

No.

In the Supreme Court of the United States

CSX TRANSPORTATION, INC.,

Petitioner,

v.

THURSTON HENSLEY,

Respondent.

**On Petition for a Writ of Certiorari
to the Court of Appeals of Tennessee**

PETITION FOR A WRIT OF CERTIORARI

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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 asbestosis-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."

RULE 29.6 STATEMENT

Petitioner CSX Transportation, Inc. has a parent company, CSX Corporation, which is publicly traded. No other publicly held company owns more than 10 percent of petitioner's stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, CSX Transportation, Inc., respectfully petitions for a writ of certiorari to review the judgment of the Court of Appeals of Tennessee in this case.

OPINIONS BELOW

The opinion of the Court of Appeals of Tennessee and its opinion and order on petition for rehearing (App., *infra*, 1a-44a) are not yet reported in the *South Western Reporter*, but they are available at 2008 WL 683755. The memorandum opinion and order of the trial court denying petitioner's motion for a new trial and/or to alter or amend the judgment (App., *infra*, 46a-54a) is unreported.

JURISDICTION

The judgment of the Court of Appeals of Tennessee was entered on March 14, 2008, and its order denying rehearing was entered on April 3, 2008. Petitioner filed a timely application for permission to appeal in the Supreme Court of Tennessee, which denied the application on November 17, 2008 (App., *infra*, 45a). The jurisdiction of this Court rests on 28 U.S.C. § 1257(a).

STATUTORY PROVISION INVOLVED

Section 1 of the Federal Employers' Liability Act, 45 U.S.C. § 51, is reproduced in the appendix. App., *infra*, 72a-73a.

STATEMENT

Under the Federal Employers' Liability Act (FELA or Act), 45 U.S.C. §§ 51-60, railroad employees may recover for workplace injuries caused in whole or in part by the railroad's negligence. In *Nor-*

folk & Western Railway Co. v. Ayers, 538 U.S. 135 (2003), this Court held that a FELA plaintiff suffering from asbestosis may recover for “fear of cancer” as an element of his damages for pain and suffering, subject to the “important” limitation that the plaintiff must prove the fear to be “genuine and serious.” *Id.* at 157. To prevent improper recoveries from “bankrupt[ing] defendants,” the Court 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.

Respondent sued petitioner under FELA, alleging that it had negligently caused his asbestosis and seeking damages for (among other things) a fear of developing cancer in the future. Petitioner requested the jury instruction identified in *Ayers*—that respondent must prove his fear to be “genuine and serious”—but the trial court refused to give it. The jury ultimately returned a verdict for respondent, awarding damages of \$5,000,000.

The Tennessee Court of Appeals upheld the trial court’s refusal to give a “genuine and serious fear” instruction. The court of appeals believed that the instruction was not required by *Ayers*—and, indeed, that such a charge would make “little sense” and serve “little if any purpose,” because a “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*.” App., *infra*, 34a. The court thought it was enough for a trial court to conduct sufficiency-of-the-evidence review to determine whether the jury “*could* * * * f[i]nd” that the fear was “genuine and serious”—even though the jury itself would not be told that it *must* so find to

award damages for a fear of cancer. *Id.* at 36a (emphasis added). The Supreme Court of Tennessee denied review. *Id.* at 45a.

The decision below, which holds that a defendant has no right to a “genuine and serious fear” instruction, is flatly inconsistent with *Ayers*, which makes clear that a defendant *does* have that right. Indeed, this very case—in which there was only the thinnest evidence of a “genuine and serious” fear, only a vague instruction on “pain and suffering,” improper and inflammatory argument by respondent’s counsel, and a staggeringly large damages award—is a textbook example of precisely *why* a defendant is entitled to a “genuine and serious fear” instruction. This Court should therefore grant certiorari, and either set the case for plenary review or summarily reverse. Further review is necessary to confirm that this Court meant what it said in *Ayers*; to disapprove the bizarre and severely flawed reasoning of the court of appeals; to ensure that an “important” “verdict control device[]” (*Ayers*, 538 U.S. at 157, 159 n.19) is uniformly available to minimize the risk of “unlimited and unpredictable liability” in asbestos cases (*Metro-North Commuter R.R. Co. v. Buckley*, 521 U.S. 424, 433 (1997)); and to disallow a massive and fundamentally unfair verdict by a misinstructed jury.

