

No. 08-1034

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IN THE  
*Supreme Court of the United States*

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CSX TRANSPORTATION, INC.,

*Petitioner,*

v.

THURSTON HENSLEY,

*Respondent.*

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**On Petition for Writ of Certiorari  
To the Court of Appeals of Tennessee**

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**MOTION FOR LEAVE TO FILE BRIEF AND  
BRIEF OF WASHINGTON LEGAL FOUNDATION  
AS AMICUS CURIAE IN SUPPORT OF PETITIONER**

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Date: March 16, 2009

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**MOTION OF WASHINGTON LEGAL FOUNDATION  
FOR LEAVE TO FILE BRIEF AS  
AMICUS CURIAE IN SUPPORT OF PETITIONER**

Pursuant to Rule 37.2 of the Rules of this Court, the Washington Legal Foundation (WLF) respectfully moves for leave to file the attached brief as *amicus curiae* in support of Petitioner. Counsel for Petitioner has consented to the filing of this brief. Counsel for Respondent declined to consent. Accordingly, this motion for leave to file is necessary.

The Washington Legal Foundation (WLF) is a non-profit public interest law and policy center with supporters in all 50 States. WLF devotes a substantial portion of its resources to defending free-enterprise, individual rights, and a limited and accountable government.

WLF supports efforts to ensure that those injured as a result of exposure to asbestos are adequately and promptly compensated for their injuries. WLF is concerned, however, that much of the money awarded as damages in asbestos liability cases has been paid to uninjured claimants. Accordingly, WLF has regularly participated in proceedings before this and other federal and state courts, to support procedures designed to ensure that the limited funds available to pay asbestos plaintiffs are reserved for those who have suffered serious injuries. *See, e.g., In re Federal-Mogul Global, Inc.*, 300 F.3d 368 (3d Cir. 2002), *cert. denied*, 537 U.S. 1148 (2003); *Norris v. Crane Co.*, *review denied*, \_\_ Cal. 4<sup>th</sup> \_\_, 2008 Cal. LEXIS 8680 (June 20, 2008); *General Electric Co. v. Cain*, 236 S.W.3d 579 (Ky. 2007); *3M Co. v. Johnson*, 895 So. 2d 151 (Miss. 2005); *Ieropoli v. AC&S Corp.*, 577 Pa. 138 (2004).

WLF has also appeared in this Court in numerous cases arising under the Federal Employers' Liability Act (FELA), to support adoption of reasonable limitations on damages awardable under that statute. *See, e.g., Norfolk & Western Ry. Co. v. Ayers*, 538 U.S. 135 (2003); *Metro-North Commuter R. Co. v. Buckley*, 521 U.S. 424 (1997); *CONRAIL v. Gottshall*, 512 U.S. 532 (1994).

WLF is concerned that the decision below, if allowed to stand, would eliminate all meaningful constraints on the award of emotional distress damages in FELA cases in which the plaintiff has suffered at least some physical injury. In the absence of such constraints, courts are ill-equipped to weed out trivial or fraudulent claims, and FELA defendants are faced with the specter of unlimited and unpredictable liability.

WLF has no direct interest in the outcome of this litigation, financial or otherwise. Accordingly, WLF can provide the Court with a perspective not shared by any of the parties.

For the foregoing reasons, the Washington Legal Foundation respectfully requests that it be allowed to participate in this case by filing the attached brief.

Respectfully submitted,

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## QUESTION PRESENTED

In *Norfolk & Western Railway Co. v. Ayers*, 538 U.S. 135 (2003), this Court held that, under the Federal Employers' Liability Act, 45 U.S.C. §§ 51-60, a plaintiff may "seek compensation for fear of cancer as an element of his asbestos-related pain and suffering damages," with the "important" qualification that the plaintiff must "prove that his alleged fear is genuine and serious." 538 U.S. at 157. The Court also identified a number of "verdict control devices," including, "on a defendant's request, a charge that each plaintiff must prove any alleged fear to be genuine and serious." *Id.* at 159 n.19. The question presented is whether the Tennessee Court of Appeals erred in holding that a defendant is *not* entitled to a jury instruction that the plaintiff must prove his alleged fear of cancer to be "genuine and serious."

