts, "most courts hold that the plaintiff can recover only if a normally constituted person would suffer, and the plaintiff in fact suffered *severe* distress," and "[i]n addition" require plaintiffs to present objective evidence of physical manifestations of severe emotional injury, thus retaining a requirement that the courts had gradually found unnecessary for the intentional tort. D. Dobbs, *The Law of Torts* § 308, at 836-37 (2000) (emphasis added) (footnote omitted); *Prosser on Torts* § 12, at 57 (5th ed.).[8] The injuries that are cognizable must result from immediate trauma: *i.e.*, "the emotional disturbance must be the immediate result of the actor's negligent conduct," whether the fear is one of immediate harm or continued peril. *Restatement (Second)* § 436 cmt. c. Moreover, the physical-manifestations requirement is one of actual bodily harm or injury caused by the emotional disturbance. *Id.* § 436 & cmt. b. Mere transitory physical phenomena do not suffice for recovery; there must be "substantial bodily harm" as a result of the emotional injury, such as "long continued nausea" or "repeated hysterical attacks." *Id.* § 436A cmt. c.; see *Falzone* v. *Busch*, 214 A.2d 12, 17 (N.J. 1965) (no recovery "where

[8] *See* 1 J. Nates et al., *Damages in Tort Actions* § 5.03[2][e], at 5-87 (2002) ("*Damages in Tort Actions*"); *Bethards* v. *Shivvers, Inc.*, 355 N.W.2d 39, 44 (Iowa 1984) (distress must be so severe that a reasonable person could not be expected to endure it).

fright does not cause *substantial* bodily injury or sickness"); *Muchow* v. *Lindblad*, 435 N.W.2d 918, 921-22 (N.D. 1984). Summarizing the judicial rationale for the limitation on compensable injury, the Restatement explains that (1) emotional harms not manifest in physical injury are generally not serious enough to burden the courts; (2) without such a requirement, the "emotional disturbance may be too easily feigned, depending, as it must, [on] subjective testimony"; and (3) negligent actors are not so culpable as to "be required to make good a purely mental disturbance." *Restatement (Second)* § 436A cmt. b; see *Champion* v. *Gray*, 478 So. 2d 17, 20 (Fla. 1985) (rule necessary to "place some boundaries on the indefinable and unmeasurable psychic claims"); *Prosser on Torts* § 54, at 361 (5th ed.).

The physical-manifestations rule of the Second Restatement remains the prevailing rule in zone-of-danger and relative-bystander jurisdictions.[9] Most jurisdictions that do not

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[9] *See Hancock* v. *Northcutt*, 808 P.2d 251, 257-58 (Alaska 1991); *Villareal* v. *State*, 774 P.2d 213, 221 (Ariz. 1989); *Towns* v. *Anderson*, 579 P.2d 1163, 1164-65 (Colo. 1978) (en banc); *Mergenthaler* v. *Asbestos Corp. of Am.*, 480 A.2d 647, 651 (Del. 1984); *Champion*, 478 So. 2d at 20; *Czaplicki* v. *Gooding Joint Sch. Dist.*, 775 P.2d 640 (Idaho 1989); *Barnhill* v. *Davis*, 300 N.W.2d 104, 108 (Iowa 1981); *Anderson* v. *Sheffler*, 752 P.2d 667, 669 (Kan. 1988); *Beynon* v. *Montgomery Cablevision L.P.*, 718 A.2d 1161, 1163 (Md. 1998); *Sullivan* v. *Boston Gas Co.*, 605 N.E.2d 805, 810 (Mass. 1993); *Payton* v. *Abbott Labs.*, 437 N.E.2d 171, 181 (Mass. 1982); *Daley* v. *LaCroix*, 179 N.W.2d 390, 395 (Mich. 1970); *Leaon* v. *Wash. 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); *Falzone*, 214 A.2d at 17 (no recovery "where fright does not cause *substantial* bodily injury or sickness"); *Portee* v. *Jaffee*, 417 A.2d 521, 527-28 (N.J. 1980) (requiring "severe emotional distress" but not addressing *Falzone* requirement); *Muchow*, 435 N.W.2d at 922; *Ellington* v. *Coca Cola Bottling Co. of Tulsa, Inc.*, 717 P.2d 109, 111 (Okla. 1986) ; *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*, 624 N.W.2d 96 (S.D. 2001);

strictly require physical manifestations require some form of objective corroborating (usually medical) evidence.[10] Even among the remainder, almost no jurisdiction questions the requirement of "severe" emotional injury.[11]

Harnicher v. *Univ. of Utah Med. Ctr.*, 962 P.2d 67, 70-71 (Utah 1998); *Myseros* v. *Sissler*, 387 S.E.2d 463 (Va. 1990).

[10] *See Bass* v. *Nooney Co.*, 646 S.W.2d 765, 772-73 (Mo. 1983) (en banc); *Schleich* v. *Archbishop Bergan Mercy Hosp.*, 491 N.W.2d 307, 310-11 (Neb. 1992); *Prato* v. *Vigliotta*, 677 N.Y.S.2d 386, 388 (N.Y. App. Div. 1998) (cases involving exposure to toxic substances); *Johnson* v. *Ruark Obstetrics & Gynecology Assocs.*, 395 S.E.2d 85, 97 (N.C. 1990); *Camper* v. *Minor*, 915 S.W.2d 437, 446 (Tenn. 1996); *Brueckner* v. *Norwich Univ.*, 730 A.2d 1086, 1092 (Vt. 1999); *Hegel* v. *McMahon*, 960 P.2d 424, 431 (Wash. 1998) (en banc); *Courtney* v. *Courtney*, 437 S.E.2d 436, 440 (W. Va. 1993); *see also Taylor* v. *Baptist Med. Ctr., Inc.*, 400 So.2d 369, 374 (Ala. 1981); *Burgess* v. *Superior Court*, 831 P.2d 1197, 1205 (Cal. 1992); *Jones* v. *Howard Univ., Inc.*, 589 A.2d 419, 424 (D.C. 1991); *Leong* v. *Takasaki*, 520 P.2d 758, 767 (Haw. 1974); *Corgan* v. *Muehling*, 574 N.E. 2d 602, 609 (Ill. 1991); *Bovson* v. *Sanperi*, 461 N.E. 2d 843, 849 (N.Y. 1984); *Paugh* v. *Hanks*, 451 N.E.2d 759, 767 (Ohio 1983); *Adams* v. *U.S. Homecrafters, Inc.*, 744 So. 2d 736, 743 (Miss. 1999); *cf.* La. Civ. Code Ann. art. 2315.6(B).

[11] Dobbs, *supra*, § 308, at 836. *But see Gates* v. *Richardson*, 719 P.2d 193, 200 (Wyo. 1986). Regarding corroboration, certain jurisdictions appear to have no requirement, *see Folz* v. *State*, 797 P.2d 246, 260 (N.M. 1990); *Gates*, 719 P.2d at 200, and in others it is unclear, *Bowen* v. *Lumbermans Mut. Cas. Co.*, 517 N.W.2d 432, 442-43 (Wis. 1994) ("given the present state of medical science, emotional distress can be established by means other than proof of physical manifestation"; adopting *Restatement (Second)* § 46 severity test); *Gammon* v. *Osteopathic Hosp. of Maine, Inc.*, 534 A.2d 1282, 1284 (Me. 1987) (relying on "state of modern medical science"); *Sacco* v. *High Country Indep. Press*, 896 P.2d 411, 426 (Mont. 1995) (same); *Montinieri* v. *S. New Eng. Tel. Co.*, 398 A.2d 1180, 1183 (Conn. 1978); *Boyles* v. *Kerr*, 855 S.W.2d 593, 598 (Tex. 1993).

1. The Fundamental Requirement That A Plaintiff Demonstrate Severe Emotional Injury From Trauma Precludes Recovery For Fear Of Cancer As A Matter Of Law.

In *Gottshall* and *Buckley*, this Court addressed the first of the common-law limitations (on the class of eligible plaintiffs) on negligent-infliction claims, but it has not directly addressed the second major common-law restriction—on the types of emotional injuries that are compensable.[12] This Court should now rule that negligent-

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[12] *Jones*, 287 F.3d at 1346-47. Both *Gottshall* and *Buckley* indicate, however, that the purpose of the negligent-infliction tort is to compensate severe injury. For example, when the *Gottshall* Court first recognized an emotional-distress claim under FELA, it did so in part based on the express rationale that "'severe emotional injuries can be just as debilitating as physical injuries.'" 512 U.S. at 550; *see id.* at 563, 566-67 (Ginsburg, J., dissenting) (describing plaintiffs' emotional distress as "unquestionably genuine and severe"). 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; *see id.* at 435 (mere contacts with carcinogens should not lead to recovery because "[t]hey may occur without causing *serious* emotional distress") (emphasis added).