A. Legal Framework

1. Enacted in 1908, FELA provides a compensation scheme for injuries sustained by railroad employees in the workplace. The Act provides for concurrent jurisdiction of state and federal courts, 45 U.S.C. § 56, but substantively FELA actions are governed by federal law, *Norfolk S. Ry. Co. v. Sorrell*, 549 U.S. 158, 165 (2007). State-law remedies are preempted. *Ibid.*

Unlike workers' compensation laws, which typically provide relief without regard to fault, FELA requires an injured railroad employee to prove negligence. Section 1 of FELA provides that

[e]very common carrier by railroad * * * shall be liable in damages to any person suffering injury while he is employed by such carrier * * * for such injury * * * resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier.

45 U.S.C. § 51.

2. In *Ayers*, this Court addressed whether FELA authorizes recovery for “fear of cancer.” The specific question was “[w]hether a plaintiff who has asbestosis but not cancer can recover damages for fear of cancer under the [FELA] without proof of physical manifestations of the claimed emotional distress.” *Ayers*, 538 U.S. at 157. The Court answered that question “yes,” but “with an important reservation.” *Ibid.* Although a railroad employee may “seek compensation for fear of cancer as an element of his asbestosis-related pain and suffering damages,” the Court held, “[i]t is incumbent” upon such a plaintiff to prove that his alleged fear is “genuine and serious.” *Ibid.*

Four Justices dissented. Three would have held that damages for fear of cancer are never recoverable as an element of pain and suffering caused by asbestosis. *Ayers*, 538 U.S. at 166-181 (Kennedy, J., joined by Rehnquist, C.J., and O'Connor and Breyer, JJ., dissenting in relevant part). The fourth would have adopted a stricter standard for recovery, and would have held that the standard was not satisfied in that

case. *Id.* at 182-187 (Breyer, J., dissenting in relevant part). Both dissenting opinions pointed out that bankruptcies caused by asbestos litigation had reduced the funds available to pay judgments, and both expressed concern that, by authorizing recovery by plaintiffs who merely *fear* cancer, the Court's decision would further diminish the funds available to those who have actually *contracted* the disease. *Id.* at 167-170 (Kennedy, J., dissenting); *id.* at 185-187 (Breyer, J., dissenting).

In response to that concern, the Court emphasized the “verdict control devices” in fear-of-cancer cases. *Ayers*, 538 U.S. 159 n.19. The Court specifically identified three such “control measures”: review of the damages award for sufficiency of the evidence; particularized verdict forms; and, “on a defendant’s request, a charge that each plaintiff must prove any alleged fear [of cancer] to be genuine and serious.” *Ibid.*

B. Proceedings In The Trial Court

1. Respondent worked for petitioner’s predecessor, L&N Railroad, and then for petitioner. In 2002, he filed suit against petitioner under FELA in the Circuit Court of Hamilton County, Tennessee. Respondent alleged that, during the course of his employment, he had been negligently exposed both to a chlorinated solvent, which caused him to develop toxic encephalopathy (a neurological disorder), and to asbestos, which caused him to develop asbestosis (a lung disease). Respondent sought to recover damages for, among other things, his alleged fear of developing cancer in the future as a result of his exposure to asbestos. Petitioner denied respondent’s allegations, and the case proceeded to trial. Resp. Am.

Compl. 1-8; Pet. Answer to Am. Compl. 1-4; Pet. C.A. Br. 2; App., *infra*, 2a-3a.

2. As far as his alleged fear of cancer was concerned, respondent's trial evidence consisted almost entirely of his own testimony. On that issue, he testified as follows:

Q: * * * [Y]ou have never been told by any physician that you have cancer? No doctor has told you that?

A: Not staying [sic] I have cancer. They said I'm a likely prospect for it.

Q: And you have some concern about that?

A: Yes.

Q: All right. It's not something that depresses you?

A: It's in the back of my mind.

Q: And I think you've described it as, "a little cloud," that's behind you?

A: Uh-huh.

Q: Is that true?

A: Back in [sic] my mind. Same thing.

Q: Yes, sir. Did you say that I don't make depressing [sic] or something like that[?] It's just a little cloud behind you; is that true?

A: That's what I said here. It was back in [sic] my mind.

Trial Tr. 1462-1463.