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**BRIEF OF WASHINGTON LEGAL FOUNDATION  
AS AMICUS CURIAE IN SUPPORT OF PETITIONER**

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**INTERESTS OF *AMICUS CURIAE***

The interests of the Washington Legal Foundation are more fully set forth in the accompanying motion for leave to file this brief.<sup>1</sup> In brief, WLF is a non-profit public interest law and policy center with supporters in all 50 States. WLF devotes a substantial portion of its resources to defending free-enterprise, individual rights, and a limited and accountable government.

WLF has regularly participated in proceedings before this and other federal and state courts, to support procedures designed to ensure that the limited funds available to pay asbestos plaintiffs are reserved for those who have suffered serious injuries. WLF has also appeared in this Court in numerous cases arising under the Federal Employers' Liability Act (FELA), 45 U.S.C. §§ 51-60, to support adoption of reasonable limitations on damages awardable under that statute. *See, e.g., Norfolk & Western Ry. Co. v. Ayers*, 538 U.S. 135 (2003); *Metro-North Commuter R. Co. v. Buckley*, 521 U.S. 424 (1997); *CONRAIL v. Gottshall*, 512 U.S. 532 (1994).

WLF is concerned that the decision below, if

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<sup>1</sup> Pursuant to Supreme Court Rule 37.6, WLF states that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than WLF and its counsel, made a monetary contribution intended to fund the preparation and submission of this brief. More than ten days prior to the due date, counsel for WLF provided counsel for Respondent with notice of its intent to file this brief.

allowed to stand, would eliminate all meaningful constraints on the award of emotional distress damages in FELA cases in which the plaintiff has suffered at least some physical injury. In the absence of such constraints, courts are ill-equipped to weed out trivial or fraudulent claims, and FELA defendants are faced with the specter of unlimited and unpredictable liability.

### **STATEMENT OF THE CASE**

Respondent Thurston Hensley is a 69-year-old man who was employed for many years as an electrician by Petitioner CSX Transportation, Inc. (CSX) and by another railroad later acquired by CSX. He alleges that during the course of his employment, CSX negligently exposed him to asbestos and Dowclene (a cleaning agent) and that the exposures caused him to contract asbestosis and toxic encephalopathy.

CSX vigorously disputed that Hensley ever actually contracted those diseases. It noted, for example, that during the period he claimed to be injured, Hensley continued to work flawlessly for CSX until age 65 and to hold down a second job as a successful preacher; and that he was still driving a car at age 67 at the time of trial. Pet. 29-30 n.3. The jury found in favor of Hensley, finding that his claimed diseases were caused at least in part by CSX's negligence. Pet. App. 30a-33a. Those findings are not at issue in this petition.

At trial, Hensley sought to recover damages based on an alleged fear that, as a result of his exposure to asbestos, he might develop cancer later in life. CSX disputed his claim that he actually had suffered serious

emotional injury as a result of any such fears. CSX requested the trial judge to instruct the jury that Hensley could not recover pain and suffering damages caused by fear of cancer (a disease Hensley indisputably has not contracted), unless he could demonstrate that his alleged fear was “genuine and serious.” The trial judge refused to give that instruction and instead told the jury that if it found in Hensley’s favor, he would be entitled to compensation for “any physical suffering and emotional suffering which he has sustained.” *Id.* at 62a.

The jury returned a verdict for Hensley and awarded \$5,000,000 in damages. In a motion for a new trial and/or to alter or amend the judgment, CSX argued among other things that the trial court had erred in refusing to grant a directed verdict on Hensley’s fear-of-cancer claim and in refusing to give CSX’s proposed instruction that a fear of cancer is compensable only if it is “genuine and serious.” The trial court denied the motion and entered judgment. *Id.* at 46a-54a.

