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

REPLY BRIEF OF PETITIONER

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REPLY BRIEF OF PETITIONER

Petitioner Norfolk & Western Railway Company ("N&W") has demonstrated a mature split among the lower courts on two issues critical to the administration of the Federal Employers' Liability Act ("FELA"): the required elements for recovery of emotional distress damages, and the apportionment of damages. In their opposition, Respondents attempt principally to draw irrelevant factual and legal distinctions to suggest that this case is not the proper vehicle for resolving those conflicts of authority. Their arguments are unavailing.

1. Respondents devote much of their brief to a discussion of the evidence that is both misleading and irrelevant. First, they recount medical testimony that asbestotics have a higher cancer risk than the population at large. Opp. 4-6. But that is a diversion from the relevant and uncontroverted point that cancer is not medically linked to, or caused by, asbestosis, and thus fear-of-cancer damages cannot be awarded as pain-and-suffering for asbestosis. Pet. 12. Under the common law and FELA, plaintiffs may only be compensated for fear of cancer under an independent cause of action for negligent infliction of emotional distress, which requires *both* that the plaintiff is in the zone of danger (as may be evidenced by physical injury, *Metro-North Commuter Railroad* v. *Buckley*, 521 U.S. 424 (1997)), and that there be some objective manifestation of serious emotional injury. It is the latter that is at issue in this case. See *infra* at 4-6.

Second, Respondents recount in detail their testimony of pain and suffering. Opp. 6-9. But there is no dispute that Respondents may have a properly instructed jury determine pain and suffering from their asbestosis (such as shortness of breath), injuries which in these cases were relatively minor for plaintiffs of their circumstances and could not have accounted for million-dollar verdicts. The issue presented to this Court is the pure legal question of whether the jury can

be *instructed* that it can award damages for fear of cancer without a showing of both physical injury from asbestos exposure (the asbestosis) *and* physical or other objective manifestation of emotional injury. Respondents effectively concede that they made no showing of the latter.

Third, Respondents wrongly claim that review is precluded under West Virginia law because no special verdict form was used. Opp. 10. That is a misstatement of state law, even assuming state law can preclude this Court's review in FELA cases. The rule, under both federal and West Virginia law, is that an error in jury instructions requires reversal even if the jury rendered a general verdict. See *Fillippon* v. *Albion Vein Slate Co.*, 250 U.S. 76, 82 (1919) ("in jury trials erroneous rulings are presumptively injurious, especially those embodied in instructions to the jury"); Syllabus by the Court at 960, *Hull* v. *Geary*, 76 S.E. 960 (W. Va. 1912) ("[a]n instruction recognizing two different measures of the damages when only one is applicable in the case, and plainly tending to mislead the jury, is error for which the trial court is justified in setting aside the verdict"). The state cases upon which Respondents rely (Opp. 10) are not to the contrary; they hold only that where the claim of legal error (exceeding a statutory cap or excessive prejudgment interest) depends on the *amount* of a specific kind of damages, relief will not be granted absent a special interrogatory in the verdict form. Respondents' objections to this Court's review are common in tort cases, and just as routinely rejected by this Court. See, *e.g.*, *Norfolk S. Ry.* v. *Shanklin*, 529 U.S. 344, 351 (2000); Br. for Resp't in Opp'n to Pet. for a Writ of Cert. at 8-9, *Norfolk S. Ry.* v. *Shanklin*, 529 U.S. 344 (2000).

Fourth, as to apportionment, Respondents assert that this is an improper vehicle because there was no evidence presented that Respondents' other employers (such as a power company and an auto dealership) acted negligently in exposing Respondents to asbestos, nor did the railroad attempt to join them as third parties. Opp. 3, 11. These arguments are based

on a misunderstanding of FELA and the issue presented to this Court. Petitioner challenges the jury instruction that in awarding damages against the railroad the jury was "'not to make a deduction for the contribution of nonrailroad exposure.'" Pet. 9. This was error because FELA provides that the rail carrier is liable only (1) for the plaintiff's "injury while he is employed by such carrier in [interstate] commerce" (2) that "result[s] in whole or in part from the negligence" of the rail carrier. 45 U.S.C. § 51. Apportionment under FELA accordingly involves two steps: (1) apportionment between railroad and nonrailroad injury, and (2) apportionment among the various tortfeasors who contributed to the railroad injury (such as the manufacturers of asbestos and asbestos-containing products to which the employee was exposed in his railroad work).