Nonetheless, neither case addressed the common-law physical-manifestations requirement. There was no cause to do so in *Gottshall* because the plaintiffs there indisputably had suffered severe and physically manifest emotional injuries corroborated by medical testimony. 512 U.S. at 536-39. In adopting the zone-of-danger test, the Court rejected the claim that "testing for the 'genuineness' of an injury *alone* can[] appreciably diminish the possibility of infinite liability," *id.* at 552, but it did not disturb the common-law rules requiring both severe emotional distress and corroborating physical manifestations. To the contrary, 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." *Id.* at 549 n.11. In *Buckley*, the Court did not address the common-law restriction on compensable injury because it found that the plaintiffs there did not satisfy the zone-of-danger test. *See* 521 U.S. at 430. Notably, however, the Justices who found that test satisfied nonetheless concurred in the dismissal as a matter of law because "Buckley did not present

infliction claims may only be brought if the plaintiff proves severe emotional injury from immediate trauma that is corroborated by physical manifestations. Here, respondents presented no evidence of physical manifestations of emotional injury, but more fundamentally, the restriction on recovery to cases of reasonably suffered severe emotional injury from immediate trauma precludes any recovery for fear of cancer.[13]

To allow claims for emotional distress based on after-acquired knowledge of an incremental risk of future cancer would be an unwarranted expansion of the narrow tort recognized in *Gottshall*. *Buckley*, 521 U.S. at 430. Recovery for negligently inflicted emotional distress evolved at common law, as an exception to the general prohibition on recovery, in cases involving actual or threatened "*immediate traumatic* harm." *Id.* at 430-31 (emphasis added) (citing cases).[14] "Subsequent brooding over the actor's misconduct or the danger in which it had put the [plaintiff] is not enough . . . ." *Restatement (Second)* § 436 cmt. c; see *id.* § 436(2). Even courts applying the more liberal bystander rule today refuse to expand this tort to cover knowledge-

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objective evidence of severe emotional distress." *Id.* at 445 (Ginsburg, J., concurring in part and dissenting in part).

[13] *Buckley* only decided that an exposed employee who lacked any symptoms of asbestos-related disease had no cause of action for emotional distress. *See* 521 U.S. at 426-27. It did not decide that asbestosis, or any specific asbestos-related disease, would in fact qualify a plaintiff for recovery under the zone-of-danger test, because those facts were not presented. See American Ins. Association ("AIA") Br. 7-8; Association of American Railroads ("AAR") Br. 3-4.

[14] *See also Restatement (Second)* § 436 cmt. c ("the emotional disturbance must be the immediate result of the actor's negligent conduct"); J. Henderson & A. Twerski, *Asbestos Litigation Gone Mad: Exposure-Based Recovery for Increased Risk, Mental Distress, and Medical Monitoring*, 59 S.C. L. Rev. (forthcoming 2002) (Lodged Copy at L23) (negligent-infliction tort "is quite limited in scope" and allows "recovery for serious and immediate emotional distress arising from conduct that was either violent or traumatic in nature").

based claims, even of information far more devastating than incremental epidemiological risk of future disease.[15]

Moreover, if knowledge-based fears were actionable, the law would not allow recovery by one who simply was misinformed. A plaintiff claiming knowledge-based fears would have some duty to understand his incremental risk based on current epidemiology[16]—an unworkable rule given its incomprehensibility to the layperson, the uncertainty and flux in scientific understanding of cancer risks from asbestos, and the intrinsic complexity of translating any statistical data into personal risk. See *Buckley*, 521 U.S. at 435 (recognizing data is "controversial and uncertain" and the problem that "those exposed" are not "experts in statistics").

The epidemiological data on asbestos and lung cancer is uncertain for various reasons, but principally because of the varying results across different occupational cohorts and the difficulties in disaggregating the effects of smoking, the leading cause of lung cancer. See M. Goodman et al., *Cancer*

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[15] *Thing* v. *La Chusa*, 771 P.2d 814, 829-30 (Cal. 1989) (requiring plaintiff to be present for the accident and "then aware that it is causing injury," in contrast to later "learning about the injurious consequences"); *Frame* v. *Kothari*, 560 A.2d 675, 678 (N.J. 1989) (injury witnessed by bystander "must be one that is susceptible to immediate sensory perception, and the plaintiff must witness the victim when the injury is inflicted or immediately thereafter"); *see also* La. Civ. Code Ann. art. 2315.6; *Asaro v. Cardinal Glennon Mem'l Hosp.*, 799 S.W.2d 595, 599-600 (Mo. 1990); *Culbert* v. *Sampson's Supermarkets, Inc.*, 444 A.2d 433, 438 (Me. 1982); *Hair* v. *County of Monterey*, 45 Cal. App. 3d 538, 543-44 (1975) (denying parent recovery where child became blind, brain damaged, and quadriplegic following negligent oral surgery; damages "flow[ing] from knowledge of unobserved tort" not compensable); *Jansen* v. *Children's Hosp. Med. Ctr.*, 31 Cal. App. 3d 22, 24 (1973) (distress from learning of the accident from others after its occurrence insufficient).

[16] *See In re Haw. Fed. Asbestos Cases*, 734 F. Supp. 1563, 1570 (D. Haw. 1990) ("A reasonable person, exercising due diligence, should know that of those exposed to asbestos, only a small percentage suffer from asbestos-related physical impairment and that of the impairment group fewer still eventually develop lung cancer.").

in Asbestos-Exposed Occupational Cohorts: A Meta-Analysis, 10 Cancer Causes & Control 453, 461 (1999); Kevin Brown, Letter, *The Quantitative Risks of Mesothelioma and Lung Cancer In Relation To Asbestos Exposure*, 45 Ann. Occ. Hyg. 327, 328 (2001).

The lifetime probability of a nonsmoker developing lung cancer is estimated to be around one percent, but smokers, although their risks vary with the intensity and duration of their smoking, on average have a 23-fold increase in lung cancer risk over nonsmokers, and ex-smokers a nine-fold increase.[17] Thus, some smokers have a lifetime lung-cancer risk of about 20%. Studies of asbestos risk confront the problem that 95% of asbestos-exposed workers who developed lung cancer were smokers. See F.D.K. Liddell, *The Interaction of Asbestos and Smoking in Lung Cancer*, 45 Ann. Occ. Hyg. 341, 350 tbl.3 (2001) (compiling data from studies covering nearly five decades). Certain early studies of very heavily exposed, long-term insulation workers suggested a five-fold asbestos risk that was multiplicative of smoking risk. See, *e.g.*, E.C. Hammond et al., *Asbestos Exposure, Cigarette Smoking and Death Rates*, 330 Ann. N.Y. Acad. Sci., 473, 487 tbl.8 (1979). Those results have not been supported for other kinds of workers in more recent comprehensive studies covering nearly 50 cohorts of workers in various occupations—all involving prolonged exposures far greater than the sporadic exposures to which respondents testified. Studies of nearly 40 cohorts showed less than a two-fold increase in lung cancer risk, with an average increase of only a factor of 1.65, and *no* excess risk among

[17] *See* Nat'l Cancer Inst. ("NCI"), *Changes in Cigarette-Related Disease Risks and Their Implication for Prevention and Control* xi tbl.1 (Smoking & Tobacco Control Monograph No. 8, 1997); Surgeon General, U.S. Dep't of Health & Human Servs., *Reducing the Health Consequences of Smoking: 25 Years of Progress*, 150 tbl.6 (1989).

asbestos-exposed railroad workers.[18] Moreover, risks vary significantly with fiber type and cessation of exposure (suggesting many living workers face risks much less than their forebears).[19] Moreover, recent peer-reviewed studies merging data from larger cohorts of exposed workers indicate that the combined effect of asbestos exposure and smoking may be less than multiplicative, and perhaps closer to additive.[20] FELA should not grant juries free rein to make inherently subjective awards of damages for emotional distress on the basis of the manipulable diagnoses of asbestosis, and the claimed emotional reaction of the plaintiff

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[18] The standard mortality ratio across all studies (meta-SMR) was 165 (expected mortality=100); the SMR was greater than 200 in only 10 of the 47 cohorts studied. R.W. Morgan, *Attitudes About Asbestos and Lung Cancer*, 22 Am. J. Indus. Med. 437, 438 tbl.I (1992); Goodman et al., *supra*, at 458 tbl.2, 459 tbl.3 (update calculating meta-SMR of 163, and tabulating SMRs of railway repair workers as under 100); G. Howe et al., *Cancer Mortality (1965-77) in Relation to Diesel Fume and Coal Exposure in a Cohort of Retired Railway Workers*, 70 JNCI 1015, 1017 tbl.3 (1983).

[19] There is accumulating evidence that certain asbestos fibers are less hazardous and less likely to induce lung cancer and mesothelioma than others. *See* Morgan & Seaton, *supra*, at 346-47 (citing J.M. Hughes, *Epidemiology of Lung Cancer in Relation to Asbestos Exposure*, *in Mineral Fibres and Health* 136 (F.D.K. Liddell & K. Miller eds., 1991)). *See id.* at 347 (noting that "[for] workers exposed primarily to chrysotile [fibers], regardless of the type of occupational exposure, the lung cancer risk was 25% or less above background rates"; mesothelioma is associated primarily with crocidolite fibers). Moreover, evidence suggests the risk of lung cancer is increased only in those with moderate to severe asbestosis. *Id*. at 148.

[20] *See* F.D.K. Liddell & B.G. Armstrong, *The Combination of Effects on Lung Cancer of Cigarette Smoking and Exposure in Quebec Chrysotile Miners and Millers*, 46 Ann. Occ. Hyg. 5 (2002). *See generally* T. Erren et al., *Synergy Between Asbestos and Smoking on Lung Cancer Risks*, 10 Epidemiology 405 (1999). If risks are additive, a 3% risk from asbestos and a 20% risk from smoking yield a 23% combined risk of lung cancer, rather than the 60% risk of a multiplicative model.

to whatever risks of cancer are reported to him (often by a lawyer in search of a client).