The Tennessee Court of Appeals affirmed. *Id.* at 1a-37a. The Court of Appeals rejected all of CSX’s claims, including claims that Hensley had submitted insufficient evidence to support damages based on fear of cancer and that the trial court erred in failing to give CSX’s proposed “genuine and serious” instruction. *Id.* at 33a-36a. The court said that such an instruction was not required by *Ayers*, and that requiring such an instruction “would make little sense.” *Id.* at 34a. The court said that a “genuine and serious” instruction would do nothing to dissuade “[a]ny juror who might be predisposed to grant a large award based on shaky evidence of fear of cancer.” *Id.* The court held that because a jury, based on the evidence at trial, *could*

reasonably have found that Hensley's fear of cancer was "genuine and serious," the \$5,000,000 damages award did not run afoul of *Ayers*. *Id.* at 34a-36a.

CSX filed an application for permission to appeal in the Tennessee Supreme Court, once again raising the issue of whether the trial court's refusal to give a "genuine and serious fear" instruction constituted reversible error. On November 17, 2008, the Tennessee Supreme Court denied the application. *Id.* at 45a.

### **REASONS FOR GRANTING THE PETITION**

The petition raises issues of exceptional importance. In creating rules governing the recovery of FELA damages, the Court has acknowledged several policy considerations that suggest the need for caution in awarding damages for negligent infliction of emotional distress. Those policy considerations include "the potential for a flood of trivial suits, the possibility of fraudulent claims that are difficult for judges and juries to detect, and the specter of unlimited and unpredictable liability." *Gottshall*, 512 U.S. at 557. The Court has been sufficiently concerned by those issues that in FELA cases it has barred altogether recovery for emotional distress caused by fear of developing cancer in the future if the emotional distress is not tied to a physical injury.

The three policy considerations are no less pertinent simply because, as here, the jury found that the plaintiff's claimed fear of cancer was, in fact, tied to a physical injury. The dangers of trivial or fraudulent emotional distress claims still exist, and as does the specter of unlimited and unpredictable liability. The

Court held in *Ayers* that those dangers were somewhat reduced by the added presence of a physical injury. Accordingly, *Ayers* did not prohibit altogether the recovery of fear-of-cancer damages in such cases; rather, it determined that the three policy concerns could be satisfied so long as recovery was limited to situations in which the finder of fact determines that the emotional distress caused by fear of cancer is “genuine and serious.” *Ayers*, 538 U.S. at 157. The Court made clear that this limitation on damages was an “important reservation” and was not met, *inter alia*, by a “general concern for one’s future health.” *Id.* at 157-158. It held that FELA defendants were entitled, upon request, to a jury instruction that limits emotional distress damages based on fear of cancer to situations in which the fear is “genuine and serious.” *Id.* at 159 n.19.

The Tennessee Court of Appeals has either misread *Ayers* or has chosen to ignore *Ayers*’s mandate. It has decided that “genuine and serious” jury instructions are unwarranted in FELA cases in Tennessee courts because, in the court’s view, they “make little sense.” Nor is Tennessee alone in failing to comply with *Ayers*; Missouri courts have also determined that a “genuine and serious” jury instruction is unwarranted in FELA cases involving fear-of-cancer claims.

The policy considerations highlighted above make abundantly clear why the error by the court below is not a mere trivial matter but rather warrants the Court’s review. *Ayers* permitted recovery of damages based on fear-of-cancer claims, despite its recognition that it can often be difficult to weed out trivial or fraudulent claims and that such claims can often lead to unlimited and unpredictable liability. It did so with the explicit

understanding that those concerns would be ameliorated by a rule barring recovery unless the jury explicitly found that the alleged fear was genuine and serious.

