No. 01-

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**

## PETITION FOR A WRIT OF CERTIORARI

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January 2, 2002

## QUESTIONS PRESENTED

1. Whether it was error for the court below, in conflict with decisions of federal courts of appeals, state supreme courts and prevailing common-law principles, to award emotional-distress damages under the Federal Employers' Liability Act ("FELA") to plaintiffs who presented no evidence of physical manifestation or other corroboration of injury related to their alleged fear of cancer?

2. Whether it was error for the court below, in conflict with decisions of the federal courts of appeals, state supreme courts and evolving common-law principles, not to apportion damages under FELA among tortfeasors?

## LIST OF PARTIES

In addition to the parties listed in the caption, the following were plaintiffs below:

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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## PETITION FOR A WRIT OF CERTIORARI

Norfolk & Western Railway Company ("N&W") respectfully petitions this Court to issue a writ of certiorari to the Circuit Court of Kanawha County, West Virginia.

## JUDGMENT FOR WHICH REVIEW IS SOUGHT

The consolidated judgments for which review is sought are: *Freeman Ayers* v. *Norfolk & Western Railway Company*, Civil Action No. 93-C-6857; *Carl Butler* v. *Norfolk & Western Railway Company*, Civil Action No. 93-C-6876; *Doyle Johnson* v. *Norfolk & Western Railway Company*, Civil Action No. 92-C-8888; *John Shirley* v. *Norfolk & Western Railway Company*, Civil Action No. 92-C-8970; *James Spangler* v. *Norfolk & Western Railway Company*, Civil Action No. 93-C-7004; and *Clifford Vance* v. *Norfolk & Western Railway Company*, Civil Action No. 92-C-5829. After a jury verdict in favor of the plaintiffs, the Circuit Court of Kanawha County denied N&W's Motion for Judgment as a Matter of Law, or, in the Alternative, for a New Trial or Remittitur on February 14, 2001. The order of the circuit court denying N&W's motion is unpublished, and is reproduced in the Petition Appendix ("Pet. App.") at pages 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. This Court has jurisdiction under 28 U.S.C. § 1257(a).

## CONSTITUTIONAL, STATUTORY, OR OTHER LEGAL 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-7a.

## STATEMENT OF THE CASE

In *Metro-North Commuter Railroad* v. *Buckley*, 521 U.S. 424 (1997), this Court held that FELA plaintiffs cannot recover damages for emotional distress related to the fear of developing asbestos-related cancer if they could not prove a "physical impact," *viz*., the onset of a disease caused by asbestos exposure. Departing from both *Buckley* and established FELA and common-law principles adopted by federal courts of appeals and state supreme courts, the court below rendered a $5.8 million judgment against N&W in favor of the six respondents who, while arguably adducing evidence of the requisite "physical impact," presented no objective proof of any emotional injury whatsoever, much less the proof of physical or psychiatric manifestations of emotional injury that the common law has always required of plaintiffs claiming negligently inflicted emotional distress. Instead, the court upheld large judgments to respondents based on – at most – their bare testimony that they were concerned that they would eventually contract cancer from asbestos exposure; it did so even though some respondents provided *no* testimony related to any "fear" of cancer. Compounding the wrong, the court below instructed the jury that, if it found that N&W's conduct caused respondents' injuries to any degree, it should hold N&W liable for all of their damages, despite the clear presence in the record of other causes independent of their N&W employment.

This case presents two issues of critical importance to the administration of FELA, namely: (1) whether a plaintiff can recover emotional-distress damages even without any

physical manifestation or other objective medical corroboration of such distress; and (2) whether a railroad is liable for the full amount of an employee's injury on a strict theory of joint and several liability, even though the evolving common law has generally rejected such liability and there is uncontroverted evidence of non-railroad causes of his injuries.

This is the second time in approximately a year in which N&W has petitioned this Court to review these same issues. See *Norfolk & W. Ry.* v. *Dye*, 121 S. Ct. 2593 (2001) (mem.). There is a pattern of injustice and maladministration of an important federal statute in West Virginia. Because of recent mergers, there are two major eastern railroads: Norfolk Southern, the successor of N&W, which operates in 22 states and the District of Columbia, and CSX, which operates in 23 states and the District of Columbia. The plaintiffs' lawyers with FELA experience solicit former railroad employees to serve as plaintiffs in mass occupational-exposure suits. Those suits are then filed in state court in notoriously populist West Virginia jurisdictions, even though a significant number of the plaintiffs are not from West Virginia. For example, in the respondents' original complaints, at least 119 plaintiffs were from other states.

The railroads have no effective remedy against these abusive tactics. *Forum non conveniens* motions are not granted in jurisdictions particularly favored by the plaintiffs' bar, no matter how egregious the aggregation of out-of-state plaintiffs.[1] Although the claims are generally insubstantial, plaintiffs' counsel settles the vast majority of them for far less than the cost to the railroads of taking the cases to trial. Because of the sheer number of plaintiffs, the plaintiffs' counsel receives a tidy fee even though the individual

[1] As discussed *infra*, the railroads have even fewer remedies under the asbestos-litigation management plan recently adopted by the West Virginia Supreme Court of Appeals.

plaintiff settlements are small. Those trials nonetheless result in multimillion dollar judgments against the railroads without evidentiary basis because of repeated, uncorrected errors of law and jury hostility to railroads. There is no right of appellate review in West Virginia, and, despite full briefing on the questions presented and on the conflict with other courts and with common-law principles, the West Virginia Supreme Court repeatedly denies discretionary review without comment. In a bitter irony, the plaintiffs then invoke the absence of a written appellate opinion as the reason for this Court to deny review.