Respondent also testified that he experienced anxiety, that he took medication for it, and that the

anxiety arose from his fear of contracting cancer. Trial Tr. 1369. Respondent admitted, however, that he had begun taking anxiety medication *before* he was diagnosed with asbestosis and *before* he was told by the diagnosing physician that his exposure to asbestos increased his risk of cancer. *Id.* at 1464-1465. Another physician confirmed that he had first prescribed anxiety medication for respondent before he was diagnosed with asbestosis—and, indeed, before he was diagnosed with toxic encephalopathy. *Id.* at 1245. That physician also testified that the cause of respondent’s anxiety had never been apparent. *Id.* at 1255, 1305.

3. Pursuant to *Ayers*, petitioner moved for a directed verdict on respondent’s fear-of-cancer claim, arguing that there was insufficient evidence that his alleged fear was “genuine and serious.” Trial Tr. 1475, 1482-1488. The trial court denied the motion. *Id.* at 2719-2720.

Also pursuant to *Ayers*, petitioner asked the trial court to instruct the jury that it could not award damages for respondent’s alleged fear of cancer unless it found that the fear was “genuine and serious.” One of petitioner’s requested instructions on that issue (No. 30) read as follows:

Plaintiff is also alleging that he suffers from a compensable fear of cancer. In order to recover, Plaintiff must demonstrate first, that he has a reasonable fear of cancer; second, that reasonable fear stems from Plaintiff’s asbestos-related disease; and third, that the reasonable fear is genuine and serious. Plaintiff must prove each of these elements by a preponderance of the evidence.

App., *infra*, 70a.¹ The trial court refused to give the proposed instructions. *Id.* at 63a-69a.

4. In his summation, respondent’s counsel misstated the legal standard governing recovery for fear of cancer. At one point, he suggested that the jury could award damages for a “real and genuine fear,” omitting the requirement that the fear also be “serious.” Trial Tr. 2782. At another point, he omitted the requirement of “fear” altogether, suggesting that the jury could award damages for an “increased *risk* of cancer.” *Id.* at 2799 (emphasis added); see *Ayers*, 538 U.S. at 153 (distinguishing between compensable “fear” of cancer and non-compensable “risk” of cancer).

Respondent’s counsel also appealed repeatedly to the jurors’ passions and asked them to punish petitioner for its conduct. He did this despite pre-trial rulings prohibiting counsel from asking the jury to “send a message” or alluding to similar suits by other railroad employees (see Motions Tr. 33, 39, 115), and despite the unavailability of punitive damages in

¹ Another of petitioner’s requested instructions (No. 33) would have apprised the jury of some of the considerations that bear on whether a fear of cancer is “genuine and serious”—in particular,

whether or not the Plaintiff has voiced more than a general concern about his future health, whether or not he has suffered from insomnia or other stress-related conditions, whether or not he has sought psychiatric or medical attention for his symptoms, whether he has consulted counselors or ministers concerning his fear, whether he has demonstrated any physical symptoms as a result of his fear, and whether he has produced witnesses who can corroborate his fear.

App., *infra*, 71a.

FELA cases (see, e.g., *Miller v. Am. President Lines, Ltd.*, 989 F.2d 1450, 1457 (6th Cir. 1993)). Among other things, counsel argued that petitioner had “refused to take responsibility for ruining [respondent’s] life,” had engaged in “outrageous” and “medically unethical” conduct, had “broke[n] * * * the law,” and was willing to “spend any amount of money to convince you [that] the truth is not the truth.” Trial Tr. 2791, 2795-2796, 2802-2803. Counsel also claimed that other railroad workers had suffered and died from the same “human tragedy” inflicted on respondent, and asked for a damages award calculated by multiplying defense-witness fees. *Id.* at 2773, 2802.

On the basis of these and other inflammatory statements in counsel’s summation, petitioner moved for a mistrial, but the trial court denied the motion. Trial Tr. 2806-2807.

5. In its instructions to the jury, the trial court did not mention respondent’s fear-of-cancer claim in general or *Ayers*’ “genuine and serious” limitation in particular. Instead, the court delivered the following very general instruction on pain and suffering:

Mr. Hensley would be entitled to recover separately for any pain and suffering. Pain and suffering is simply what it means. This amount compensates Mr. Hensley for any physical suffering and emotional suffering which he has sustained.

App., *infra*, 61a-62a. Petitioner objected to the court’s failure to give a “genuine and serious fear” instruction. *Id.* at 62a.