In any event, as a matter of law any injury generated by reasonable knowledge of asbestos-related risks could not meet the objective severity test of the common law. A nonsmoker, like Respondent Shirley, has a total lung cancer risk of at most a few percent. JA 214. Smokers have higher absolute risk, with the weight of evidence suggesting a small additional increase from asbestos, with only long-term, exceptionally heavy asbestos exposure (not the situation for respondents) increasing risk more. Mesothelioma risks, which do not vary with smoking but do vary with fiber type, are also small. Among some heavily-exposed occupational groups (again not the case here), mesothelioma has accounted for up to ten percent of deaths, but in the large majority of studies of asbestos workers less than two percent, and usually less than one percent, of deaths have been due to this cancer. See Goodman et al., *supra*, at 456-57 tbl.I. Moreover, these disease-specific risks must be put into further perspective. The average American male has a 44% lifetime chance of contracting—and a 24% chance of dying from—some form of cancer (not including skin cancer)[21]; see also *Buckley*, 521 U.S. at 435. Smokers, because smoking causes seven other cancers, debilitating and fatal respiratory diseases, and cardiovascular and other diseases, have a 50% chance of dying from a *smoking*-caused disease. See NCI, *supra*, at xi tbl.1. Against this background, the small incremental risk from asbestos exposure simply is not enough reasonably to cause a normal person to suffer immediate emotional distress of the severe character long required by the common law.

Cancer is a frightful disease, but jury awards for fear of cancer that are based solely on perceived statistical risks

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[21] *See* L.A.G. Ries et al., NCI, *SEER Cancer Statistics Review, 1973-1999*, at I-15, I-16 (2002), *available at* http://seer.cancer.gov/csr/1973_1999.

augur liability without rational limit. Asbestosis and cancer are separate diseases that are separately actionable, and the rule should be that a plaintiff who can prove work-related cancer should recover for not only that injury but all related mental anguish as pain and suffering. See AIA Br. 5-7; AAR Br. 5-8; *Simmons* v. *Pacor*, 674 A.2d 232, 239 (Pa. 1996). The recovery respondents seek has no viable basis in law.

2. Permitting The Jury To Award Damages For Emotional Distress Uncorroborated By Objective Physical Manifestations Was Error.

This Court should adhere to the well-founded common-law rule requiring corroborating physical manifestations of negligently inflicted emotional distress. The Court suggested in *Buell* a significant distinction between FELA claims for "pure emotional injury" and those involving "physical symptoms in addition to . . . severe psychological illness." 480 U.S. at 570 n.22. And the *Gottshall* Court noted that many zone-of-danger and bystander jurisdictions additionally require physical manifestation of emotional distress, 512 U.S. at 549 n.11; *id.* at 564 (Ginsburg, J., dissenting), as does the Second Restatement.

The only court of appeals to address this issue under FELA recently held, after thorough review, that plaintiffs are "required to make a showing of objective manifestations of their emotional distress to recover for that distress under the FELA." *Jones*, 287 F.3d at 1345; see *id.* at 1349 (noting *Gottshall* Court's concern particularly with "'unpredictable and nearly infinite liability'"); see also *Martinez* v. *Bally's La., Inc.*, 244 F.3d 474, 477-78 (5th Cir. 2001) (Jones Act); *Adkins* v. *Seaboard Sys. R.R.*, 821 F.2d 340, 342 (6th Cir. 1987) (same).

As noted above, the physical-manifestations requirement remains the prevailing rule.[22] The Second Restatement is in accord. *Restatement (Second)* § 436A & cmt. a; *id.* cmt. c (requiring "substantial bodily harm"); see *Gottshall*, 512 U.S. at 564 (Ginsburg, J., dissenting); *Jones*, 287 F.3d at 1347. And the clear weight of authority among the federal courts in FELA, Jones Act, and general maritime cases requires a showing of objective physical manifestations.[23]

A review of the common law at the time of FELA's enactment confirms this rule.[24] See *Gottshall*, 512 U.S. at 554-55 (analyzing common law of 1908 in determining FELA

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[22] *See supra* note 9; *Jones*, 287 F.3d at 1348-49 (citing cases); *Prosser on Torts* § 54, at 364 & n.55 (5th ed.) (citing cases) ("the great majority of courts" require "that the mental distress be certified by some physical injury, illness or other objective physical manifestation"); D. Marlowe, Comment, *Negligent Infliction of Mental Distress: A Jurisdictional Survey of Existing Limitation Devices and Proposal Based on an Analysis of Objective Versus Subjective Indices of Distress*, 33 Vill. L. Rev. 781, 796-98 & n.91, 808 & n.146 (1988).

[23] *See, e.g.*, *Williams* v. *Carnival Cruise Lines, Inc.*, 907 F. Supp. 403, 406-07 (S.D. Fla. 1995); *Nelsen* v. *Research Corp.*, 805 F. Supp. 837, 849 (D. Haw. 1992); *Puthe* v. *Exxon Shipping Co.*, 802 F. Supp. 819, 828 (E.D.N.Y. 1992), *aff'd*, 2 F.3d 480 (2d Cir. 1993); *Masiello* v. *Metro-North Commuter R.R.*, 748 F. Supp. 199, 205 (S.D.N.Y. 1990); *Elliott* v. *Norfolk & W. Ry.*, 722 F. Supp. 1376, 1377-78 (S.D.W. Va. 1989), *aff'd on other grounds*, 910 F.2d 1224 (4th Cir. 1990); *Teague* v. *Nat'l R.R. Passenger Corp.*, 708 F. Supp. 1344, 1350 (D. Mass. 1989); *Halko* v. *N.J. Transit Rail Operations, Inc.*, 677 F. Supp. 135, 139 (S.D.N.Y. 1987).

[24] All the early cases cited in *Gottshall* to support recognition of a negligent-infliction claim, *see* 512 U.S. at 547 n.8, upheld the physical-manifestations requirement. *See Gulf, Colo. & Santa Fe Ry.* v. *Hayter*, 54 S.W. 944, 945 (Tex. 1900); *Mack* v. *South-Bound R.R.*, 29 S.E. 905, 908, 910 (S.C. 1898); *Kimberly* v. *Howland*, 55 S.E. 778, 780-81 (N.C. 1906), *overruled on other grounds*, *Johnson* v. *Ruark Obstetrics & Gynecology Assocs.*, 395 S.E.2d 85 (N.C. 1990); *Pankopf* v. *Hunkley*, 123 N.W. 625, 626-27 (Wis. 1909); *Purcell* v. *St. Paul City Ry.*, 50 N.W. 1034, 1035 (Minn. 1892); *Simone* v. *R.I. Co.*, 66 A. 202, 203-04 (R.I. 1907); *Stewart* v. *Ark. S. R.R.*, 36 So. 676, 677 (La. 1904); *Watson* v. *Dilts*, 89 N.W. 1068, 1068-69 (Iowa 1902).

rule). Most zone-of-danger courts at that time allowed recovery only for the physical injuries plaintiffs suffered as a consequence of their emotional distress, not for the intermediate emotional distress itself. See, *e.g.*, *Watson* v. *Dilts*, 89 N.W. 1068, 1069-70 (Iowa 1902) (allowing recovery for "physical injuries resulting from . . . fright"); *Mack* v. *South-Bound R.R.*, 29 S.E. 905, 908 (S.C. 1895); *Pankopf* v. *Hunkley*, 123 N.W. 625, 627 (Wis. 1909); *Simone* v. *R.I. Co.*, 66 A. 202, 204-05, 209 (R.I. 1907). Courts gradually liberalized as they came to grips with the potential inconsistency in allowing recovery for physical injuries caused by fright or anxiety, but not the fright or anxiety itself. See *Chiuchiolo* v. *New Eng. Wholesale Tailors*, 150 A. 540, 543 (N.H. 1930). Even then "[a]ll the courts agree[d] that mere fright, unaccompanied or followed by physical injury, [could not] be considered as an element of damage." *Kimberly* v. *Howland*, 55 S.E. 778, 780 (N.C. 1906), *overruled on other grounds*, *Johnson* v. *Ruark Obstetrics & Gynecology Assocs.*, 395 S.E.2d 85 (N.C. 1990); see C. McCormick, *Handbook on the Law of Damages* § 89(b) (1935). It would be curious indeed to ascribe to Congress an intent in 1908 not to require physical manifestations, when most of the courts that allowed recovery at all limited recovery strictly to the resulting physical harms themselves. Thus, allowing recovery in 1908 for intermediate fright if it caused actual physical injury was the then-liberal rule. Cf. *Gottshall*, 512 U.S. at 555 (adopting zone-of-danger test in part due to status as liberal rule in 1908). Because the physical-manifestations requirement was the clear majority rule both at the time of FELA's enactment and today, it should apply universally to all FELA claims.

Finally, the same common-law policy reasons that weighed against the broadest eligibility test in *Gottshall*, and against an expansive definition of "physical impact" in *Buckley*, weigh as heavily against abandonment of the physical-manifestations rule here. See *Buckley*, 521 U.S. at 436.