It is the first step of FELA apportionment that is the most critical in asbestos cases (and occupational-exposure cases generally), and it is the issue on which the court below is directly in conflict with the Supreme Courts of Utah and Pennsylvania. See *infra* at 6-7. Apportionment between railroad and nonrailroad injury does not require a showing that the nonrailroad causes were negligent or otherwise legally at fault, but simply that some part of the injury did not occur during railroad employment. That is the plain command of the statute, and if it were otherwise the railroad would become the lifetime insurer of any employee with even the most passing exposure to dangerous agents during his railroad work. Respondent Butler is a perfect example of the absurdity of the rule adopted by the court below: by proof of a mere *three months* of exposure to asbestos as a railroad employee, he is allowed by the court below to recover all his asbestos-related damages (including fear of cancer) from the railroad under FELA's reduced standards of causation, even though indubitably the principal cause of his injury was his 33 years as a union pipefitter where he was continuously exposed to asbestos at various sites. Pet. 8. Petitioner

presented substantial evidence of the nature and duration of nonrailroad exposure that would have permitted a properly instructed jury to apportion damages between railroad and nonrailroad injury.

The issues on which the lower courts are divided are thus cleanly presented by this case. The rulings below do violence to the text of FELA and result in substantial and costly injustice to railroads. This Court should grant certiorari to restore order and clarity to the law.

2. *Emotional distress*. There is a square conflict among the lower courts as to whether a plaintiff may recover for emotional distress in a FELA action absent some medical or physical manifestation of that distress. Pet. 11-19. Respondents wrongly allege that this split of authority is not relevant to the decision below simply based on the presence in this case of a significant "physical impact" or injury (namely, asbestosis). Opp. 12-14, 21-22. Their argument is based on a misunderstanding of the distinctions drawn in *Consolidated Rail Corp.* v. *Gottshall*, 512 U.S. 532 (1994), and in the common law.

In *Gottshall*, the Court cordoned off negligent infliction of emotional injury as "apart from the tort law concepts of pain and suffering," the latter of which encompasses mental harms "'stemming *directly* from a physical injury or condition.'" *Id.* at 544 (emphasis added). The Court defined the separate tort of negligent infliction of emotional injury as "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." *Id.* (emphasis added). Consistent with this distinction, the zone-of-danger test adopted by this Court for emotional distress claims under FELA is not limited to physical impacts: it "limits recovery for emotional injury to those 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). There is no doubt that the common law

jurisdictions adopting the zone-of-danger test have long required physical or objective manifestation of the claimed emotional injury as a precondition for recovery. See *id.* at 549 n.11; Pet. 13-14. Respondents' assertion that the presence of a physical impact eliminates the manifestation requirement has no basis in law.[1]

Respondents fail to distinguish individual cases within the relevant conflict of authority over whether FELA incorporates the common-law manifestation requirement.[2] Opp. 12. Respondents also attempt to dilute the split of authority by asserting that most of the cases predate the Court's decisions in *Gottshall* and *Buckley*. However, the Court has left this particular question unaddressed. Pet. 14-16. In *Gottshall*, the Court acknowledged the two separate common law "limitations on the class of plaintiffs that may recover for emotional injuries and on the injuries that may be compensable." 512 U.S. at 546. In both *Gottshall* and *Buckley*, the Court addressed only the first limitation through

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[1] Respondents claim that in many jurisdictions fear of cancer claims do not require any manifestation of emotional distress. Opp. 22. But the common-law rule remains decidedly the majority rule, and in any event many of the cited cases explicitly required some manifestation or objective corroboration of the plaintiff's fear of cancer. *See*, *e.g.*, *Mauro* v. *Owens-Corning Fiberglas Corp.*, 542 A.2d 16, 24 (N.J. Super. Ct. App. Div. 1988), *aff'd*, 561 A.2d 257 (N.J. 1989); *Lavelle* v. *Owens-Corning Fiberglas Corp.*, 507 N.E.2d 476, 481 (Ohio Ct. Com. Pl. 1987).

[2] For example, Respondents allege that the Fifth Circuit rejected a manifestation requirement for emotional distress claims, Opp. 12, but ignore its later opinion noting that "a plaintiff may recover damages for *serious* mental distress." *Hagerty* v. *L & L Marine Servs., Inc.*, 797 F.2d 256, 256 (5th Cir. 1986) (emphasis added). Respondents distinguish the decision in *Bullard* v. *Central Vermont Railway*, 565 F.2d 193 (1st Cir. 1977), on the irrelevant grounds that the plaintiff there sought recovery for emotional distress other than fear of future injury. Opp. 12. Moreover, even though the court in *Vance* v. *Consolidated Rail Corp.*, 652 N.E.2d 776 (Ohio 1995), did not identify exactly "what evidence was needed to establish emotional distress," Opp. 12, it did require at least some "'medical evidence'" to support such a claim. 652 N.E.2d at 784.

its adoption and application of the "zone of danger" test. *Id*. at 554-56; 521 U.S. at 430. Without any direct treatment of the second limitation, it is irrelevant whether the split of authority arose before or after *Gottshall* and *Buckley*. The relevant conflict is as alive today as before these decisions.