This is systematic injustice and gamesmanship that demands this Court's intervention. Moreover, review is even more warranted now than in *Dye*. First, the repetition of injustice refutes the previously made claims of respondents' counsel (who was also counsel in *Dye*) that there is no broad-based problem in the West Virginia courts. Second, the conflict of authority has deepened. Third, under the asbestos-litigation management plan recently adopted by the West Virginia Supreme Court, all pending asbestos-related cases have been transferred to the court below, the Circuit Court of Kanawha County, with the substantial involvement of the judge below, the Honorable A. Andrew MacQueen, III. See *State ex rel. Allman* v. *MacQueen*, 551 S.E.2d 369, 372 (W. Va. 2001) (per curiam). Given the absence of any mandatory appellate review in the West Virginia state courts and the generous venue provisions of FELA, the extraordinary rulings of the court below will largely govern FELA liability for asbestos-related claims of the major eastern railroads (CSX and Norfolk Southern, the successor of N&W), both of which operate in West Virginia. See *infra* at 24-27. Fourth, mass complaints of this kind continue to be filed in West Virginia in the wake of *Dye*. See *infra* at 26. Thus, the immediate resolution of these issues is vital to the railroad industry, which otherwise faces exactly what the Court has sought to avoid in its recent FELA opinions: significant, unpredictable

liability for a flood of unsubstantiated claims of emotional distress.

**Statutory Background**

Congress enacted FELA as a broad remedial statute to ensure relief for injured railroad employees who work under perilous conditions. See *Urie* v. *Thompson*, 337 U.S. 163, 181 (1949). Consistent with its remedial nature, FELA lowers certain common-law hurdles that historically prevented recovery for plaintiffs. 45 U.S.C. § 51 (reduced standard for causation); *id.* § 53 (contributory negligence not a bar to recovery).

Nonetheless, railroad employers are not insurers of an employee's welfare under FELA. See *Inman* v. *Baltimore & Ohio R.R.*, 361 U.S. 138, 140 (1959). Liability is predicated on proof that the railroad's negligence caused injury to the employee. Absent express statutory departures from the common law, the requisite negligence under FELA is founded on the common-law concepts of negligence "as established and applied in the federal courts." *Urie*, 337 U.S. at 174; see also *Norfolk & W. Ry.* v. *Liepelt*, 444 U.S. 490, 493 (1980) ("It has long been settled that questions concerning the measure of damages in an FELA action are federal in character."). The scope of FELA is "a federal question, not varying in accordance with the differing conceptions of negligence applicable under state and local laws." *Urie*, 337 U.S. at 174. Indeed, one of the purposes of FELA was to "create uniformity throughout the Union" with respect to the financial responsibility of railroads for injuries to their employees. H.R. Rep. No. 60-1386, at 3 (1908). Uniformity is vital in light of the wide latitude FELA plaintiffs have to select a forum. See 45 U.S.C. § 56.

To promote this uniformity, guidance from this Court is essential to the proper administration of FELA. In the absence of express statutory provisions, the Court accords "great weight" to evolving common-law principles in

delineating the unspecified bounds of recovery under FELA. *Consolidated Rail Corp.* v. *Gottshall*, 512 U.S. 532, 544 (1994).

The text of FELA is mostly silent on the two issues raised in this petition, and thus these are issues to be resolved based on evolving principles of common law adapted to the circumstances of the railroad industry. *Id.* at 555-56. First, although this Court has recognized that FELA's purpose is to authorize recovery in damages for "a *serious* and negligently caused emotional harm," *Buckley*, 521 U.S. at 438 (emphasis added), and has adverted to the majority rule requiring physical manifestations of severe emotional injury, *Atchinson, Topeka & Santa Fe Railway* v. *Buell*, 480 U.S. 557, 567 n.13, 568-69 & n.18 (1987), it has not yet had occasion to adopt that rule expressly in FELA actions. See *Gottshall*, 512 U.S. at 554. Second, this Court has not yet resolved the conflict in the lower courts over whether FELA permits apportionment of liability among multiple tortfeasors. Indeed, this conflict has become even deeper since *Dye*, as the Supreme Court of Utah recently upheld a jury instruction requiring apportionment in a FELA case. See *Brewer* v. *Denver & Rio Grande W. R.R.*, 31 P.3d 557, 571 (Utah 2001). Both of these questions leave fundamental gaps in FELA doctrine that require immediate resolution.

**Factual Background**

The plaintiffs below, six retired employees of N&W, asserted claims against their former employer under FELA as part of large, multi-plaintiff complaints filed in West Virginia. The basis of their claims was N&W's alleged failure to provide them with a reasonably safe workplace because of their exposure to asbestos and other dusts. The plaintiffs alleged that they had contracted asbestosis, and sought damages for, among other things, a claimed concern about contracting cancer sometime in the future.

At trial, it was contested whether any of the plaintiffs had any asbestos-related condition. The plaintiffs did not present any testimony of treating physicians. Instead, a physician hired to examine the plaintiffs solely for purposes of the litigation testified that there were indications of asbestosis, a set of lung disorders from the inhalation of asbestos dust. The plaintiffs' medical witnesses also testified that the plaintiffs' workplace exposure to asbestos may have caused their asbestosis. They also testified that asbestos exposure is correlated with cancer. Significantly, none of the plaintiffs' witnesses testified that asbestosis itself increases the risk of cancer.

Indeed, other medical evidence at trial established that there are four separate disease processes associated with exposure to asbestos: asbestosis, pleural thickening, malignant mesothelioma (a rare cancer of the lining of the lung cavity), and certain other cancers. Although all these diseases may be associated with the same asbestos exposure, none evolves into the other and there is no established connection among the diseases (*i.e.,* asbestosis does not turn into lung cancer or mesothelioma). The fact that asbestosis and asbestos-related cancer are separate diseases that are not medically linked has also been widely recognized among courts. See, *e.g.*, *Jackson* v. *Johns-Manville Sales Corp.*, 727 F.2d 506, 517 (5th Cir. 1984) (asbestosis itself does not lead to an increased risk of cancer); *Pierce* v. *Johns-Manville Sales Corp.*, 464 A.2d 1020, 1025 (Md. 1983) ("asbestosis and lung cancer are separate and distinct latent diseases that are not medically linked").[2]

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[2] *See also Joyce* v. *A.C. & S., Inc.*, 785 F.2d 1200, 1205 (4th Cir. 1986); *Wilson* v. *Johns-Manville Sales Corp.*, 684 F.2d 111, 117 n.33 (D.C. Cir. 1982) (Ginsburg, J.); *Devlin* v. *Johns-Manville Corp.*, 495 A.2d 495, 501 (N.J. Super. Ct. Law Div. 1985); *Eagle-Picher Indus., Inc.* v. *Cox*, 481 So. 2d 517, 522 (Fla. Dist. Ct. App. 1985).