6. The jury returned a verdict for respondent. It found that petitioner was negligent and that its negligence was a cause, in whole or in part, of respon-

dent's asbestosis and toxic encephalopathy; it found that respondent was not contributorily negligent; and it awarded \$5,000,000 in damages. App., *infra*, 55a-59a.

Petitioner filed a motion for a new trial and/or to alter or amend the judgment. Among other things, it argued that the trial court had erred in refusing to direct a verdict on respondent's fear-of-cancer claim and in refusing to instruct the jury on the elements of that claim. Mem. Supp. Mot. New Trial and/or Alter or Amend J. 14-19. The trial court denied the motion in its entirety. App., *infra*, 46a-54a.

C. Decision Below

1. Petitioner appealed. It raised several issues for review, including two relating to respondent's fear-of-cancer claim. First, petitioner argued that there was insufficient evidence that respondent's fear was "genuine and serious," and that the trial court should therefore have directed a verdict on the claim. Pet. C.A. Br. 37-48. Second, petitioner argued that the trial court committed reversible error by refusing to instruct the jury that it could award fear-of-cancer damages only if it found that the fear was "genuine and serious." *Id.* at 48-51. The Court of Appeals of Tennessee rejected all of petitioner's claims and affirmed in a published opinion. App., *infra*, 1a-37a.

In upholding the trial court's refusal to give a "genuine and serious fear" instruction, the court of appeals followed the decision of the Missouri Court of Appeals in *Hedgecorth v. Union Pacific Railroad Co.*, 210 S.W.3d 220 (Mo. Ct. App. E.D. 2006), cert. denied, 128 S. Ct. 59 (2007). App., *infra*, 33a-34a. Quoting *Hedgecorth*, the court expressed the view

that *Ayers* “did not discuss or authorize jury instructions on this issue” and “does not require . . . instructions detailing or explaining damages based on a fear of developing cancer.” *Ibid.* (quoting 210 S.W.3d at 228-229). Having so understood this Court’s decision, the court of appeals declined to adopt “a requirement that the *Ayers* test or a similar standard be communicated to the jury.” *Id.* at 34a.

The court also thought that “such a requirement would make little sense.” App., *infra*, 34a. One purpose of the “genuine and serious” limitation, the court explained, “is to protect defendants from excessive verdicts based on appeals to jurors’ passions with respect to the deeply emotional issue of cancer.” *Ibid.* Because “the mere suggestion of a possibility of cancer has the potential to evoke raw emotions,” the court said, “a juror may be swayed by the barest shred of evidence that a defendant has caused a plaintiff to suffer an increased * * * fear of cancer, and may be tempted to overcompensate the plaintiff for such a * * * fear.” *Ibid.* “In light of this reality,” the court believed that “little if any purpose would be served by instructing the jury that the plaintiff’s fear must be ‘genuine and serious,’” because “[a]ny 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*.” *Ibid.* Rather than instructing juries that damages may be awarded only if the fear is “genuine and serious,” the court reasoned, courts must “serve as gatekeepers * * * to ensure that fear of cancer claims do not go to the jury unless there is credible evidence of a ‘genuine and serious’ fear.” *Ibid.*

The court of appeals then held that respondent had “introduced sufficient evidence” to “prove that he

had a genuine and serious fear of cancer,” and thus to “support a fear of cancer claim under *Ayers*.” App., *infra*, 34a-35a. In so holding, the court relied on respondent’s testimony that (1) he had “some concern” that he might get cancer “in the back of [his] mind,” like “a little cloud” hanging over him; (2) he had experienced “anxiety”; and (3) he had taken medication for his anxiety “in part because of his fear of cancer.” *Id.* at 35a. The court acknowledged contrary evidence, including (1) respondent’s admission that he had begun taking the anxiety medication *before* being diagnosed with asbestosis and (2) testimony of the prescribing physician that he did not know the cause of respondent’s anxiety. *Id.* at 35a-36a. But the court determined that “it is the province of the jury to weigh [respondent’s] evidence against the countervailing evidence,” and that, “if the jury reasonably believed [respondent’s] evidence, it could have found that a genuine and serious fear of cancer existed.” *Id.* at 36a.²

2. Petitioner filed an application for permission to appeal in the Supreme Court of Tennessee. The application presented a number of issues for review, one of which was that the trial court had committed reversible error by refusing to give a “genuine and serious fear” instruction. App. for Permission to Appeal 15-31. The Supreme Court of Tennessee denied the application without explanation. App., *infra*, 45a.