Contrary to Respondents' assertions, this case is the perfect vehicle for addressing the question presented. It is difficult to conceive of a case in which a plaintiff could present any less evidence of emotional distress. The only relevant evidence was some Respondents' own testimony that they are "concern[ed] about," or "worr[y] about" contracting cancer sometime in the future; indeed, the other Respondents provided no testimony at all regarding cancer. Opp. 6-9. Respondents otherwise refer to medical testimony that "plaintiffs were at risk of developing lung cancer." *Id*. at 4. Again, this testimony does not establish that Respondents actually experienced emotional distress.

3. *Apportionment*. N&W demonstrated that there is a square conflict on the critical question of apportionment of damages under FELA. Pet. 19-24. The Court's resolution of this conflict is particularly warranted by the rapid changes in the common law in the past few decades on this very issue. See *Restatement (Third) of Torts: Apportionment of Liability* § 17 (2000). Respondents fail to refute this split of authority and common law trend or give any reason to delay review.

Respondents attempt to distinguish the principal cases in conflict with the ruling below by arguing that none involved multiple tortfeasors. Their argument misses the point. Because FELA limits the railroad's liability to injury occurring during railroad employment that is caused by the railroad's negligence, 45 U.S.C. § 51, it commands apportionment between railroad and nonrailroad injury. That is why Respondents simply cannot distinguish the principal decision with which the decision below is in conflict: *Dale* v. *Baltimore & Ohio Railroad*, 552 A.2d 1037 (Pa. 1989). First, *Dale*, like this case, involved indivisible injuries related to

asbestos exposure. Second, Petitioner seeks apportionment not just among multiple tortfeasors, but as in *Dale* among the railroad's conduct and independent, nonrailroad sources of lung disease. Third, the holding of *Dale* broadly and properly requires apportionment among the railroad and all other causes, regardless of whether those causes involve independent tortfeasors. *Id.* at 1041. The railroad cannot be held jointly and severally liable for injuries caused outside of railroad employment. Thus, *Dale* repudiated joint and several liability as inconsistent with the statutory scheme, in clear conflict with the decision below.[3]

Similarly, Respondents' effort to distinguish the Utah Supreme Court's recent decision in *Brewer* v. *Denver & Rio Grande Western Railroad*, 31 P.3d 557 (Utah 2001), is unavailing. Opp. 15. As in *Dale*, the court affirmed the apportionment of damages among the railroad's negligence and other causes, including the plaintiff's "'diabetes, obesity, age, and sedentary habits.'" 31 P.3d at 571 n.7. Contrary to Respondents' assertions, these "natural conditions" have no bearing on the indivisibility of the injury itself. *Id*. The court mentioned these conditions only in the context of a state comparative negligence statute, which it expressly overrode in favor of apportioning damages under federal common-law principles governing FELA actions. *Id*. In addition, all but three of the federal appellate decisions have rejected joint-and-several liability for indivisible injuries from multiple causes, and are indistinguishable on the grounds which Respondents invoke. See Pet. 21-22.

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[3] Respondents make the implausible claim that a decision of a lower Pennsylvania court has called into doubt the validity of *Dale*. Opp. 15 n.1. To the contrary, the lower court relied on its prior decision in *Dale*, unaware that it had been vacated by the Pennsylvania Supreme Court. *See McDermott* v. *Consolidated Rail Corp.*, No. 153 EAL 2001, 2001 WL 1635493 (Pa. Dec. 20, 2001) (per curiam), *vacating* 768 A.2d 348, 352-53 (Pa. Super. Ct. 2001).

Respondents also argue that N&W failed to join any third-party defendants, or to make any effort to obtain contribution from any third parties. Opp. 3. Under West Virginia law, however, N&W was barred from seeking contribution from any of the *32* other entities with which Respondents settled claims for the same injuries.[4] See *Board of Educ.* v. *Zando, Martin & Milstead, Inc.*, 390 S.E.2d 796, 803-05 (W. Va. 1990). In any event, contribution actions are not necessary – and indeed, duplicative – under prevailing common-law principles where damages are apportioned among tortfeasors. See *Restatement (Third) of Torts: Apportionment of Liability* § B19 cmt. c.[5]

Most of Respondents' arguments in favor of joint-and-several liability, although erroneous, are relevant only at the merits stage. The critical point is that Respondents, admitting that only "fifteen states . . . still retain pure joint and several liability," Opp. 26, do not contest that the recent prevailing and rapid trend in the common law has been away from joint and several liability, even for indivisible injuries. Pet. 23; see also *Restatement (Third) of Torts: Apportionment of Liability* § 17 cmt. a; *id*. § D18 cmt. b.[6] Contrary to Respondents' claims, Opp. 24, this Court does not usurp Congress's role by fulfilling its statutory "duty of fashioning remedies for injured employees in a manner analogous to the development of tort remedies at common law." *Kernan* v. *American Dredging Co.*, 355 U.S. 426, 432 (1958).