The parties also disputed whether N&W had been negligent at all, and whether the plaintiffs had experienced substantial exposure to asbestos during their railroad employment that caused their alleged current conditions. Specifically, Respondent John Shirley worked for N&W primarily as an office clerk with minimal or no exposure to asbestos. Furthermore, there was extensive testimony that two of the plaintiffs had far more substantial exposure to asbestos fibers during decades of subsequent employment elsewhere. Respondent Carl Butler worked at N&W for only three years in the 1950s. Butler testified at trial that he was not aware of having ever been exposed to asbestos at N&W, but that he could have been exposed to asbestos during a three-month period in 1951. Butler later worked as a union pipefitter for other employers for 33 years, and testified that he had substantial exposure to asbestos at subsequent places of employment. Respondent Freeman Ayers testified that he had last worked for N&W in 1962, and subsequently worked in automotive maintenance with frequent direct exposure to asbestos. The plaintiffs testified as to other contributing factors to their alleged injuries, including smoking up to two packs of cigarettes per day for up to 60 years. The plaintiffs also had concurrently filed separate lawsuits against numerous asbestos manufacturers in various West Virginia counties. In those lawsuits, pleadings from which are part of the record below, the plaintiffs alleged that their injuries were the "sole, direct, and proximate result" of the acts and omissions of the manufacturers.

The parties also contested whether any of the plaintiffs had suffered any emotional distress. The plaintiffs testified as to varying degrees of concern about contracting cancer. Respondents Butler, Johnson, Shirley, and Vance testified that, at most, they had a "concern" about cancer. For example, Vance testified only that "it makes me think, occasionally." Butler testified that what worried him the most about cancer was "if there's nobody to take care of the farm

or anything." Respondent Ayers did not testify as to having even a concern about contracting cancer. When asked if he had any worry or concern, Ayers testified, "Well, I have an insurance policy that I've had for years for cancer, if I get it." Respondent Spangler offered no testimony at all regarding any concern about contracting cancer. Indeed, none of the plaintiffs testified as to even having a "fear" of cancer. Furthermore, not only did none of the plaintiffs testify as to the existence of severe emotional injury, but none presented evidence of any emotional or physical manifestation of their concerns, or any other objective corroboration of their bare assertions of emotional distress.

Despite this lack of supporting evidence, the court below denied N&W's motion to exclude all evidence regarding cancer at trial due to its irrelevant and highly prejudicial nature. Throughout the trial and in closing arguments, the plaintiffs' counsel emphasized the need to compensate respondents for their fear of cancer.

The court below instructed the jury that, despite the lack of evidence that any of the plaintiffs actually had cancer or reasonably might develop cancer in the future, that any plaintiff who had a reasonable fear of cancer that was related to proven physical injury from asbestos was entitled to be compensated for that fear as a part of damages for "emotional pain and suffering related to physical injury." The jury was further instructed to find N&W liable if its negligence contributed "however slightly to the plaintiff's injuries," and "not to make a deduction for the contribution of the nonrailroad exposure." The jury returned a verdict in favor of the plaintiffs, collectively awarding them $5,810,606 against N&W.

**The State Court Decisions**

The court below upheld the jury verdict in favor of the plaintiffs in an order entered on February 14, 2001. Pet. App. 4a. The Circuit Court provided no written opinion in support

of its order. Having no right of appellate review (for there are no intermediate appellate courts in the West Virginia state court system), N&W petitioned the West Virginia Supreme Court of Appeals for review of the Circuit Court's decision. As had happened previously in *Dye*, the West Virginia Supreme Court of Appeals denied review without comment on October 4, 2001. *Id.* at 1a-2a.

## REASONS FOR GRANTING THE PETITION

FELA is not intended to transform railroad employers into the "insurers of the emotional well being and mental health of their employees." *Gottshall*, 512 U.S. at 554; see also *Buckley*, 521 U.S. at 438 (courts "must consider the general impact, on workers as well as employers, of the general liability rules they would thereby create"). As the cases below illustrate, the West Virginia courts continue to cross the line and greatly expand the proper recoveries for employees under FELA. Plaintiffs from any state where Norfolk Southern or CSX operates now bring suits in West Virginia to recover for allegations of emotional distress without presenting any corroborating evidence of any such injury – much less even testifying on the subject. Moreover, the West Virginia courts have denied apportionment of any of these ever-increasing damages among other tortfeasors, even in cases in which the railroad employer is at best marginally responsible for the employee's injuries. As a result, railroad employers are broadly liable to their employees for health problems arising over the course of their entire lives, and not just their term of employment.

The court below has joined other state and federal courts in adopting these legal standards of liability and apportionment in conflict with the decisions of other lower courts and principles embodied in this Court's decisions. Only by resolving this conflict can the Court ensure that FELA is given the "uniform application throughout the country

essential to effectuate its purposes." *Dice* v. *Akron, Canton, & Youngstown R.R.*, 342 U.S. 359, 361 (1952).

## I. THE COURT SHOULD RESOLVE THE CONFLICT OF AUTHORITY AS TO WHETHER FELA PLAINTIFFS MAY RECOVER EMOTIONAL-DISTRESS DAMAGES WITHOUT ANY CORROBORATING MANIFESTATION OF EMOTIONAL INJURY.