² In a subsequent opinion and order, the court of appeals denied petitioner’s petition for rehearing on a claim (relating to a statute-of-limitations defense) that is not at issue here. App., *infra*, 37a-44a.

REASONS FOR GRANTING THE PETITION

The court below acknowledged that, under this Court's decision in *Ayers*, a FELA plaintiff seeking damages for fear of cancer must prove that the alleged fear is "genuine and serious." It also acknowledged that the question whether the fear is "genuine and serious" is for the jury to decide. The court nevertheless held that a defendant has no right to have the jury *informed* of this "important" limitation on recovery. *Ayers*, 538 U.S. at 157.

The court's decision squarely conflicts with *Ayers*, which makes clear that a FELA defendant *does* have the right to such an instruction. The reasoning employed by the court in support of its contrary conclusion is severely flawed. The question the court erroneously decided is a recurring one of exceptional importance. And this case is an ideal vehicle for confirming that this Court meant what it said in *Ayers*. For these reasons, the Court should grant certiorari and set the case for briefing on the merits and oral argument. In the alternative, because the decision below is so manifestly inconsistent with *Ayers*, the Court should grant certiorari and summarily reverse.

A. The Decision Below Squarely Conflicts With *Ayers*

One of the "compelling reasons" for the exercise of this Court's certiorari jurisdiction is that a state court "has decided an important federal question in a way that conflicts with relevant decisions of this Court." Sup. Ct. R. 10(c). This is one of the rare cases in which there is such a "direct" and "readily apparent" conflict. E. Gressman et al., SUPREME COURT PRACTICE § 4.5, at 250 (9th ed. 2007). The

court of appeals' decision is squarely "contrary to" *Ayers* (*United States v. Bass*, 536 U.S. 862, 864 (2002) (per curiam summary reversal)), a decision of this Court that "rejected the position taken by the [court of appeals] below" (*Spears v. United States*, No. 08-5721, 2009 WL 129044, at *2 (U.S. Jan. 21, 2009) (per curiam summary reversal)).

Ayers holds that a railroad employee may seek compensation for fear of cancer "as an element of his asbestosis-related pain-and-suffering damages" if, and only if, he "prove[s] that his alleged fear is genuine and serious." 538 U.S. at 157. The decision holds, in other words, that the "genuine[ness] and serious[ness]" of the alleged fear is an essential element of a fear-of-cancer claim. As with any other element of a FELA claim, that element must be proved to, and found by, the jury. See, e.g., *Smith v. A.C. & S., Inc.*, 843 F.2d 854, 858 (5th Cir. 1988), cited in *Ayers*, 538 U.S. at 157-158. See generally *Baker v. Tex. & Pac. Ry. Co.*, 359 U.S. 227, 228 (1959) (per curiam). Indeed, the court below recognized that "it is the province of the jury" to decide whether an alleged fear of cancer is "genuine and serious." App., *infra*, 36a. A jury cannot make that—or any other—required finding, however, unless it is told that it must. That is why juries are instructed on the elements of a plaintiff's claim, both as to liability and as to damages. See, e.g., *Carey v. Piphus*, 435 U.S. 247, 264 n.20 (1978) ("[j]uries must be guided by appropriate instructions" on "mental suffering or emotional anguish"); *St. Louis Sw. Ry. Co. v. Dickerson*, 470 U.S. 409, 411 (1985) (per curiam) (a FELA defendant is "entitled to a jury instruction on present value").

But *Ayers* does not merely hold *by implication* that a FEOLA defendant has a right to a “genuine and serious fear” instruction; it says so explicitly. Consistent with its more general holding that a plaintiff must prove the “genuine and serious” nature of his alleged fear of cancer, *Ayers* specifically entitles a defendant, “on [its] request,” to “a *charge* that each plaintiff must prove any alleged fear to be genuine and serious.” 538 U.S. at 159 n.19 (emphasis added). Petitioner requested just such a charge here; the trial court nevertheless refused to give it; and the court of appeals upheld that refusal. Indeed, insofar as it believed that instructing the jury on this element would make “little sense” and serve “little if any purpose” (App., *infra*, 34a), the court seems to have held, not merely that a jury *need* not be so instructed, but that it *should* not be. The decision below is thus patently inconsistent with *Ayers*.