First, the physical-manifestations requirement helps courts avoid the "'fantastic realm of infinite liability'" for emotional injury. *Gottshall*, 512 U.S. at 563 (Ginsburg, J., dissenting). There is no effective constraint on juries in determining the amount of damages to award for mental distress. The Court in *Gottshall* considered the common-law "fear of unlimited liability[] to be well founded." *Id.* at 557; see *id.* at 546 (deeming possibility "very real"). "Every injury has ramifying consequences, like the ripplings of the waters, without end," and thus "[t]he problem for the law is to limit the legal consequences of wrongs to a controllable degree." *Id.* at 553 (internal quotation marks omitted). Although the zone-of-danger test provides some measure of security, the common law always has mitigated this policy concern by "plac[ing] substantial limitations on the class of plaintiffs . . . *and on the injuries that may be compensable*." *Id.* at 546 (emphasis added). Accordingly, the categorical physical-manifestations requirement appreciably diminishes the possibility that compensation for emotional distress would cost society unreasonably more than it would benefit. See *Buckley*, 521 U.S. at 438; *Jones*, 287 F.3d at 1349.

Second, the physical-manifestations requirement aids judges and juries in making what are "'highly subjective determinations'" in weeding out invalid and trivial claims. The *Buckley* Court considered the facts of that case to illustrate the "serious" "evaluation" problem presented by these claims. 521 U.S. at 433-35. The Second Circuit in *Buckley* found objective confirmation of severe emotional distress in evidence of complaints to supervisors and investigative bodies. See *id.* at 433. This Court, however, considered such evidence "only indirectly related to the question at issue, the *existence and seriousness* of Buckley's claimed emotional distress." *Id.* at 433-34 (emphasis added); see *id.* at 445 (Ginsburg, J., concurring in part and dissenting in part). Evidence of physical manifestations, by contrast, *is* directly related to that question. *Prosser on Torts* § 54, at

360-61 (5th ed.); see *Gottshall*, 512 U.S. at 571 (Ginsburg, J., dissenting) (suggesting "'objective medical proof'" as a possible filter). Moreover, adherence to the physical-manifestations requirement is consistent with *Buckley*'s preference for rules reflecting the courts' general policy of discouraging standardless case-by-case inquiry. See 521 U.S. at 436.

Third, the physical-manifestations requirement helps to stem the ever rising tide of trivial or comparatively less important emotional-distress claims. See *Jones*, 287 F.3d at 1349. The Court in *Buckley* asked, "[i]n a world of limited resources, would a rule permitting immediate large-scale recoveries for wide-spread 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 435-46. The collective financial risks of railroads from asbestos (and other occupational exposure) liability are breathtaking if the patterns of multimillion-dollar judgments for healthy plaintiffs continues unabated. See *id.* at 438 (courts construing FELA "must consider the general impact, on workers as well as employers, of the general liability rules they would thereby create"); *supra* at 5-6. As this case vividly illustrates, allowing otherwise unrestricted recovery by those who arguably develop asbestosis (or another benign disease), provides no protection for railroads (nor future claimants) from trivial claims. Coalition for Asbestos Justice Br. 3-4; Chamber of Commerce Br. 4-10.

The Eleventh Circuit aptly stated that although "the objective manifestation requirement has been subject to criticism and . . . has been rejected by some courts,"[25] "the

[25] The physical-manifestations requirement is not inconsistent with advances in medical science on mental health. *Restatement (Second)* 436A cmt. c. A physical-manifestations requirement does not obviate the need for medical testimony; indeed, it is difficult to conceive how any plaintiff could recover for objectively "severe" emotional injury without demonstrating a recognized mental illness or disorder. *See, e.g.*, *Bass*, 646 S.W.2d at 772-73 (plaintiff must show that the disease "is severe enough

large number of jurisdictions that require some type of objective or verifiable evidence of plaintiff's emotional injury convinces us that the requirement continues to be an appropriate limitation on the recovery for such injury." *Jones*, 287 F.3d at 1349. In short, the physical-manifestations requirement best reconciles the remedial purposes of FELA and the substantial concerns of the common law regarding unlimited and unpredictable recovery for emotional harm.

Respondents made no showing of substantial bodily harm or illness arising from their claimed emotional distress. See *supra*, at 8-9. Indeed, plaintiffs put on no objective evidence (much less medical evidence) of their alleged distress, resting instead on subjective assertions made in their own self-serving testimony. Moreover, as a matter of law there is no evidence of severe emotional injury suffered by any respondent, and thus their claims would fail under any standard this Court may adopt. Accordingly, this Court should vacate the judgments below.

II. FELA REQUIRES THAT DAMAGES BE APPORTIONED WHENEVER APPORTIONMENT IS REASONABLY POSSIBLE.

The court below instructed the jury that it could not apportion respondents' injuries among contributing causes, including exposures to asbestos and other occupational dusts that occurred outside railroad employment. JA 570. The result was that petitioner was held jointly and severally liable for the entirety of respondents' damages (save for the percentage attributable to their negligence) even though the railroad exposure was only one of multiple, successive causes, and was concededly a minimal cause of injury for certain respondents. This was error. The language and history of FELA

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to be medically significant"). Moreover, many (if not all) psychiatric disorders are manifest by physical symptoms. *See* N. Bagdasarian, *A Prescription for Mental Distress: The Principles of Psychosomatic Medicine with the Physical Manifestations Requirement in N.I.E.D. Cases*, 26 Am. J. L. & Med. 402, 420-22 (2000).

require damages to be apportioned among contributing causes so that, simply put, the railroad is only held liable for the injury that it causes. Apportionment was the common-law rule at the time of FELA's enactment; indeed, given the dominant rule of several liability, where an injury was caused by successive independent causes, as here, a defendant could not be held liable unless the plaintiff proved the defendant's causal contribution to his injury. The evolving common law (including federal law) retains the traditional strong preference of the common law for apportionment by cause on any reasonable basis. Moreover, most States have abolished pure joint and several liability when a defendant is a legal cause of all or part of an injury that is indivisible by cause, and apportion damages based on principles of comparative responsibility. Such apportionment rules should govern under FELA.

A. The Text And History Of FELA Support Apportionment.

The interpretation of FELA begins with the language and history of the statute. See *Gottshall*, 512 U.S. at 541. Section 1 provides that "[e]very common carrier by railroad . . . shall be liable in damages to any person suffering injury *while he is employed by such carrier*." 45 U.S.C. § 51 (emphasis added). This provision makes clear that railroads are not liable for employee injuries that result from outside causes. Accordingly, if a railroad is to be held liable for occupational diseases that result from multiple causes, Section 1 requires that railroad and non-railroad causes be separated, and that the railroad be held liable for only the portion of the injury caused by its negligence. See *Urie*, 337 U.S. at 181 (statute limits compensable injury to those "suffered by any employee *while employed* by reason of the carrier's negligence") (emphasis added).[26]

[26] Indeed, the structure and common law background of FELA suggest an overall congressional purpose to apportion liability. The statute replaced contributory negligence with comparative negligence, *see* 45 U.S.C. § 53; abolished the absolute bar of the fellow servant rule, *see id.*

This construction of Section 1 is confirmed by FELA's history, which demonstrates that the statute was intended to hold railroads liable only for the injuries that they cause: "Cognizant of the physical dangers of railroading that resulted in the death or maiming of thousands of workers every year, Congress crafted a federal remedy [in FELA] that shifted part of the human overhead of doing business from employees to their employers." *Gottshall*, 512 U.S. at 542 (internal quotation marks omitted). Thus, FELA supplanted the traditional common-law duty of the master to the servant, which did not extend to protection from the torts of fellow servants, "with the far more drastic duty of paying damages for injury or death *at work* due in whole or in part from the employer's negligence." *Rogers* v. *Mo. Pac. R.R.*, 352 U.S. 500, 507 (1957) (emphasis added).

Although FELA did away with the master-servant rule, it did not replace it with a workers' compensation scheme or "make the railroad the insurer for all employee injuries." *Buckley*, 521 U.S. at 429. Yet the rule adopted below would do just that, rendering railroads liable for all damages suffered by an employee, no matter how short the period of employment or how slight the railroad's contribution to the injury. The case of Respondent Butler illustrates the inequity of such a rule. Butler worked at N&W for less than three years, and testified that he was unaware of any asbestos exposure during that time, although he *might* have been exposed during one

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§ 51; and left in place the common law preference for several liability, *see infra* Section II.B; *Astoria Fed. Sav. & Loan Ass'n* v. *Solimino*, 501 U.S. 104, 108 (1991) (Congress is presumed not to abrogate the common law unless it does so expressly). Taken together, these doctrines demonstrate that Congress intended to create a statutory scheme that holds tortfeasors liable only for the harm caused by each. *See Dale* v. *Baltimore & Ohio R.R.*, 552 A.2d 1037, 1041 (Pa. 1989) ("[I]t is implicit in the statutory scheme that liability attaches to a negligent act only to the degree that the negligent act caused the employee's injury, and thus that an employer is financially responsible only for those damages which it has caused."); Coalition for Asbestos Justice Br. 25-27.

brief three-month period. JA 250-51. In contrast, Butler later worked for 33 years as a pipefitter for other employers, and testified that he experienced "significant" asbestos exposure at those workplaces. JA 257-59; see also JA 274-75 (testimony of Freeman Ayers that he last worked for N&W in 1962, and subsequently worked in automotive maintenance with frequent direct exposure to asbestos). Even so, N&W was held liable for the entirety of Butler's damages, despite its conceded "minimal" contribution to his injury, JA 236-37, and the ready availability of a basis for apportioning damages. In designing a statute that permits an employee to recover for accidental injuries sustained at work, Congress did not intend such far-reaching liability.