Section 1 of FELA states that employers "shall be liable in damages to any person suffering injury." 45 U.S.C. § 51. The statute does not define the term "injury" – much less its specific meaning for claims of negligent infliction of emotional distress. Based on its review of common-law developments, this Court has recognized that emotional distress is a compensable injury under FELA. *Gottshall*, 512 U.S. at 550. In *Gottshall* and *Buckley*, the Court was careful to embrace one common-law limitation, the "zone of danger" test. However, the Court has not directly addressed the other vital common-law limitation on emotional-distress claims: namely, that emotional injury, in order to be compensable, must be corroborated by physical manifestations (or objective medical symptoms) of injury. In conflict with other courts, the court below failed to vindicate this limitation by awarding millions of dollars based solely on the bare, subjective testimony of the plaintiffs regarding their "fear" of cancer.[3] It

[3] Petitioner does not challenge in this petition the right of the jury to determine whether respondents should be awarded damages for pain and suffering or medical expenses arising from the asbestosis itself (such as shortness of breath). Nonetheless, even if those were permissible bases of recovery, the error in instructing the jury that it may award damages for fear of cancer without any physical manifestation of emotional injury requires reversal of the entire judgment. *See Fillippon* v. *Albion Vein Slate Co.*, 250 U.S. 76, 83 (1919) ("in jury trials erroneous rulings are presumptively injurious, especially those embodied in instructions to the jury; and they furnish ground for reversal unless it affirmatively appears that they were harmless"); *Yazoo & Miss. Valley R.R.* v. *Mullins*, 249 U.S.

is imperative that this Court intervene to prevent this unwarranted expansion of FELA liability.

The court below turned a blind eye to sound common-law principles in allowing recovery for uncorroborated emotional injuries. As an initial matter, the court ignored this Court's decision in *Gottshall* in awarding the plaintiffs pain and suffering damages for their "fear of cancer" claims. Pain and suffering "traditionally have been used to describe sensations *stemming directly* from a physical injury or condition." *Gottshall*, 512 U.S. at 544 (internal quotation marks omitted) (emphasis added). The plaintiffs claimed to have contracted only asbestosis, which does not lead to cancer. See, *e.g.*, *Jackson*, 727 F.2d at 517; *Pierce*, 464 A.2d at 1025. Although the physical injury of asbestosis and the claimed emotional injury of fear of cancer may arise from the same asbestos exposure, fear of cancer is not distress that stems directly from the asbestosis, and therefore it should not be compensable as pain-and-suffering damages from the asbestosis itself. See *Gottshall*, 512 U.S. at 544 (negligent infliction of emotional distress contemplates mental and emotional injury that is "not directly brought about by a physical injury"); *Potter* v. *Firestone Tire & Rubber Co.*, 863 P.2d 795, 805 (Cal. 1993) (characterizing pain-and-suffering damages as "parasitic damages" which compensate "a reasonable fear of a future harm *attributable to the injury*") (emphasis added). As a result, the court below could only have awarded damages for fear of cancer as a form of negligently inflicted emotional distress. See *id.* at 807-08 (analyzing parasitic pain-and-suffering damages as distinct from claim for nonparasitic damages for emotional distress for asbestos exposure). But, regardless of whether damages are awarded as pain and suffering, or as a separate claim for negligent infliction of emotional distress, common-law limits on recovery that are consonant with the purposes of FELA

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531, 533 (1919) (same); *see also United States* v. *River Rouge Improvement Co.*, 269 U.S. 411, 421 (1926).

must be observed. *Gottshall*, 512 U.S. at 557; *Smith* v. *Union Pac. R.R.*, 236 F.3d 1168, 1171 (10th Cir. 2000).

### A. FELA Incorporates Common Law Limitations On Emotional-Distress Damages.

When the common law recognized the tort of negligent infliction of emotional distress, the courts placed two types of severe restrictions on recovery.[4] First, the common law limited the kind of conduct that was actionable. See *Gottshall*, 512 U.S. at 546-49 (describing the three principal tests for actionable conduct as requiring a "physical impact" upon the plaintiff, placement of the plaintiff in a "zone of danger," or endangerment of a "relative bystander"); *Restatement (Second) of Torts* § 436 (1965). Second, the common law restricted the type of negligently inflicted emotional injuries that are compensable, requiring plaintiffs to present some objective evidence of a manifestation of their injuries. "[T]he negligent actor is not liable when his conduct results in the emotional disturbance alone, without the bodily harm or other compensable damage." *Id*. § 436A & cmt. a; see also *id.* § 436 cmt. d (requiring proof that "the negligent conduct be a substantial fact[or] in bringing about the fright and that the fright also be a substantial factor in bringing about the illness"). Most jurisdictions continue to adhere to the requirement of physical manifestations (or objective,

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[4] The common law long forbade the recovery of emotional-distress damages, a rule said to "'rest upon the elementary principle that mere mental pain and anxiety are too vague for legal redress where no injury is done to person, property, health, or reputation.'" *Southern Express Co.* v. *Byers*, 240 U.S. 612, 615 (1916) (quoting *Cooley on Torts* 94 (3d ed.)). This traditional reluctance derived from the distinctive nature of emotional distress in comparison with physical injuries: (1) it is often temporary and relatively trivial; (2) it is less ascertainable, and therefore more easily falsified or imagined; and (3) it is less apparent, and therefore operates as a more remote consequence of a defendant's action. W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 54, at 360-61 (5th ed. 1984); *see also Gottshall*, 512 U.S. at 545.

medically diagnosed symptoms) of emotional injury as a prerequisite of recovery.[5]

In *Gottshall*, the Court faced the question of whether claims for negligent infliction of emotional distress are cognizable under FELA, and in what circumstances. 512 U.S. at 544. In light of FELA's remedial purpose, the Court interpreted the employee's statutory entitlement to recover for "injury" caused by the railroad's negligence to include emotional injury, for "severe emotional injuries can be just as debilitating as physical injuries." *Id.* at 550 (internal quotation marks omitted). This Court recognized the two major restrictions at common law on emotional-distress damages, noting that "[c]ourts . . . have placed substantial limitations on the class of plaintiffs that may recover for emotional injuries *and on the injuries that may be compensable*." *Id.* at 546 (emphasis added). In *Gotshall*, the second limitation (on the kind of emotional injuries that are compensable) was not in dispute. See *id.* at 536-37, 539. This Court addressed the second limitation only in the context of rejecting the claim that the genuine-injury requirement obviated the need to restrict what conduct is actionable. *Id.* at 552. Accordingly, this Court restricted the kind of conduct that was actionable (and thus the type of plaintiffs who could sue), adopting the "zone of danger" test as the standard most consonant with FELA. *Id.* at 554-56.