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[4] *See* Motions for Entry of Judgment Order (Petitioner's Lodging).

[5] Contrary to Respondents' claims, Opp. 11, the offset by the court below based on settlements with other entities (which amounted to less than 3% of the jury award) does not affect Petitioner's right to proper apportionment. *Cf.* Final Judgment Orders (Respondents' Lodging).

[6] Indeed, the Restatement sections cited by Respondents in favor of joint and several liability for indivisible injuries have been expressly superseded. *See Restatement (Third) of Torts: Apportionment of Liability* Parallel Table 2 (2000) (noting replacement of *Restatement (Second) of Torts* §§ 433A, 434, 879 (1965)).

This case thus presents a clear vehicle for resolving the conflict among the lower courts. In light of the rapid, definitive movement away from joint-and-several liability in the past few decades, the Court should establish a uniform standard for the apportionment of damages in FELA actions.

4. *FELA Mass Tort Litigation In West Virginia*. In their opposition, Respondents paint an idyllic picture of the conduct of mass tort litigation in West Virginia and elsewhere. Their assertions, however, reveal the exact opposite: the tactical targeting of pro-plaintiff jurisdictions to take full advantage of extraordinary rulings such as the decision below. It is no accident that 25,000 asbestos suits have been filed in West Virginia, and 2,500 FELA asbestos suits are pending against railroads, Pet. 25, even though only 1.6% of U.S. railroad employees reside in West Virginia, see AAR Br. 3. The need for uniform FELA standards on these questions could not be more apparent, and denial of certiorari would simply vindicate the strategy of the plaintiff's bar.

Respondents attempt to downplay the impact of the decision below on current and future FELA asbestos litigation. Despite acknowledging that all such litigation in West Virginia has been transferred to the court below, Respondents assume that Judge MacQueen "will be subject to the supervision of both . . . the supervising judge for the [Mass Litigation Panel], and the State Supreme Court." Opp. 16. Any effective oversight is doubtful, however, as the West Virginia Supreme Court has found Judge MacQueen to be "uniquely qualified" to conduct mass trials, *State ex rel. Allman* v. *MacQueen*, 551 S.E.2d 369, 375 (W. Va. 2001), and has refused even to review such extraordinary rulings as his decision below.[7]

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[7] Respondents also exaggerate the availability of appellate review in West Virginia. There is no right of appellate review there, Opp. 16 n.2, and discretionary review is granted in less than 30% of civil cases, *id*. at 17 n.2. The vast majority of FELA and asbestos cases cited by Respondents were appeals raised by plaintiffs, not defendant railroads, or

Respondents also claim that West Virginia courts do not suffer from an influx of non-resident FELA plaintiffs. Opp. 18-19. However, both Petitioner and the Association of American Railroads have presented numerous examples of mass FELA complaints filed in West Virginia by an astonishing number of out-of-state plaintiffs. See Pet. 25-26; AAR Br. 9 n.15. Contrary to Respondents' assertions, Opp. 18, the West Virginia courts have not contained this flood of litigation by dismissing cases on the grounds of *forum non conveniens*. Respondents rely solely on their lodging of 15 such dismissals in the past ten years. *Id*. This lodging at most illustrates that the West Virginia courts sporadically dismiss FELA cases on this basis, but more importantly reveals how broad is the practice of targeting pro-plaintiff jurisdictions such as West Virginia for the filing of FELA cases on behalf of thousands of non-resident plaintiffs. Pet. 25-26.

Now that all state-wide asbestos litigation has been transferred to a court that 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 despite evidence of numerous other causes of injury, there can be no doubt that the West Virginia courts will be the principal locus for FELA litigation against the major Eastern railroads. With an even deeper conflict of authority and more serious practical consequences since *Dye*, the Court should review these two issues of fundamental importance to the equitable administration of FELA.

CONCLUSION

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

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cases in which the court's jurisdiction was original. *Id*. at 17 nn.3, 4.

Respectfully submitted,

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