By doing away with the bar on recovery in the absence of a “genuine and serious” jury finding, the Tennessee Court of Appeals is stripping FELA defendants of the principal protection that *Ayers* afforded them against unwarranted and unprincipled jury verdicts. Review is urgently warranted to prevent asbestos-related FELA litigation from becoming the unmitigated disaster that all agree has befallen common-law asbestos liability litigation. The Court has on several occasions washed its hands of responsibility for that disaster and suggested that any solution must come from Congress. *See, e.g., Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 821 (1999). Passing responsibility to Congress is not an answer to the mounting backlog of asbestos cases raising FELA claims; Congress has left it to this Court to craft and implement the rules governing such litigation. In *Gotshall*, *Metro-North*, and *Ayers*, the Court crafted a series of rules governing the award of emotional distress damages in FELA cases. It is now incumbent on the Court to ensure that those rules are being followed.

**I. REVIEW IS WARRANTED BECAUSE THE DECISION BELOW IGNORED *AYERS* AND DID SO BASED ON A RATIONALE THAT DEFIES LOGIC**

Common law is sharply split on whether individuals who have suffered physical injury as a result of another's negligence may recover emotional distress damages based on a fear that the defendant's negligent conduct may cause them to develop cancer at some unspecified time in the future. Compare *Celotex Corp. v. Wilson*, 607 A.2d 1223 (Del. 1992) (permitting damages for asbestosis claimant's fear of cancer), with *Simmons v. Pacor, Inc.*, 543 Pa. 644 (1996) (denying damages based on fear of cancer). In *Ayers*, the Court (by a 5-4 vote) sided with those common-law courts that have permitted recovery and held that such fear-of-cancer claims are cognizable in FELA suits. 538 U.S. at 145-59. But it did so with an "important reservation": "It is incumbent upon [the] complainant . . . to prove that his alleged fear is genuine and serious." *Id.* at 157. The court held that several "control devices" are available to ensure that fear-of-cancer claims are not compensated unless they meet the genuine-and-serious threshold; among the "control devices" it cited was the right to, "on a defendant's request, a [jury] charge that each plaintiff must prove any alleged fear to be genuine and serious." *Id.* at 159 n.19.

Despite *Ayers*'s explicit statement that defendants are entitled to a jury charge that fear-of-cancer claims are not compensable unless they are "genuine and serious," the trial court refused CSX's request to give such a charge, and the Tennessee Court of Appeals

affirmed, in an opinion that indicated that such charges should never be given in Tennessee courts. Pet. App. 34a. The appeals court agreed with a Missouri appellate court's conclusion that “*Ayers* does not require . . . instructions detailing or explaining damages on a fear of developing cancer. . . [T]he Court in *Ayers* did not discuss or authorize jury instructions on this issue.” Pet. App. 33a-34a (quoting *Hedgecorth v. Union Pac. R.R. Co.*, 210 S.W.3d 220, 228-29 (Mo. App. 2006)). The Tennessee Court of Appeals opined that such a jury instruction requirement “would make little sense,” explaining:

One purpose of the “genuine and serious” requirement, we believe, is to protect defendants from excessive verdicts based on appeals to jurors’ passions with respect to the deeply emotional issue of cancer. Because the mere suggestion of a possibility of cancer has the potential to evoke raw emotions, a juror may be swayed by the barest shred of evidence that a defendant has caused a plaintiff to suffer an increased risk and/or fear of cancer, and may be tempted to overcompensate the plaintiff for such a risk or fear. In light of this reality, little if any purpose would be served by instructing the jury that the plaintiff’s fear must be “genuine and serious.” Juries do not routinely grant multimillion-dollar awards for injuries that the jurors might regard as non-genuine or unserious. Any juror who might be predisposed to grant a large award based on shaky evidence of a fear of cancer is unlikely to be swayed by the language of *Ayers*. Rather, it is for the courts to serve as gatekeepers in this regard, to ensure that fear of

cancer claims do not *go* to the jury unless there is credible evidence of a “genuine and serious” fear.