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[5] Mary Donovan, Comment, *Is The Injury Requirement Obsolete In A Claim For Fear Of Future Consequences?*, 41 UCLA L. Rev. 1337, 1363-68 (1994); *Payton* v. *Abbot Labs.*, 437 N.E.2d 171, 174-75 & n.5 (Mass. 1982); *see*, *e.g.*, *First Nat'l Bank* v. *Drier*, 574 N.W.2d 597, 600 (S.D. 1999); *Beynon* v. *Montgomery Cablevision Ltd. P'ship*, 718 A.2d 1161, 1163 (Md. 1998); *Hegel* v. *McMahon*, 960 P.2d 424, 431 (Wash. 1998); *Leaon* v. *Washington County*, 397 N.W.2d 867, 875 (Minn. 1986); *Barnhill* v. *Davis*, 300 N.W.2d 104, 107-08 (Iowa 1981); *Corso* v. *Merrill*, 406 A.2d 300, 304 (N.H. 1979); *see also Restatement (Second) of Torts* § 436A cmt. c (1965).

In *Buckley*, the Court elaborated on the meaning of the term "physical impact" in the context of toxic exposure. 521 U.S. at 430. Despite his exposure to asbestos during his employment, Buckley did not allege that he suffered from any asbestos-related disease or exhibited any physical or psychiatric symptoms resulting from his asbestos exposure. The Second Circuit had allowed recovery for emotional distress because (1) Buckley presented some objective proof of an injury apart from his own testimony; and (2) Buckley's contact with asbestos constituted a "physical impact." *Buckley* v. *Metro-North Commuter R.R.*, 79 F.3d 1337, 1346 (2d Cir. 1996), *rev'd*, 521 U.S. 424 (1997). This Court addressed only the second ground in reversing the Second Circuit:

> The case before us . . . focuses on the italicized words "physical impact." . . . In our view, however, the "physical impact" to which *Gottshall* referred does not include a simple physical contact with a substance that might cause a disease at a substantially later time – where that substance, or related circumstance, threatens no harm other than that disease-related risk.

*Buckley*, 521 U.S. at 430. Other than to reiterate *Gottshall*'s admonition that the test for the genuineness of emotional injury "alone" is insufficient to safeguard defendants from meritless claims, *id.* at 434, the Court in *Buckley* did not address the fundamental requirement that emotional injury be corroborated by some objective manifestation.

The Court has previously acknowledged the importance of this unresolved question in cases decided on alternative grounds. In *Atchinson, Topeka & Santa Fe Railway* v. *Buell*, 480 U.S. 557 (1987), the Court recognized that "severe emotional injury . . . has generally been required to establish liability for purely emotional injury." *Id*. at 567 n.13; see also *id.* at 568-69 & n.18. The Court later noted in *Gottshall* that "[m]any jurisdictions that follow the zone of danger or relative bystander tests also require that a plaintiff

demonstrate a 'physical manifestation' of an alleged emotional injury, that is, a physical injury or effect that is the direct result of the emotional injury, in order to recover." 512 U.S. at 549 n.11; see *id*. at 544 ("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, but that may manifest itself in physical symptoms.").

Justice Ginsburg twice has separately encouraged the resolution of this exact question: "a solution the Court does not explore . . . would be to require such 'objective medical proof' and to exclude, as too insubstantial to count as 'injury,' claims lacking this proof." *Id.* at 571 (Ginsburg, J., dissenting). In *Buckley*, Justice Ginsburg found that Buckley's contact with asbestos constituted a "physical impact," but concurred in the denial of recovery "because Buckley did not present objective evidence of severe emotional distress." 521 U.S. at 445 (Ginsburg, J., concurring in part and dissenting in part). Thus, the Court has yet to address directly this fundamental element of an emotional-distress claim, but it should do so now not only to redress the clear injustice of the judgment below but also to resolve a decisional conflict among the lower courts.

### B. This Court Should Resolve The Conflict Of Authority Over Whether FELA Limits Recovery To Objectively Manifest, Severe Emotional Injury.

Despite the clarity of the common law rule, there is considerable disarray among the courts of appeals and the state courts over what emotional injuries are compensable under FELA. The decision below is in direct conflict with decisions of the First Circuit and state supreme courts that hew to the traditional requirement that emotional injuries are compensable only if manifested in some form. See *Moody* v. *Maine Cent. R.R.*, 823 F.2d 693, 696 (1st Cir. 1987) (rejecting claims of injury "manifested only by subjective pain" and