Indeed, the federal courts have widely recognized the propriety of apportionment in the common circumstance of preexisting conditions. See, *e.g.*, *Varhol* v. *Nat'l R.R. Passenger Corp.*, 909 F.2d 1557, 1565 (7th Cir. 1990); *Akers* v. *Norfolk & W. Ry.*, 417 F.2d 632, 632 (4th Cir. 1969); *Gustafson* v. *Burlington N. R.R.*, 561 N.W.2d 212, 219-20 (Neb. 1997); AAR Br. 21-23; *cf. Restatement (Second)* § 433A cmt. a at 435 (discussing preexisting conditions as one basis for apportionment). Even when there is no clear basis for measuring the aggravation of injury, these courts have embraced the common law rule, see *infra* at 37-38 & note 31; *id.* at 41, that apportionment need not be exact: "The extent to which an injury is attributable to a preexisting condition or prior accident need not be proved with mathematical precision or great exactitude. The evidence need only be sufficient to permit rough practical apportionment." *Sauer* v. *Burlington N. R.R.*, 106 F.3d 1490, 1494 (10th Cir. 1996).

B. FELA Incorporates The Common-Law Preference For Apportionment That Prevailed At The Time Of Its Enactment.

This interpretation of FELA's plain language is bolstered by the fact that, at the time FELA was enacted, courts regularly apportioned damages among contributing causes.

As this Court has repeatedly stated, common-law practices in 1908 are persuasive evidence of FELA's meaning. *Gottshall*, 512 U.S. at 554; *Monessen S.W. Ry.* v. *Morgan*, 486 U.S. 330, 337-38 (1988). And, at the time of FELA's enactment, the common-law rule was clear: "[A]cts of independent tort-feasors, each of which causes some damage, may not be combined to create a joint liability at law for damages."[27] Several liability was not only the general rule, but the overwhelming rule.[28] In contrast, joint liability was imposed

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[27] Annotation, 9 A.L.R. 939, 942 (1920); 38 *Cyclopedia of Law & Procedure* 484-85 (William Mack ed., 1911) ("*Cyc*."); T. Cooley, *A Treatise on the Law of Torts* § 314, at 623 (John Lewis ed., 1907).

[28] *See, e.g.*, *Sloggy* v. *Dilworth*, 36 N.W. 451, 453 (Minn. 1888) ("If the damage caused is the combined result of several acting independently, recovery may be had severally in proportion to the contribution of each to the nuisance, and not otherwise."); *see also Jones* v. *Tenn. Coal, Iron & R.R.*, 80 So. 463, 465 (Ala. 1918); *Ralston* v. *United Verde Copper Co.*, 37 F.2d 180, 184 (D. Ariz. 1929), *aff'd*, 46 F.2d 1 (9th Cir. 1931); *Le Laurin* v. *Murray*, 87 S.W. 131, 133 (Ark. 1905); *Miller* v. *Highland Ditch Co.*, 25 P. 550, 551 (Cal. 1891); *Livesay* v. *First Nat'l Bank*, 86 P. 102, 104-05 (Colo. 1906); *Gulf, Colo. & Santa Fe Ry.* v. *Cities Serv. Co.*, 273 F. 946, 950-51 (D. Del. 1921); *Standard Phosphate Co.* v. *Lunn*, 63 So. 429, 432 (Fla. 1913); *Schneider* v. *City Council*, 45 S.E. 459, 460 (Ga. 1903); *Woodland* v. *Portneuf-Marsh Valley Irrigation Co.*, 146 P. 1106, 1106-07 (Idaho 1915); *Chi. & Alton R.R.* v. *Glenney*, 9 N.E. 203, 204-05 (Ill. 1886); *Louisville, New Albany & Chi. Ry. v. Jones*, 9 N.E. 476, 485-86 (Ind. 1886); *Anderson* v. *Halverson*, 101 N.W. 781, 781-82 (Iowa 1904); *Powers* v. *Kindt*, 13 Kan. 74 (1874), *available at* 1874 WL 690, at *2 (1874); *Polk* v. *Ill. Cent. R.R.*, 195 S.W. 129, 130-31 (Ky. 1917); *Middlesex Co.* v. *City of Lowell*, 21 N.E. 872, 873 (Mass. 1889) (Holmes, J.); *Albrecht* v. *St. Hedwig's Roman Catholic Benevolent Soc'y*, 171 N.W. 461, 462 (Mich. 1919); *King* v. *Ruth*, 101 So. 500, 500 (Miss. 1924); *Sherwood* v. *St. Louis S.W. Ry.*, 187 S.W. 260, 263 (Mo. Ct. App. 1916); *Watson* v. *Colusa-Parrot Mining & Smelting Co.*, 79 P. 14, 15 (Mont. 1905); *Brown* v. *Chi., Burlington & Quincy R.R.*, 195 F. 1007, 1011-12 (D. Neb. 1912); *McLeod* v. *Miller & Lux*, 167 P. 27, 55-56 (Nev. 1917); *State* v. *Wood*, 35 A. 654, 654 (N.J. 1896); *Wood* v. *Snider*, 79 N.E. 858, 861 (N.Y. 1907); *Long* v. *Swindell*, 77 N.C. 176, 183-85 (1877); *Boulger* v. *N. Pac. Ry.*, 171 N.W. 632, 634 (N.D. 1918); *City of Mansfield* v. *Brister*, 81 N.E. 631, 633-35 (Ohio 1907); *Pac. Livestock Co.* v. *Murray*,

only in limited circumstances—none of which is present here—such as when tortfeasors acted in concert or with unity of purpose.[29]

Courts apportioned damages in a variety of circumstances. Damages were apportioned among tortfeasors, see *supra* notes 27-28; between wrongful conduct and market forces, see *Boesch* v. *Graff*, 133 U.S. 697, 706 (1890); between tortious and natural causes, *e.g.*, *Standley* v. *Atchison, Topeka & Santa Fe Railway*, 97 S.W. 244, 246-47 (Mo. Ct. App. 1906); *Radburn* v. *Fir Tree Lumber Co.*, 145 P. 632, 644 (Wash. 1915); and even between a single tortfeasor's negligent and nonnegligent conduct, *e.g.*, *Jenkins* v. *Pennsylvania Railroad*, 51 A. 704, 706 (N.J. 1902).

Of particular relevance here, where injuries were caused by the successive torts of independent actors, a defendant could not be held liable unless apportionment was possible. The plaintiff bore the burden of proving the damage caused by each defendant. See *Restatement (Third) of Torts: Apportionment of Liability* § 26 rptr's note cmt. h, at 332-33

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76 P. 1079, 1080 (Ore. 1904); *Wiest* v. *City of Phila.*, 49 A. 891, 892 (Pa. 1901); *Cole* v. *Lippett*, 46 A. 43, 43-44 (R.I. 1900); *Bebout* v. *Pense*, 141 N.W. 515, 515 (S.D. 1913); *Swain* v. *Tenn. Copper Co.*, 78 S.W. 93, 93-99 (Tenn. 1903); *Sherman Gas & Elec. Co.* v. *Belden*, 123 S.W. 119, 121 (Tex. 1909); *Pulaski Anthracite Coal Co.* v. *Gibboney Sand Bar Co.*, 66 S.E. 73, 74 (Va. 1909); *Ames* v. *Dorset Marble Co.*, 23 A. 857, 858 (Vt. 1892); *Johnson* v. *Irvine Lumber Co.*, 140 P. 577, 578 (Wash. 1914); *Farley* v. *Crystal Coal & Coke Co.*, 102 S.E. 265, 266-67 (W. Va. 1920); *Mitchell Realty Co.* v. *City of West Allis*, 199 N.W. 390, 394-96 (Wis. 1924); *Mau* v. *Stoner*, 87 P. 434, 440 (Wyo. 1906).

[29] *See* W. Prosser, *Joint Torts and Several Liability*, 25 Cal. L. Rev. 413, 429-30 (1937) ("*Joint Torts*"); W. Hale, *Handbook on the Law of Torts* § 55, at 122 (1896); *Swain*, 78 S.W. at 94 ("Where the tort feasors have no unity of interest, common design, or purpose or concert of action, there is no intent that the combined acts of all shall culminate in the injury resulting therefrom, and it is just that each should only be held liable so far as his acts contribute to the injury."). Certain courts also allowed joint liability for concurrent torts. *See, e.g.*, *Doeg* v. *Cook*, 58 P. 707, 708 (Cal. 1899).

(2000) ("*Restatement (Third)*"). This requirement was an application of the basic principle that a plaintiff must prove causation to demonstrate negligence; thus, the failure to do so with sufficient specificity barred recovery. See, *e.g.*, *Slater* v. *Pac. Am. Oil Co.*, 212 Cal. 648, 654-55 (1931); *Harley* v. *Merrill Brick Co.*, 48 N.W. 1000, 1001 (Iowa 1891).