The court of appeals’ decision also conflicts with decisions of this Court that emphasize the importance of focused instructions as a “verdict control device[]” (*Ayers*, 538 U.S. at 159 n.19) in other contexts in which juries commonly make large awards for an impermissible reason. In the analogous context of punitive damages, for example, the Court has made clear that “proper jury instruction[s]” are “a well-established and, of course, important check against excessive awards.” *Honda Motor Co., Ltd. v. Oberg*, 512 U.S. 415, 433 (1994). “Vague instructions” on punitive damages “do little to aid the decisionmaker in its task of assigning appropriate weight to [the] evidence” (*State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 418 (2003)), and thus “a court, upon request, must protect against [a significant] risk” that the jury will misunderstand the law (*Philip Morris USA v. Williams*, 549 U.S. 346, 357

(2007)). “Careful instructions” provide a critical “safeguard[]” against the possibility that “arbitrariness, passion, or bias” will be “the basis for the jury’s verdict.” *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 474-475 (1993) (O’Connor, J., dissenting). Accordingly, as in *Ayers*, the Court has mandated certain instructions in punitive-damages cases. See, e.g., *State Farm*, 538 U.S. at 422 (“A jury must be instructed * * * that it may not use evidence of out-of-state conduct to punish a defendant for action that was lawful in the jurisdiction where it occurred.”); *Philip Morris*, 549 U.S. at 357 (“a court, upon request, must protect against [the] risk” that a jury will seek to punish the defendant for harm to non-parties).

B. The Reasoning Employed By The Court Below Is Severely Flawed

The court of appeals not only reached a conclusion at odds with an unambiguous requirement of *Ayers*; it sought to justify that conclusion with reasoning that cannot withstand the barest scrutiny. Indeed, the court’s reasoning is fundamentally flawed in at least four independent respects.

First, the court overlooked critical language in *Ayers*. It mistakenly believed that this Court’s decision “does not require . . . instructions detailing or explaining damages based on a fear of developing cancer,” and that the decision “d[oes] not discuss or authorize jury instructions” that the alleged fear of cancer must be “genuine and serious.” App., *infra*, 33a-34a (quoting *Hedgecorth*, 210 S.W.3d at 228-229). As we have explained, *Ayers* in fact makes clear, that, “on * * * request,” a defendant is entitled to “a charge that each plaintiff must prove any al-

leged fear to be genuine and serious.” 548 U.S. at 159 n.19.

Second, the court’s decision is internally inconsistent. On the one hand, in addressing petitioner’s challenge to the sufficiency of the evidence, the decision correctly recognized that whether the plaintiff has a “genuine and serious” fear of cancer is “the province of the jury,” and that there must be sufficient evidence that “the jury * * * could have found that a genuine and serious fear of cancer existed.” App., *infra*, 36a. On the other hand, in addressing petitioner’s challenge to the trial court’s refusal to give its proposed instruction, the court held that there is no “requirement that the *Ayers* test * * * be communicated to the jury.” *Id.* at 34a.

But how can a jury find a fact unless it is told that it must? It defies logic to review a verdict to determine whether there was sufficient evidence to support a finding that the jury was never asked to make. And it is meaningless to say that a reviewing court may not “substitute [its] judgment for that of the jury” on whether “a genuine and serious fear of cancer existed” (App., *infra*, 36a) when the jury is not instructed to exercise its judgment on that issue in the first place.

Third, although the court correctly recognized that “the ‘genuine and serious’ requirement * * * protect[s] defendants from excessive verdicts based on appeals to jurors’ passions with respect to the deeply emotional issue of cancer” (App., *infra*, 34a), it drew the wrong conclusion from that fact. Indeed, it drew precisely the opposite conclusion of the one it should have drawn.

The court thought that “little if any purpose would be served by instructing the jury that the plaintiff’s fear must be ‘genuine and serious,’” because, according to the court’s bizarre logic, “[a]ny 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*.” *Ibid.* But “[a] jury is presumed to *follow* its instructions,” not ignore them. *Weeks v. Angelone*, 528 U.S. 225, 234 (2000) (emphasis added). That is why jury instructions are given. And a concern that jurors may return a verdict based on its passions rather than the law and the facts makes an instruction all the *more* necessary, not less.