unsupported by "any medical opinion as to causation"); *Bullard* v. *Central Vermont Ry.*, 565 F.2d 193, 197 (1st Cir. 1977) ("If there is to be compensation for nervousness, depression, or other mental conditions . . ., there must be evidence from which a jury can make an informed judgment as to the existence, nature, duration and seriousness of the condition."); *Vance* v. *Consolidated Rail Corp.*, 652 N.E.2d 776, 784 (Ohio 1995) (finding actionable emotional distress claim under FELA where, "[a]s a preliminary matter," there was "'sufficient medical evidence to establish that plaintiff was suffering from chronic and disabling depression'"); *Alabama Great S. R.R.* v. *Jackson*, 587 So. 2d 959, 965 (Ala. 1991) (upholding award of damages where "the consequences of th[e] injury caused . . . various physical problems"); *McMillan* v. *National R.R. Passenger Corp.*, 648 A.2d 428, 433 n.3 (D.C. 1994) (FELA plaintiff must show "serious and verifiable" emotional injuries); cf. *Dodge* v. *Cotter Corp.*, 203 F.3d 1190, 1202 (10th Cir.) (requiring, in non-FELA action, evidence of a "chronic objective condition caused by their increased risk of developing cancer to permit their recovery for emotional distress damages"), *cert. denied*, 531 U.S. 825 (2000). The decision below is also in conflict with two Fifth Circuit decisions under the Jones Act,[6] the first of which required evidence of "serious mental distress" without addressing the precise nature of injury that would be compensable, *Hagerty* v. *L & L Marine Services, Inc.*, 797 F.2d 256, 256 (5th Cir. 1986), and the second of which upheld dismissal of a claim for intentional infliction of emotional distress because the plaintiff "failed to prove she suffered any physical manifestations of her alleged emotional injury," *Martinez* v. *Bally's Louisiana, Inc.*, 244 F.3d 474, 477-78 (5th Cir. 2001).

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[6] The Jones Act incorporates FELA doctrine, and precedent under one Act governs cases brought under the other. *Kernan* v. *American Dredging Co.*, 355 U.S. 426, 431-32 (1958).

On the other side of the coin, the Second Circuit, although not going so far as the court below, has rejected the requirement of physical injury or medically diagnosed symptoms, allowing recovery if there is *any* objective evidence (no matter how thin) corroborating the plaintiff's subjective testimony that asbestos exposure caused him fear and anger (such as a contemporaneous complaint to a supervisor about negligent conduct). *Buckley*, 79 F.3d at 1346, *rev'd on other grounds*, 521 U.S. 424 (1997). In a statute of such importance to railroads and railroad workers alike, with broad venue provisions that invite forum shopping, it is imperative that this Court resolve this conflict and uncertainty now.

The Court is faced not only with considerable conflict and uncertainty on this issue in the federal and state courts, but also a serious threat to the important policies underlying its recent restrictions on emotional-distress claims under FELA. In *Gottshall*, the Court adopted the "zone of danger" test in order to prevent "the potential for a flood of trivial suits, the possibility of fraudulent claims that are difficult for judges and juries to detect, and the specter of unlimited and unpredictable liability." 512 U.S. at 557 (citation and internal quotation marks omitted). In *Buckley*, the Court considered these policy goals at length in justifying its further restriction on emotional-distress claims. 521 U.S. at 433-34. Specifically, the Court noted that these policy goals would be eviscerated where, "apart from Buckley's own testimony, there was virtually no evidence of distress." *Id*. at 433. If plaintiffs here are allowed to recover on uncorroborated claims of emotional distress, the Court's reasonable effort to restrict FELA claims will become a nullity. Requiring corroborating evidence of an emotional-distress claim addresses these problems and best serves the underlying purpose of FELA: the compensation of employees who suffer actual and serious injuries.

Although this case comes from a trial court's judgment, it is a perfect vehicle for resolving the issue that has vexed the lower courts and that this Court has reserved. It is inconceivable that there will ever be a case where there is less evidence suggesting cognizable emotional injury than here. Indeed, some of the plaintiffs offered *no* testimony regarding any "fear" of cancer – much less any manifestation thereof. Under the ruling below, practically every former railroad worker with asbestosis is *ipso facto* entitled to seek emotional-distress damages, even if he disavows any true "fear" of getting cancer. In West Virginia, FELA has already become a worker-insurance statute without limit, and railroads have been and will be exposed to a "flood of relatively trivial claims [for which] liability may be imposed for highly remote consequences of a negligent act." *Gottshall*, 512 U.S. at 545. In sum, this Court should act now to resolve the conflict of authority, eliminate the injustice of the unlawful judgments below, and properly limit the sweep of emotional-distress claims under FELA.

## II. THIS COURT SHOULD RESOLVE THE SQUARE CONFLICT OF AUTHORITY ON THE CRITICAL QUESTION OF APPORTIONMENT OF DAMAGES UNDER FELA.

The court below instructed the jury that, if it found N&W in the slightest degree liable for respondents' asbestos-related injuries, it should hold N&W liable for 100% of the damages despite uncontroverted evidence of numerous other causes of respondents' injuries. The court justified its instruction based on the language of FELA and the traditional concept of joint and several liability, which is still recognized in only a minority of jurisdictions – including West Virginia. As railroad employers now face substantial liability for entirely uncorroborated claims and as long-term occupational-exposure claims under FELA have multiplied, apportionment has become a vital issue of law that remains unanswered in the FELA context. The decision below is in square conflict

with that of the Supreme Court of Pennsylvania, which requires apportionment of damages in FELA asbestos cases, and also conflicts with the reasoning of the Fourth, Seventh, and Tenth Circuits and the supreme courts of Nebraska and Utah, all of which have apportioned damages so that a FELA defendant is responsible only for those injuries its negligence caused. Resolution of this question is critical given that Pennsylvania and West Virginia are adjoining states, and the plaintiff's bar has every incentive and ability to shift Pennsylvania asbestos-related claims to the West Virginia courts. See *infra* at 24-27.

The history and language of FELA suggest that damages should be apportioned among those who are responsible for the injuries of an employee. FELA's adoption of a comparative negligence regime was radical at the time. See 45 U.S.C. § 53; see also *Mondou* v. *New York, New Haven, & Hartford R.R.*, 223 U.S. 1, 49-50 (1912); *Coats* v. *Penrod Drilling Corp.*, 61 F.3d 1113, 1147-48 (5th Cir. 1995) (en banc) (Garwood, J., dissenting). Under FELA, a railroad carrier shall be liable to "any person suffering injury *while he is employed by such carrier*," and not for injuries suffered outside the scope of employment. 45 U.S.C. § 51 (emphasis added). This statutory framework, together with this Court's construction of FELA in accordance with evolving principles of common law, require a departure from the strict principles of joint and several liability and the establishment of some standard of apportionment in FELA actions.