*Id.*

Review is warranted because the decision below so obviously conflicts with *Ayers* and ensures that trial courts in Tennessee (in line with those in Missouri) will conduct FELA trials that do not comply with *Ayers*’s mandate. The appeals court’s statement that *Ayers* neither “discuss[ed]” nor “authoriz[ed]” jury instructions that cancer fears are not compensable unless “genuine and serious” is demonstrably wrong, and was made without any discussion of *Ayers*’s Footnote 19, which discusses the jury instruction requirement.

Moreover, the appeals court’s rationale for abandoning the jury instruction requirement makes no sense whatsoever. Petitioner has already spelled out in detail all the logical inconsistencies in the appeals court’s rationale. Pet. 16-19. Accordingly, we will not repeat those details here. Suffice to say that, under the appeals court’s rationale, Tennessee courts will affirm multi-million dollar FELA judgments for plaintiffs claiming fear of cancer but with only minor physical injuries – without *anyone* actually determining that the plaintiff’s fear of cancer is “genuine and serious.” A trial court and Tennessee appellate courts will not have made that determination; under the appeals court’s ruling, they consider only whether a rational jury, if it “reasonably believed [an] [e]mployee’s evidence, . . . could have found that a genuine and serious fear of cancer existed.” *Id.* at 36a. Nor will a jury have made that determination; it cannot possibly have determined

that a plaintiff's claimed fear of cancer is "genuine and serious" when it has not been asked to do so.<sup>2</sup>

In sum, review is warranted to address the serious conflict between the decision below and this Court's *Ayers* decision.

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<sup>2</sup> The appeals court's response – that "[j]uries do not routinely grant multi-million dollar awards for injuries that the jurors regard as non-genuine or unserious" and that a jury inclined to do so would not be dissuaded by an instruction directing them not to do so, *id* at 34a – is belied by the history of asbestos litigation over the past four decades, which has seen many huge judgments awarded to plaintiffs with minor injuries. The danger of large awards for emotional distress based on genuine but not-out-of-the-ordinary fears of cancer is magnified in FELA cases, in which punitive damage awards are not generally permitted. *Wildman v. Burlington Northern R.R. Co.*, 825 F.2d 1392 (9<sup>th</sup> Cir. 1987). Jurors who believe that the plaintiff's fear of developing cancer in the future do not rise to the "serious" level, but who believe that the defendant deserves to be punished for its negligence, may decide to award massive emotional distress damages as an alternative to punitive damages. Indeed, that may be precisely what happened in this case; the jury awarded \$5,000,000 in damages to a man claiming a fear of developing cancer, even though: (1) his chances of developing cancer were not appreciably higher than those of any man his age; and (2) there was little evidence that any fear of cancer he experienced was either genuine or serious; and (3) his anxiety symptoms pre-dated the diagnosis of asbestosis (the event that allegedly triggered his fear of cancer), as demonstrated by the fact that he had been prescribed Xanax (an anti-anxiety medication) long before the contested asbestosis diagnosis was made.

## **II. REVIEW IS WARRANTED TO ENSURE THAT REASONABLE LIMITS CONTINUE TO BE IMPOSED ON EMOTIONAL DISTRESS DAMAGE AWARDS IN FELA LITIGATION**

In a series of decisions issued over the past 15 years, the Court has crafted rules designed to impose reasonable limitations on the award of emotional distress damages in FELA litigation. Review is warranted to ensure that those limitations are not rendered ineffective by lower courts' unwillingness to abide by the control devices mandated by the Court.

The first of the Court's recent FELA decision addressing emotional distress damages was the 1994 *Gottshall* decision. The plaintiff in that case filed suit under FELA, alleging that he suffered severe emotional distress when he witnessed the death of a co-worker while on the job. The Court held that claims for negligent infliction of emotional distress were cognizable under FELA. *Gottshall*, 512 U.S. at 550. The Court nonetheless acknowledged several policy considerations – also recognized by the common law – that suggested the need for caution in awarding such emotional distress damages. Those policy considerations included “the potential for a flood of trivial suits, the possibility of fraudulent claims that are difficult for judges and juries to detect, and the specter of unlimited and unpredictable liability.” *Gottshall*, 512 U.S. at 557. Those policy concerns led the Court to conclude that when plaintiffs claim to have suffered emotional distress damages unaccompanied by physical injury, recovery is limited to those who can meet the

common-law “zone of danger” test – that is, those whose emotional injury is caused by having been “placed in immediate risk of physical harm by [the defendant’s negligent] conduct.” *Id.* at 548.