In *McGannon* v. *Chicago & North Western Railway*—a case on all fours with this one—the Minnesota Supreme Court considered the claims of a plaintiff who suffered lung damage after inhaling fine sand during successive periods of railroad employment. 199 N.W. 894, 894 (Minn. 1924). The plaintiff sought to sue both employers in a single action (which, at common law, was permissible only if the defendants were jointly liable, see Prosser, *Joint Torts*, at 415 & n.19). The court held joinder to be improper because "[t]he acts were not concurrent either in point of time or in result." 199 N.W. at 895; *id.* at 894 ("Causes of action for separate torts of different persons not acting in concert or by unity of design cannot be joined."). Other courts concluded likewise, holding that successive tortfeasors are severally liable, even for a single harm.[30]

To ease the harsh results for plaintiffs that accompanied this common-law rule, courts lowered the burden of production, apportioning damages whenever apportionment was reasonably possible. As Prosser described, whenever "a logical basis [could] be found for some rough practical apportionment, which limits a defendant's liability to that part of the harm which he has in fact caused, it [could] be

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[30] *See, e.g.*, *Albrecht*, 171 N.W. at 462 (holding that defendants were not jointly liable because they committed two separate, successive assaults and there was no concert of action); *Coleman Vitrified Brick Co.* v. *Smith*, 175 S.W. 860, 860 (Tex. Civ. App. 1915) (holding that owner of brick plant that causes damage to plaintiff, his family and his land is not responsible for damages, if any, caused by the prior owner of the brick plant); *Mexican Nat'l Constr. Co.* v. *Middlegge*, 13 S.W. 257, 258 (Tex. 1890); *S. Iron & Steel Co.* v. *Acton*, 62 So. 402, 403 (Ala. Ct. App. 1913).

expected that the division [would] be made." W. Prosser, *Handbook of the Law of Torts* § 47, at 328, 334-35 (1st ed. 1941) ("*Prosser on Torts* (1st ed.)"); *accord Ogden* v. *Lucas*, 48 Ill. 492, 494 (1868). Presented with "evidence which reasonably tends to show the relative proportion" of the tortfeasors' fault, *Eckman* v. *Lehigh & Wilkes-Barre Coal Co.*, 50 Pa. Super. 427, 432 (1911), courts would "permit the jury, as reasonable men, to make from the evidence the best possible estimate," *Hill* v. *Chappel Bros.*, 18 P.2d 1106, 1110 (Mont. 1932).[31]

This preference for apportionment was applied in a line of cases analogous to this one, in which pollution by multiple tortfeasors harmed a plaintiff's person or property. Courts uniformly held that a tortfeasor was liable for only the portion of the injury that it had caused, see, *e.g.*, *Cal. Orange Co.* v. *Riverside Portland Cement Co.*, 195 P. 694, 695 (Cal. Ct. App. 1920), and apportioned damages on any reasonable basis—including, notably, volumetric evidence[32]—even when

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[31] *Accord Wm. Tackaberry Co.* v. *Sioux City Serv. Co.*, 132 N.W. 945, 948 (Iowa 1911); *Bowman* v. *Humphrey*, 109 N.W. 714, 716 (Iowa 1906) ("It may, sometimes, be difficult to separate and apportion the damages chargeable to the defendant, but that difficulty goes simply to the amount and not to the right of recovery."); *Chipman* v. *Palmer*, 77 N.Y. 51, 54 (1879); *Cal. Orange Co.* v. *Riverside Portland Cement Co.*, 195 P. 694, 695 (Cal. Ct. App. 1920); 38 *Cyc.* at 484-85. The ready availability of apportionment makes further sense in light of the fact that contribution between tortfeasors was unavailable at common law, and the law refused to saddle minimally culpable defendants with the entire burden of a damages award. *Miller*, 25 P. at 551.

[32] *See, e.g.*, *Ralston*, 37 F.2d at 184 (apportioning damages between two smelters, the emissions from which damaged plaintiff's crops, based on the amount of ore processed by each); *Thomas* v. *Ohio Coal Co.*, 199 Ill. App. 50, 56-57 (1916) (suggesting that damages caused by runoff from oil wells be apportioned based on the number and activity of wells owned by each defendant); *see also Woodland*, 146 P. at 1106-07; *Harley*, 48 N.W. at 1001-02; 38 *Cyc.* at 485 & n.96; *Prosser on Torts* § 47, at 333 & nn.14-17 (1st ed.). Similarly, in animal trespass cases, courts held defendants severally liable, *see* 38 *Cyc.* at 484 & n.95; *Prosser on Torts* § 47, at 332-

separate torts combined to produce a single injury. See *Symmes* v. *Prairie Pebble Phosphate Co.*, 63 So. 1, 3 (Fla. 1913) ("[t]orts that are several, separate, and independent acts when committed do not become joint by the subsequent union or intermingling of their consequences"); *Verheyen* v. *Dewey*, 146 P. 1116, 1119-20 (Idaho 1915). Congress thus enacted FELA against the backdrop of a common-law preference for apportionment, which served largely to benefit plaintiffs who would bear the burden of proving attributable injury.

C. The Evolving Common Law Likewise Expresses A Strong Preference For Apportionment.

This Court's determination of liability rules under FELA is "'informed by reference to the evolving common law.'" *Buckley*, 521 U.S. at 429, 439; *Kernan* v. *Am. Dredging Co.*, 355 U.S. 426, 432 (1958). The common law has been unwavering in its embrace of liberal rules of apportionment by causation, and a clear majority of States have gone even further in recent decades, adopting such additional methods as fault-based and pro rata apportionment.

For a period during the middle of the last century, joint and several liability was given somewhat broader rein. Reacting against common-law pleading and proof requirements, many States expanded joint and several liability (even to some consecutive torts), see, *e.g.*, *Landers* v. *E. Tex. Salt Water Disposal Co.*, 248 S.W.2d 731, 734-35 (Tex. 1952); broadened the concept of "indivisible" harm,[33] see G. Boston, *Apportionment of Harm in Tort Law: A Proposed Restate-*

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33 & nn.11-13 (1st ed.), and found numerous ways to apportion damages even in the absence of clear evidence of causation, *see, e.g.*, *Ogden*, 48 Ill. at 494 (apportioning liability based on the number of trespassing cattle owned by each defendant).

[33] The description of harms as "divisible" or "indivisible" in the Second and Third Restatements refers to whether damages are reasonably capable of division by cause, *see Restatement (Third)* § 26, whereas the term "distinct harms" refers to the nature of the injury itself, such as when a plaintiff suffers two separate wounds, *see Restatement (Second)* § 433A cmt. b.

ment, 21 U. Dayton L. Rev. 267, 290-91 (1996); and shifted the burden of proving divisibility to defendants, see *Restatement (Second)* § 433B.[34] However, that move toward joint and several liability has long since been abandoned as inequitable, because of cases like *Walt Disney World* v. *Wood*, in which Disney was held jointly and severally liable, despite the fact that it had been found only 1% culpable. 515 So. 2d 198, 198, 202 (Fla. 1987); 6 *Damages in Tort Actions* § 49.03[3], at 49-13; *Restatement (Third)* § 17 rptr's note cmt. a. Now, damages are routinely apportioned by cause, using any practical measure, as always; and, in a clear majority of States, even damages termed "indivisible" are now apportioned based upon notions of comparative responsibility.

1. The Evolving Common Law Recognizes Apportionment Based On Causation Where There Is A Reasonable Basis For Division.

Consistent with the common-law tradition at the turn of the century, modern courts apportion damages based upon causation. Under this method, damages are apportioned among contributing causes—whether innocent or tortious, natural or intentional—based on the role played by each in causing the harm. Contemporary authorities require that harms be apportioned when they are "divisible"—*i.e.*, when "there is a reasonable basis for determining the contribution of each cause to a single harm." *Restatement (Second)* § 433A. This well-established approach has been adopted by the Second and Third Restatements of Torts.[35]

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[34] Importantly, even during that period, apportionment was widely available under the circumstances present here. *See, e.g.*, *Restatement (Second)* § 433A cmt. c (stating that apportionment is available for successive injuries); *id.* § 881 illus. 1, 2 (illustrating apportionment between polluters).

[35] *See Restatement (Third)* § 26; *id.* cmt a ("No party should be liable for harm it did not cause . . . ."); *id.* cmt. f ("All that is required is a reasonable basis for dividing the damages."); *Restatement (Second)* § 433A; *id.* § 881 (where "there is a reasonable basis for division" of

To apportion damages, it is not essential that particular harms be capable of precise attribution to particular causes. Rather, in accord with the common-law tradition, the question is whether "a factual basis can be found for some rough practical apportionment." *Prosser on Torts* § 52 (5th ed.); see also *Restatement (Third)* § 26 cmt. f ("The fact that the magnitude of each indivisible component part cannot be determined with precision does not mean that the damages are indivisible. All that is required is a reasonable basis for dividing the damages.").

As with the historical tradition, the evolving common law apportions damages by causation in numerous situations: "Apportionment principles are applied to tortious and nontortious conduct, to parties joined as defendants and those not joined, to both plaintiffs and defendants, to pre-existing conditions, and to forces of nature." Boston, *supra*, at 299; see also *Restatement (Second)* § 433A cmts. a, e, f. Indeed, many of the same factual scenarios in which common-law courts historically apportioned damages reappear in the modern cases. Of particular relevance here, damages are apportioned among multiple tortfeasors that pollute a single source, see *id.* cmts. a, c, d, illus. 5; *Prosser on Torts* § 52, at 345-46 (5th ed.), and among successive tortfeasors, *Restatement (Second)* § 433A cmt. c; *Restatement (Third)* § 26 cmt. f.