The Supreme Court of Pennsylvania has recognized the necessity of apportionment of damages under FELA. In *Dale* v. *Baltimore & Ohio Railroad*, 552 A.2d 1037 (Pa. 1989), the plaintiff sued his employer for injuries caused in part by his exposure to asbestos in the course of his employment. The Supreme Court of Pennsylvania noted that 45 U.S.C. § 51, in isolation, did not clearly call for apportionment where "the railroad's negligence was not the cause of all of the damages." *Id.* at 1041. The court resolved this ambiguity

based on its reading of 45 U.S.C. § 53, which specifically mandates apportionment for a plaintiff's contributory negligence:

> If there is a statutory requirement that FELA awards shall be diminished by the amount of an employee's contributory negligence, it 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. Thus, we hold that an FELA employer whose employee has been injured partially by the employer's negligence and partially by other causes, whether those other causes relate to a pre-existing condition or to a concurrent, contemporary cause arising from the circumstances of the injury, must pay damages only for those injuries attributable to its negligence.

*Id*. This holding is in square conflict with the decision below.

The Seventh Circuit also apportioned damages where a FELA plaintiff was seeking recovery for two injuries – only one of which was caused by his employer's negligence. *Shupe* v. *New York Cent. Sys.*, 339 F.2d 998 (7th Cir. 1965). The Seventh Circuit held that a FELA plaintiff "cannot recover damages which are not proximately caused by defendant's alleged negligence." *Id*. at 1000. In these circumstances, the plaintiff "ha[s] the burden of proving what proportion, if any, of the alleged [damages] was caused by the [defendant's negligence]." *Id*.

Similarly, in a case decided after *Dye*, the Supreme Court of Utah recently affirmed a jury instruction to apportion damages where a FELA plaintiff was seeking recovery for carpal tunnel syndrome. *Brewer*, 31 P.3d at 571. The trial court had "directed the jury to limit its award of damages to those injuries caused by the railroad's negligence. . . . and to refrain from awarding 'damages arising from symptoms

associated with a condition that was not caused by any negligence.'" *Id*. Notably, the court upheld this instruction despite the fact that it conflicted with Utah law, because the plaintiff "brought suit in this case under [FELA]." *Id*. at 571 n.7.[7]

On the other side of the divide, some courts have refused to apportion damages in FELA actions based on the traditional concept of joint and several liability. Under joint and several liability, a defendant is liable for the entire amount of damages, and must then seek contribution or indemnity from the other tortfeasors. The Fifth Circuit has interpreted FELA to incorporate the traditional rule of joint and several liability. *Coats*, 61 F.3d at 1134. The court reached this conclusion based on a statutory interpretation in direct conflict with that employed by the Supreme Court of Pennsylvania: "section 53 of the FELA provides that a plaintiff may recover the total amount of his judgment less that part representing his own contributory negligence. There is no exception in [FELA] for cases in which one or more of the defendants fails to pay its share." *Id*. (internal citation omitted). In dissent, five of the judges believed that apportionment might be permitted in FELA actions, particularly in light of the statutory consideration of comparative fault between the plaintiff and defendant. *Id*. at 1169-70 (Garwood, J., dissenting). Other courts have followed suit. See, *e.g.*, *Lockard* v. *Missouri Pac. R.R.*, 894 F.2d 299, 305 (8th Cir. 1990); *Gaulden* v. *Burlington N., Inc.*, 654 P.2d 383, 391 (Kan. 1982); see also *Stevens* v. *Bangor & Aroostook R.R.*, 97 F.3d 594, 602 (1st Cir. 1996).

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[7] Courts have also apportioned damages in FELA actions involving pre-existing conditions. *See, e.g.*, *Sauer* v. *Burlington N. R.R.*, 106 F.3d 1490, 1493 (10th Cir. 1996); *Varhol* v. *National 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).

There is thus a square and mature – and, since *Dye*, even deeper – conflict among federal courts of appeals and state supreme courts that this Court should resolve. Resolution of this conflict is all the more imperative because the strict rule of joint and several liability followed by the court below is anachronistic. In the absence of express statutory provisions, the Court's duty in interpreting FELA "is to develop a federal common law of negligence . . . informed by reference to the *evolving* common law." *Gottshall*, 512 U.S. at 558 (Souter, J., concurring) (emphasis added).

Joint and several liability unfairly allocates all risk of uncollectible judgments upon named defendants. FELA defendants are particularly vulnerable in these respects, since they are often the only named defendant and have been held liable for "even the slightest" causation of an employee's injury. *Rogers* v. *Missouri Pac. R.R.*, 352 U.S. 500, 506 (1957).

Indeed, only 14 states – including West Virginia – have retained the pure form of joint and several liability. See *Restatement (Third) of Torts: Apportionment of Liability* § 17, reporter's note at 151 (2000). Sixteen states have adopted pure several liability, which holds each defendant responsible only for its proportional share of the plaintiff's injuries. *Id*. at 154. For example, Colorado law now provides that "no defendant shall be liable for an amount greater than that represented by the degree or percentage of the negligence or fault attributable to such defendant that produced the claimed injury." Colo. Rev. Stat. Ann. § 13-21-111.5(1) (West 2000). Twenty states have taken intermediate positions between several and joint and several liability, but even many of these provisions hold defendants severally liable under most circumstances. 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 that plaintiff unable to collect for one year may seek

reapportionment of uncollectible share); N.Y. C.P.L.R. 1601 (several liability if defendant 50% or less at fault).