Three years later, the Court considered the FELA emotional distress claims of a plaintiff who had been exposed to asbestos-laden insulation dust while employed as a pipefitter by a railroad. *Metro-North Commuter R.R. Co. v. Buckley*, 521 U.S. 424 (1997). The exposure had not caused any physical injuries, but he feared – with some cause – that he might develop cancer. The Court repeated the policy reasons, set forth in *Gottshall*, for limiting the circumstances under which FELA plaintiffs should be permitted to recover emotional distress damages. *Id.* at 433. In stressing two of those policy considerations – the difficulty in weeding out trivial and invalid claims – the Court noted that “apart from [the plaintiff’s] own testimony, there was virtually no evidence of distress.” *Id.* The Court concluded that prolonged exposure to asbestos did not by itself constitute a physical injury and thus, under the rule announced in *Gottshall*, the plaintiff could not recover under FELA for his negligently inflicted fear of developing cancer. *Id.* at 428-38.

Finally, in *Ayers* the Court considered whether a FELA plaintiff who has been negligently exposed to asbestos and who has developed at least some physical injuries (but not cancer) may recover emotional distress damages based on a fear of developing cancer in the future. The *Ayers* Court answered “yes,” concluding that concerns over “unlimited” and “unpredictable” liability for emotional distress damages are reduced when “the universe of potential claimants” is reduced

by eliminating those who have not suffered any physical injury. *Ayers*, 538 U.S. at 157. But in light of the previously expressed policy concerns, the Court added “an important reservation”: a FELA claimant suffering from asbestosis may obtain compensation based on fear of cancer only if he can “prove that his alleged fear is genuine and serious.” *Id.* “General concern for one’s future health” is “insufficient to support recovery for an asbestosis sufferer’s fear of cancer.” *Id.* at 158 (quoting *Smith v. A.C. & S., Inc.*, 843 F.2d 854, 859 (5<sup>th</sup> Cir. 1988)).

As *Ayers* made clear, the policy considerations identified in *Gottshall* and *Metro-North* do not become irrelevant simply because, as here, the jury found that the plaintiff’s claimed fear of cancer was, in fact, tied to a physical injury (in this case, asbestosis).<sup>3</sup> The dangers of trivial or fraudulent emotional distress claims still exists, as does the specter of unlimited and unpredictable liability. And as *Metro North* pointed out, those dangers are particularly great when, as was true in *Metro North* and is also true here, the only real evidence of emotional distress attributable to a fear of

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<sup>3</sup> The importance of strict enforcement of *Ayers*’s “genuine and serious” fear-of-cancer requirement in asbestosis cases is made clear when one considers the nature of that disease. Asbestosis is a set of lung disorders for which no causal link to cancer has been established. See A. Chung & F. Green, *PATHOLOGY OF LUNG DISEASE* 312 (2d ed. 1998). In some instances, the patient may suffer severe loss of lung function; in other instances, as in Hensley’s, any loss in lung function is relatively mild. There is increased reason to question whether the emotional distress brought on by fear of asbestos-related cancer meets the “genuine and serious” threshold when the patient’s physical impairment from asbestosis is relatively mild.

cancer is the plaintiff's own testimony. *Metro-North*, 521 U.S. at 433.