Fourth, the court mistakenly believed that review for sufficiency of the evidence is an adequate substitute for a properly instructed jury. As with any element of the plaintiff’s claim, it is certainly necessary, as the decision below observed, for courts to “serve as gatekeepers * * * to ensure that fear of cancer claims do not *go* to the jury unless there is credible evidence of a ‘genuine and serious’ fear.” App., *infra*, 34a. But a court’s gatekeeping is just as certainly not *sufficient*. That is why this Court included both sufficiency-of-the-evidence review *and* a jury instruction among the “verdict control devices” identified in *Ayers*. 538 U.S. at 159 n.19.

That there is legally sufficient evidence for a finding in the plaintiff’s favor does not mean that the plaintiff is *entitled* to such a finding; it means only that the plaintiff is entitled to have the jury *make* the finding. A properly instructed jury could find, as a fact, that the plaintiff’s fear of cancer is *not* “genuine and serious” even when there is legally sufficient evidence for the jury to come out the other way. In

this very case, the court of appeals held that there was sufficient evidence to support the damages award because there was “evidence” that respondent’s fear of cancer was “genuine and serious,” even though there was also “countervailing evidence” that it was not, such that a reasonable jury exercising its function of “weigh[ing] th[e] evidence” could also have found that any fear of cancer was *not* “genuine and serious.” App., *infra*, 36a. But the jury was never given that option.

Under the court’s peculiar reasoning, *no one* decides the issue that is necessary for an award of damages: whether the plaintiff’s fear of cancer is *in fact* “genuine and serious.” The jury does not make that decision at all (because it is not asked to); and the court decides only whether a reasonable jury *could* make the decision. That is quite clearly insufficient under *Ayers*.

C. The Question Presented Is A Recurring One Of Exceptional Importance

The decision below does not merely conflict squarely with *Ayers*, and it does not merely employ indefensible reasoning; the issue it erroneously decided is one of far-reaching importance. The court of appeals eliminated a critical mechanism for limiting recoveries in asbestos cases; the need for that mechanism is at least as compelling today as it was when *Ayers* was decided; there are hundreds, if not thousands, of pending cases in which the instructional issue could arise; and without this Court’s intervention, defendants will continue to have a right to the instruction in some jurisdictions but not in others.

1. In *Ayers*, this Court described the plaintiff’s obligation to prove that his “alleged fear is genuine

and serious” as an “important” limitation on recovery for fear of cancer under FELA. 538 U.S. at 157. By holding that jurors need not be informed of the limitation, the decision below severely dilutes it.

Ayers was a 5-4 decision, with two dissenting opinions. Quoting the Court’s decision in a prior FELA case, both dissents expressed concern that the decision in *Ayers* would lead to “unlimited and unpredictable liability.” 538 U.S. at 181 (Kennedy, J., dissenting in relevant part) (quoting *Metro-North*, 521 U.S. at 433); *id.* at 185 (Breyer, J., dissenting in relevant part) (same). The dissents also expressed concern that the decision would hasten the exhaustion of funds that would otherwise be available to those who actually *develop* cancer, as opposed to those who merely *fear* it. *Id.* at 167-170 (Kennedy, J., dissenting); *id.* at 185-187 (Breyer, J., dissenting).

As the dissents pointed out, the costs of asbestos litigation—already more than \$50 billion when *Ayers* was decided—have “driven dozens of companies into bankruptcy.” *Ayers*, 538 U.S. at 186 (Breyer, J., dissenting). With each bankruptcy, “the remaining defendants come under greater financial strain and the funds available for compensation become closer to exhaustion.” *Id.* at 169 (Kennedy, J., dissenting) (citation omitted). The Court itself has recognized this problem in other cases. See *Metro-North*, 521 U.S. at 435-436 (“In a world of limited resources, would a rule permitting immediate large-scale recoveries for * * * fear of future disease diminish the likelihood of recovery by those who later suffer from the disease?”); *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 Confer-

ence Ad Hoc Committee on Asbestos Litigation 2-3 (Mar. 1991)).

It was in direct response to the concern that broad liability for fear of cancer might “bankrupt defendants,” and thereby deplete the funds available to those who actually suffer from the disease, that the Court emphasized the availability of “verdict control devices” in fear-of-cancer cases, including a “genuine and serious fear” jury instruction. *Ayers*, 538 U.S. at 159 n.19. One of the important limitations on recovery set forth in *Ayers* is thus that the plaintiff must establish, *to the satisfaction of the jury*, that his fear of cancer is “genuine and serious.” The limitation set forth in the decision below, by contrast, is that the plaintiff need only present sufficient evidence to withstand a defense motion for a directed verdict. As this case itself demonstrates, that standard is far easier to satisfy than the actual standard of *Ayers*. Under the decision below, therefore, fear-of-cancer recovery will be far more readily available than *Ayers* either contemplates or permits.