State courts hearing FELA actions are required to apply federal law. See *Dice*, 342 U.S. at 361 ("State laws are not controlling in determining what the incidents of [a FELA] federal right shall be."). In clear defiance of this directive, the court below applied the minority position still followed in West Virginia in finding N&W jointly and severally liable for highly prejudicial claims based on scant, uncorroborated evidence. As a result of this clear error, N&W is now solely responsible for massive damage awards to former employees, some of whom had minimal or no exposure to asbestos at N&W or had been exposed to asbestos for far longer periods of time after their short-term employment with N&W decades ago, or whose lung disorders are largely attributable to their own smoking habits. If this claim had been brought across the border in Pennsylvania, N&W's liability would have been a tiny fraction of what it is. That is precisely the situation when review by this Court is particularly warranted.

## III. THE COURT SHOULD GRANT REVIEW BECAUSE THE DECISION BELOW WILL CONTROL LIABILITY AND APPORTIONMENT OF DAMAGES FOR THOUSANDS OF OCCUPATIONAL EXPOSURE CLAIMS FILED IN WEST VIRGINIA.

The two issues discussed above amply justify certiorari in this case. But, in addition, this Court must take into account the realities of current litigation, and the strong likelihood that the ruling below (if unchecked) will largely control the asbestos-related liability of the two major eastern railroads, Norfolk Southern and CSX, both of whom operate in West Virginia. The need for the Court's review of these issues has become even greater since *Dye*. Not only is there a deeper conflict of authority, but the recent implementation of a litigation management plan in West Virginia has transferred

all statewide asbestos-related litigation to the court – and in large part to the judge – below.

The plaintiffs' bar is now highly coordinated, and actively solicits plaintiffs for suits in favorable jurisdictions as part of a plan of "assembly-line litigation" to mass-produce tort claims for "lottery-size verdicts" against corporations. Mike France, *The Litigation Machine*, Bus. Wk., Jan. 29, 2001, at 116, 120, 122-23. The railroad plaintiffs' bar has employed these tactics in asbestos-related FELA actions, and has targeted certain jurisdictions where large judgments are routinely entered against railroads by juries and upheld by trial judges. Indeed, the popularity of West Virginia courts with the plaintiffs' bar is evident from a recent administrative order of the West Virginia Supreme Court of Appeals (a copy of which was lodged with the Court by petitioner in *Dye*). That order declares that there are over 25,000 asbestos-related actions (including 2,500 asbestos-related actions against railroads) currently pending in West Virginia (many involving out-of-state plaintiffs, as discussed below). Administrative Order Re: Motion To Refer Asbestos Litigation To The Mass Litigation Panel ¶¶ 2, 11 (W. Va. Dec. 28, 2000) (Petitioner's Lodging Tab A, *Norfolk & W. Ry.* v. *Dye*, 121 S. Ct. 2593 (2001) (No. 01-1637)). See also *State ex rel. Appalachian Power Co.* v. *MacQueen*, 479 S.E.2d 300, 303 (W. Va. 1996) (noting that asbestos-related actions "threaten to cripple the common law system of adjudication, if for no other reason by the sheer volume of cases"). Moreover, railroads have no right of appellate review of these actions in the two-tiered West Virginia court system, and the elected West Virginia Supreme Court of Appeals (as was true here and in *Dye*) frequently declines review. See, *e.g.*, Pet. App. 1a-2a.

As a result, the plaintiffs' bar is increasingly ushering former railroad employees from other states into the courts of West Virginia to take full advantage of rulings of this kind. Indeed, as indicated by copies of FELA complaints lodged

with the Court by N&W in *Dye*, literally *thousands* of out-of-state plaintiffs have filed FELA claims in West Virginia in recent years involving allegations of asbestos exposure and emotional distress therefrom. This trend continues unabated in the wake of *Dye*. For example, CSX was recently named the defendant in a FELA asbestos-related action brought by 917 plaintiffs, only 177 of whom are residents of West Virginia. Complaint, *Abbott* v. *CSX Transp., Inc.*, No. 01-C-162M (Marshall County Cir. Ct., W. Va. Aug. 1, 2001). Norfolk Southern was recently named the defendant in a FELA asbestos-related action brought by 365 plaintiffs, only 15 of whom are residents of West Virginia. Complaint, *Adkins* v. *Norfolk S. Ry.*, No. 01-C-183(1-365) (Brooke County Cir. Ct., W. Va. Sept. 13, 2001). The *in terrorem* effect of large mass tort actions creates undue pressure on defendants to settle even meritless claims. Cf. *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1298 (7th Cir. 1995) (Posner, J.).

Due in part to this flood of FELA litigation, the West Virginia Supreme Court of Appeals recently adopted a litigation management plan to handle the uncontrollable number of asbestos-related claims in its court system. Of particular significance, this plan transfers all pending statewide asbestos-related litigation to the court below, the Circuit Court of Kanawha County. See *State ex rel. Allman*, 551 S.E.2d at 372. Moreover, the judge below, the Honorable A. Andrew MacQueen, III, was called out of retirement "to conduct as many trials . . . as [he] is desirous of conducting and as time and circumstances permit." *Id*. at 375. As a result, the judgment below is of utmost significance on the critical issues for which review is sought.

Now that the court below has ruled that multimillion dollar judgments are proper for any plaintiff with asbestos-related symptoms without a showing of any severe emotional injury, and denied apportionment, there can be no doubt that the West Virginia courts will be the principal locus for FELA

litigation against the major eastern railroads. The railroads have no recourse from this mandated forum, because FELA actions may be brought in any district "in which the defendant shall be doing business at the time of commencing such action," 45 U.S.C. § 56, and may not be removed to federal court. See 28 U.S.C. § 1445(a). Thus, the decision below for all practical respects will govern the asbestos-related liability of Norfolk Southern and CSX in future litigation involving thousands of employees. Because these important and pressing issues will recur in thousands of cases, this Court should intervene to clarify the limits on railroad liability for emotional-distress damages and to ensure that compensation for these claims is fair and just.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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