The Court held in *Ayers* that the dangers identified in *Gottshall* and *Metro-North* were somewhat reduced by the added presence of a physical injury. It thus imposed a somewhat looser restriction than the prior two cases on the award of emotional distress damages, the requirement that any fear of cancer be "genuine and serious." As one of the "control devices" designed to ensure that the "genuine and serious" fear of cancer limitation had teeth, the Court held that FELA defendants were entitled, upon request, to a jury instruction that limits emotional distress damages based on fear of cancer to situations in which the fear is "genuine and serious." *Ayers*, 538 U.S. at 159 n.19.

The policy considerations highlighted above make abundantly clear why the error by the court below is not a mere trivial matter but rather warrants the Court's review. *Ayers* permitted recovery of damages based on fear-of-cancer claims, despite its recognition that it can often be difficult to weed out trivial or fraudulent claims and that such claims can often lead to unlimited and unpredictable liability. It did so with the clear understanding that those concerns would be ameliorated by a rule barring recovery unless the jury explicitly found that the alleged fear was genuine and serious.

By doing away with the bar on recovery in the absence of a "genuine and serious" jury finding, the Tennessee Court of Appeals is stripping FELA defendants of the principal protection that *Ayers* afforded them against unwarranted and unprincipled

jury verdicts. Review is urgently warranted to prevent asbestos-related FELA litigation from becoming the unmitigated disaster that all agree has befallen common-law asbestos liability litigation.

As more and more major corporations are being driven into bankruptcy by asbestos litigation liabilities, one must question the priorities of a tort system that awards millions of dollars in damages to those who claim to fear developing cancer yet are unlikely ever to do so. As this Court has recognized, corporate funds to compensate those with asbestos-related injuries are rapidly dissipating, and there may well be inadequate funds available to compensate those likely to develop mesothelioma and other fatal asbestos-related cancers in the years to come. *Amchem Prods. Inc. v. Windsor*, 521 U.S. 591, 598 (1997) (“Exhaustion of assets threatens and distorts the process; and future claimants may lose altogether”) (quoting *Report of the Judicial Conference Ad hoc Committee on Asbestos Litigation 2-3* (Mar. 1991)).

In the six years since *Ayers* was decided, the asbestos litigation crisis has only grown worse. See generally Patrick M. Hanlon and Anne Smetak, *Asbestos Changes*, 62 N.Y.U. ANN. SURV. AM. L. 525 (2007). Asbestos-related corporate bankruptcies have continued unabated, and 2005 estimates pegged the number of yet-to-be-filed asbestos lawsuits at 2,000,000. Stephen J. Carroll, *et al.*, ASBESTOS LITIGATION 109, 106 (Rand Institute for Civil Justice 2005). A congressional effort to adopt asbestos litigation reform legislation fell apart in 2006, and no new legislation is expected in the near term.

The Court on several occasions has washed its hands of responsibility for the asbestos litigation disaster and suggested that any solution must come from Congress. *See, e.g., Ortiz v. Fibreboard Corp.*, 527 U.S. at 821 (“the elephantine mass of asbestos cases . . . defies customary judicial administration and calls for national legislation.”). Passing responsibility to Congress is not an answer to the mounting backlog of asbestos cases raising FELA claims, almost every single one of which seeks to recover fear-of-cancer damages; Congress has left it to this Court to craft and implement the rules governing such litigation.<sup>4</sup> In *Gotshall*, *Metro-North*, and *Ayers*, the Court crafted a series of rules governing the award of emotional distress damages in FELA cases. It is now incumbent on the Court to ensure that those rules are being followed.

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<sup>4</sup> Moreover, Congress made clear in adopting FELA that its primary focus was on present injuries. The statute provides a cause of action for “any person suffering injury,” 45 U.S.C. § 51, not for persons “at risk of suffering injury,” or “who fear they will suffer an injury.” That statutory language represents a clear mandate to the Courts from Congress to take effective steps to ensure that FELA remedies are being afforded only to those with real, current injuries.

**CONCLUSION**

*Amicus curiae* Washington Legal Foundation respectfully requests that the Court grant the petition for a writ of certiorari. In the alternative, the petition should be granted and the judgment below summarily reversed.

Respectfully submitted,

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Dated: March 16, 2009