Likewise, modern courts have recognized that injuries caused by toxic exposure are amenable to apportionment among contributing causes. See Boston, *supra*, at 301 ("[P]rinciples of comparative causation are especially relevant in the toxic torts area, where measures of toxicity can be applied to determine apportionment."). Unlike a multi-car collision, for instance, in which injuries may not reasonably

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injury based on the contribution of independent tortfeasors, "each is subject to liability only for the portion of the total harm that he has himself caused"); *accord* Uniform Comparative Fault Act § 4, 12 U.L.A. 143 (1996); *Edmonds* v. *Compagnie Generale Transatlantique*, 443 U.S. 256, 260 & n.8 (1979).

be allocated to separate causes, see, *e.g.*, *Kalland* v. *North American Van Lines*, 716 F.2d 570, 573-74 (9th Cir. 1983) (Kennedy, J.), injuries in an asbestos case are readily apportionable based on causation. Thus, in *Moore* v. *Johns-Manville Sales Corp.*, the Fifth Circuit concluded that the jury properly apportioned damages between manufacturers of asbestos-containing products based on the length of the plaintiff's periods of exposure, the quantity of asbestos contained in each product, and the extent to which those products emitted asbestos fibers. 781 F.2d 1061, 1064 (5th Cir. 1986). Other courts have reasoned similarly.[36]

2. The Modern Trend Favors Apportionment Even When Injuries Cannot Be Apportioned Based Upon Causation.

The preference for apportionment reflected in the evolving common law has progressed beyond apportionment by causation; most States now apportion even indivisible harms, and "[t]he clear trend over the past several decades has been a move away from pure joint and several liability." *Restatement (Third)* § 17 rptr's note cmt. a. Sixteen States have adopted several liability in such cases. See *id.* § 17, at 154 (listing States). Twenty other States have adopted intermediate doctrines, see *id.* at 156-59 (listing States), many of which

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[36] *See, e.g.*, *Panther* v. *Raybestos-Manhattan, Inc.*, 701 P.2d 145, 146 (Colo. Ct. App. 1985) (holding that plaintiff's exposures to the asbestos products of four defendants, resulting in asbestosis, constituted "multiple, but independent, torts" that were apportionable); *see also Brisboy* v. *Fibreboard Corp.*, 418 N.W.2d 650, 655 (Mich. 1988) (approving jury's apportionment of damages based on comparative causation between cigarette smoking and asbestos exposure); *Dafler* v. *Raymark Indus.*, 622 A.2d 1305 (N.J. 1993) (same), *aff'g* 611 A.2d 136, 141-45 (N.J. Super. Ct. App. Div. 1992). Although the court below allowed the jury to consider smoking here as comparative negligence, smoking may be regarded as an independent cause (and indeed must be in strict-liability FELA actions, where contributory negligence is not a defense, *see* 45 U.S.C. § 53).

impose several liability under most circumstances.[37] These modern schemes use a variety of methods to apportion damages. Most common is apportionment based on comparative responsibility, which requires juries to consider factors such as "the nature of the person's risk-creating conduct" and "the strength of the causal connection between the person's risk-creating conduct and the harm." *Restatement (Third)* § 8. In recent years, courts have apportioned a variety of harms on this basis, including asbestos-related injuries. See, *e.g.*, *Owens-Corning Fiberglass Corp.* v. *Parrish*, 58 S.W.3d 467, 479-81 (Ky. 2001); *Kapsis* v. *Port Auth.*, 712 A.2d 1250, 1257 (N.J. Super. Ct. App. Div. 1998); *A.W. Chesterton* v. *Fisher*, 655 So. 2d 170, 171-72 (Fla. Dist. Ct. App. 1995). Indeed, some courts have held, in the context of evaluating a plaintiff's comparative negligence under FELA, that comparative responsibility is the required method of apportioning damages.[38]

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[37] *See, e.g.*, Cal. Civ. Code § 1431.2 (several liability, except for economic damages in certain actions); Conn. Gen. Stat. § 52-572h (several liability, except plaintiff unable to collect for one year may seek reapportionment of uncollectable share); N.Y. C.P.L.R. § 1601(1) (several liability if defendant less than 50% at fault). This Court considers statutes no less than judicial decisions in devising federal common law rules. *Moragne* v. *States Marine Lines, Inc.* 398 U.S. 375, 391 (1970).

[38] *See Sears* v. *S. Pac. Co.*, 313 F.2d 498, 502-03 (9th Cir. 1963) (the jury must consider both the "'quantity and quality'" of negligence (quoting *N.Y., Chi. & St. Louis R.R.* v. *Niebel*, 214 F. 952, 955 (6th Cir. 1914))); *Holweger* v. *Great N. Ry.*, 130 N.W.2d 354, 360-62 (Minn. 1964); *see also Norfolk & W. Ry.* v. *Earnest*, 229 U.S. 114 (1913); *cf. United States* v. *Reliable Transfer Co.*, 421 U.S. 397, 411 (1975) (holding in an admiralty case that "liability for . . . damages is to be allocated among the parties proportionately to the comparative degree of their fault"). Although this Court need only decide in this case that apportionment is available, other authorities—similarly reasoning that rough apportionment is better than depriving a deserving plaintiff of recovery or unjustly mulcting a defendant for the entirety of damages for which it is only partially responsible—have advocated still other approaches to apportionment. Some have advocated per capita apportionment, *see Restatement (Third)* § 26 rptr's note cmt. c, at 334-35; Boston, *supra*, at

3. Apportionment Has Been Recognized Pursuant To The Federal Common Law Developed Under Other Federal Statutes.

Following this modern trend, the federal courts have recognized a right to apportionment in developing a federal common law to govern various federal statutes.

This Court has held that damages should be apportioned under the federal labor laws. In *Vaca* v. *Sipes*, 386 U.S. 171 (1967), the Court apportioned damages between an employer that discharged an employee in violation of a collective bargaining agreement and a union that breached its duty to provide fair representation. Applying "principles of federal common law," *Clayton* v. *UAW*, 451 U.S. 679, 686 (1981), this Court held that liability would be apportioned "between the employer and the union according to the damage caused by the fault of each," because in the absence of concerted action, "joint liability for either wrong would be unwarranted," *Vaca*, 386 U.S. at 197-98.

Similarly, the courts of appeals have unanimously held that apportionment is available under CERCLA.[39] This body of case law is persuasive, as CERCLA resembles FELA in

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341, which was the default method of contribution at common law, *see* 1 S. Speiser et al., *The American Law of Torts* § 3:23, at 468 (1983) ("*American Law of Torts*"). Other courts have apportioned damages based on the defendant's share of the relevant market, even though, as the California Supreme Court has noted, "it is probably impossible . . . to determine market share with mathematical exactitude." *Sindell* v. *Abbott Labs.*, 607 P.2d 924, 937 (Cal. 1980); *see also Hymowitz* v. *Eli Lilly & Co.*, 539 N.E.2d 1069, 1078-79 (N.Y. 1989); *Wheeler* v. *Raybestos-Manhattan*, 11 Cal. Rptr. 2d 109, 112-13 (Cal. Ct. App. 1992) (asbestos case).

[39] *See United States* v. *Alcan Aluminum Corp.*, 990 F.2d 711, 722 (2d Cir. 1993); *United States* v. *Alcan Aluminum Corp.*, 964 F.2d 252, 270 (3d Cir. 1992); *United States* v. *Monsanto*, 858 F.2d 160, 171 (4th Cir. 1988); *In re Bell Petroleum Servs.*, 3 F.3d 889, 903 (5th Cir. 1993); *United States* v. *Township of Brighton*, 153 F.3d 307, 319 (6th Cir. 1998); *United States* v. *Hercules*, 247 F.3d 706, 718-19 (8th Cir.), *cert. denied*, 122 S. Ct. 655 (2001).

numerous respects. Both (1) are interpreted in light of "traditional and evolving common law principles," *United States* v. *Hercules*, 247 F.3d 706, 717 n.9 (8th Cir.), *cert. denied*, 122 S. Ct. 655 (2001); (2) impose strict liability under certain circumstances, *Kernan*, 355 U.S. at 431; *In re Bell Petroleum Servs.*, 3 F.3d 889, 897 (5th Cir. 1993); (3) permit plaintiffs to establish liability under a reduced standard of causation, *Rogers*, 352 U.S. at 506; *United States v. Alcan Aluminum Corp.*, 964 F.2d 252, 266 (3d Cir. 1992); and (4) commonly involve multiple actors contributing to a single harm where relative causation is not perfectly certain. To offset the harsh outcomes that CERCLA's reduced causation standard might otherwise impose upon marginally culpable parties, *Bell*, 3 F.3d at 897; *United States* v. *Alcan Aluminum Corp.*, 990 F.2d 711, 720 (2d Cir. 1993), courts have insisted on apportionment whenever there is "evidence sufficient to permit a rough approximation." 3 F.3d at 904 n.19.[40] Not only does this result in fairer outcomes; it also encourages plaintiffs to sue all responsible parties in a single action, rather than target wealthier defendants, as occurs under joint and several liability. Boston, *supra*, at 374-75.

D. The Adoption Of An Apportionment Regime Is Supported By Sound Policy.

In addition to finding support in the text of FELA and the historical and evolving common law, apportionment is supported by numerous policy considerations, which should

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[40] *See also Bell*, 3 F.3d at 903-04 (permitting apportionment between chromium polluters of water supply based on numerous factors, including the length of time each defendant owned the offending plant; the amount of chrome-plating activity; relative sales; and testimony regarding each company's practices). Indeed, courts have apportioned damages even when the commingling of substances caused synergistic effects, relying on such factors as "the relative toxicity, migratory potential, and synergistic capacity of the hazardous substances at the site." *Monsanto Co.*, 858 F.2d at 172 n.26; *see also Hercules*, 247 F.3d at 718 ("commingling is not synonymous with indivisible harm'" (quoting *Alcan*, 990 F.2d at 720)); *Alcan*, 964 F.2d at 269-70 & n.29.

inform this Court's interpretation of the statute, see *Gottshall*, 512 U.S. at 541, 557; *Buckley*, 521 U.S. at 436.

First, as noted above, apportionment works with FELA's reduced causation standard to effectuate a core principle of tort law—that a tortfeasor should be held liable only for the damage that it causes.[41] Causation requirements are often relaxed in toxic exposure cases to permit plaintiffs to recover more readily.[42] Under CERCLA, Congress recognized the potential injustice to defendants of such relaxed standards, and "left it to the courts to fashion some rules that will, in appropriate circumstances, ameliorate this harshness." *Bell*, 3 F.3d at 897.[43] Just such an injustice often occurs under FELA, because the railroads' perceived deep pockets combine with the reduced causation standard to render them an inviting target. If joint and several liability is applied, as it was by the trial court in this case, a railroad employee has every incentive to sue only the railroad, no matter the length

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[41] Boston, *supra*, at 370. For this same reason, railroads should not be held to a higher standard of evidentiary certainty in proving the relative contribution of various causes than plaintiffs bear in proving that the railroad was a legal cause of the injury. *See id.* at 371 ("If corrective justice accepts the requirement of causation-in-fact, and that the inquiry can never eliminate all causal indeterminacy, then it should embrace an apportionment model based on the very same evidence that was relied upon to establish causation.") (footnote omitted); *cf. Dixon* v. *Penn Cent. Co.*, 481 F.2d 833, 835 (6th Cir. 1973) (applying in a FELA case the same causation standard to employee and employer negligence); *Page* v. *St. Louis S.W. Ry.*, 349 F.2d 820, 822-24 (5th Cir. 1965) (same).

[42] *See Prosser on Torts* § 41, at 267-68 (5th ed.); R. Ausness, *Will More Aggressive Marketing Practices Lead to Greater Tort Liability for Prescription Drug Manufacturers*, 37 Wake Forest L. Rev. 97, 138 (2002); D. Robertson, *The Common Sense of Cause in Fact*, 75 Tex. L. Rev. 1765, 1775-76 (1997).

[43] This Court echoed these same concerns when it abandoned the rule of divided damages (often harsh to ships that were only slightly at fault and lightly damaged) in favor of proportionate liability in maritime collision cases (which require both negligence and causation). *Reliable Transfer*, 421 U.S. at 405.

of his tenure or the degree of the railroad's culpability. Nothing in FELA's purposes supports such an unfair rule.

Apportionment is also superior to the other alternative to joint and several liability, a contribution-only regime. First, unlike contribution, apportionment promotes judicial economy by obviating the need to retry these scientifically and medically complex cases in another forum—a task that is both wasteful, and virtually impossible for railroads in occupational exposure cases, where the railroad was not involved in the other exposures. See G. Boston, *Toxic Apportionment: A Causation and Risk Contribution Model*, 25 Envtl. L. 549, 617, 619 (1995). Apportionment suffers none of these problems, as it permits difficult questions of causation to be resolved in a single action and with the participation of the plaintiff, who is in the best position to show which parties caused his injuries.[44]

Finally, the interaction between FELA's reduced standard of causation and a contribution-only scheme produces systemic inequities. As discussed above, a FELA plaintiff can often recover from a railroad under the reduced causation requirement set forth in *Rogers*. 352 U.S. at 506. But thus far, railroads have been forced to seek contribution from third parties pursuant to ordinary principles of negligence, including standard causation requirements. See *Armstrong* v. *Kansas City S. Ry.*, 752 F.2d 1110, 1114 (5th Cir. 1985). As

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[44] Furthermore, unlike contribution, apportionment promotes "[o]ne of the purposes of the Federal Employers' Liability Act," which is "to 'create uniformity throughout the Union' with respect to railroads' financial responsibility for injuries to their employees." *Norfolk & W. Ry*. v. *Liepelt*, 444 U.S. 490, 493 n.5 (1980) (quoting H.R. Rep. No. 60-1386, at 3 (1908)). Contribution undercuts this goal, as it predicates a FELA defendant's right to recover from a third party upon state laws of contribution and indemnity, which vary widely. *See, e.g.*, *Shields* v. *Consol. Rail Corp.*, 810 F.2d 397, 399 (3d Cir. 1987). Some jurisdictions allow contribution only after a joint judgment; others require only a finding of common liability. 1 *American Law of Torts* § 3:19, at 452. Still others recognize no right of contribution. *Id.* § 3:15.

a result, a plaintiff could recover the entirety of his damages from a marginally culpable railroad, which may then have no recourse against significantly more culpable third-party tortfeasors. (Indeed, many third-party employers will then be able to invoke their participation in worker's compensation insurance as an absolute defense to contribution. *Restatement (Second)* § 886A cmt. g.) Hence, a contribution-only scheme transforms the railroad into the insurer of its employees' health, permitting the employee to recover damages from the railroad that could not be recovered from a third party, either by the railroad or by the plaintiff himself. Rather than sanctioning such a result, this Court should permit damages to be apportioned, thereby harmonizing the interests of railroads and employees, promoting judicial economy, and maintaining the national uniformity envisioned by Congress.

E. The Trial Court Erred By Failing To Instruct The Jury To Apportion Damages In This Case.

Petitioner N&W should not have been held liable for the entirety of respondents' damages, given the minimal evidence of causation. Each respondent bears the burden of proving that the exposure for which the railroad was responsible was a legal cause of his claimed injury—*i.e.*, the railroad exposure must have been "in reasonable medical probability" a substantial factor in developing the disease. *Rutherford* v. *Owens-Ill., Inc.*, 941 P.2d 1203, 1223 (Cal. 1997).[45] Respondents cannot satisfy that burden by proving only, for

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[45] *Restatement (Second)* § 431(a); *id.* § 433(a); *Restatement (Third)* § 26 cmts. k-m. The slight-cause standard of *Rogers* does not apply to this question. *Rogers* based that standard on FELA's textual directive that the employer is liable for *railroad* injury caused "in whole or part" by the carrier's negligence. 352 U.S. at 506-07 & n.14 (citing 45 U.S.C. § 51). Thus, *Rogers* provides only that the railroad is responsible for a railroad exposure when its negligence was the slightest cause of that injurious exposure. But the railroad exposure itself must still be a substantial factor in causing the asbestos-related injury. *See Gavagan* v. *United States*, 955 F.2d 1016, 1019-20 (5th Cir. 1992) (Jones Act).

example, that the railroad made a "minimal" contribution to their injuries. See, *e.g.*, JA 236-37.

Furthermore, under any approach to apportionment, respondents' damages should have been apportioned here. Under the common-law rules that have existed since the time of FELA's enactment, damages are apportioned between other causes (tortious or innocent) and pre-existing conditions on any reasonable basis. See *Restatement (Third)* § 26 & cmts. a, f; *Restatement (Second)* § 433A. Here, respondents' injuries are analogous to damages caused by pollution, and the injuries suffered by Butler, Ayers and Spangler were successive. Indeed, respondents' injuries are particularly amenable to apportionment by causation, because asbestosis is dose-related, thus permitting damages to be divided among respondents' various exposures. The pollution of a lung by asbestos, and the resulting asbestosis, is analogous to a polluted stream in a CERCLA case. Just as the Fifth Circuit has used periods of factory ownership to apportion damages in a CERCLA case, see *Bell*, 3 F.3d at 903, so too can asbestos injuries be apportioned based on periods of exposure at different workplaces. Indeed, respondents' counsel conceded that it was "common sense" that two years of exposure contributes more to a disease than two months, JA 476, and respondents' expert assessed the relative causal contribution of different exposures on the basis of time of employment, see, *e.g.*, JA 195, 237. And just as volumetric evidence can serve as a proxy for the amount of a pollutant contributed to a site by a party under CERCLA, evidence regarding the level and intensity of exposure to asbestos can likewise establish a railroad's contribution to an employee's occupational disease. These indicators—and others, such as epidemiological evidence—more than qualify as the "reasonable basis" for apportionment required by the common law.

Finally, the evolving common law permits apportionment by comparative responsibility for indivisible injuries. Under

this approach, the jury considers many of the same facts that bear on causation, as well as factors like knowledge, scienter, and the degree of causal link. Here, varying degrees of culpability should be assigned to petitioner's conduct, as well as to respondents' other workplace exposures and the tortious conduct of third parties, including the asbestos manufacturers' failure to warn railroads and their employees of potential dangers. See, *e.g.*, JA 127-31. Such determinations are well within the province of the jury. *Moore*, 781 F.2d at 1064-65; *Kapsis*, 712 A.2d at 1257.

Thus, injuries and damages must be apportioned by causation whenever reasonably possible, in accord with the common-law tradition; and by principles of comparative responsibility when a defendant is a legal cause of all or part of an injury that is indivisible by causation. Such a rule effectuates FELA's textual mandate that railroads be held liable for only the injuries they cause, and avoids the inequities inherent in the long-abandoned rule of joint and several liability. Because the proper apportionment rule was not applied here, there should be a new trial as to all respondents.

CONCLUSION

The judgments of the Circuit Court should be vacated and the cases remanded for a new trial.

Respectfully submitted,

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