Ayers strikes a balance. It allows asbestosis plaintiffs to be compensated for fear of cancer as part of their damages for pain and suffering. Sensitive to the concerns of the four dissenting Justices, however, it also seeks to ensure that there is a meaningful limitation on such damages, so that they cannot be recovered as a matter of course, to the detriment of defendants and cancer victims alike. By dispensing with one of the critical “verdict control devices” identified by the Court, the decision below upsets that careful balance.

Nor could the court of appeals be said to have compensated for its elimination of a jury instruction with rigorous sufficiency-of-the-evidence review—

another of the “verdict control” mechanisms identified in *Ayers*. On the contrary, the court found legally sufficient evidence of a “genuine and serious” fear of cancer based on little more than respondent’s own testimony that he had a “concern” and “anxiety” about the possibility that he might contract the disease in the future. Even robust sufficiency-of-the-evidence review would not be an adequate substitute for a properly instructed jury, but the court’s toothless sufficiency review makes the refusal to charge the jury all the more problematic.

2. Six years after *Ayers*, the concerns that led the Court to emphasize the importance of “verdict control devices” are still very much present. Indeed, far from having abated, the “asbestos-litigation crisis” (*Amchem Prods.*, 521 U.S. at 597) has worsened.

In his *Ayers* dissent, Justice Kennedy noted that as many as 26 corporate asbestos defendants had filed for bankruptcy in the two years since January 1, 2000. 538 U.S. at 169 (dissenting opinion). After only two more years, that estimate had climbed to 37—more than in the previous two decades combined. Stephen J. Carroll et al., ASBESTOS LITIGATION 109 (Rand Institute for Civil Justice 2005). Despite this Court’s frequent pleas for a legislative solution (see *Ayers*, 538 U.S. at 166; *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 821 (1999)), reform efforts failed in Congress in 2006, with the pace of litigation only increasing thereafter (see, e.g., Scott Sabatini, *Plaintiffs’ Attorneys Weathered the Asbestos Political Storm*, MADISON COUNTY (ILL.) RECORD, Jan. 7, 2009). And “the litigation is far from over”; as of 2005, as many as two million asbestos claims had yet to be filed. Carroll et al., *supra*, at 106.

As the pool of resources available to asbestos plaintiffs shrinks, the pace of claims suggests that “[o]nly those individuals who can sprint to the courthouse door” will be able to recover. David Marcus, *Some Realism About Mass Torts*, 75 U. Chi. L. Rev. 1949, 1984 (2008). But the worst consequences of asbestos exposure—such as mesothelioma, an excruciating and incurable form of cancer—do not reveal themselves for many years. See *Ayers*, 538 U.S. at 168-169 (Kennedy, J., dissenting). If the available funds are expended today on less deserving claims, it may well be that “tomorrow’s actual cancer victims will recover nothing—for medical costs, pain, or fear.” *Id.* at 186 (Breyer, J., dissenting).

3. The question whether a FELA defendant has a right to have the jury instructed that the plaintiff’s alleged fear of cancer must be “genuine and serious” would be an inherently important one even if it arose only sporadically. In fact, it arises with great frequency. According to the Association of American Railroads, there were nearly 10,000 asbestos-related FELA actions against the eight largest U.S. freight railroads and Amtrak pending as of October 2008. Br. of Ass’n of Am. R.R. as Amicus Curiae at *9, *Ill. Cent. R.R. Co. v. Copple*, 127 S. Ct. 497 (2008) (No. 08-271), 2008 WL 4484591. The same railroads reported an additional several hundred pending FELA cases in which the plaintiff claimed exposure to allegedly carcinogenic substances *other* than asbestos. *Id.* at *10. And these statistics do not account for asbestos-related cases brought under the Jones Act, 46 U.S.C. § 30104(a), which governs liability for injuries sustained in the workplace by seamen and “adopts ‘the entire judicially developed doctrine of liability’ under [FELA].” *Am. Dredging Co. v. Miller*,

510 U.S. 443, 456 (1994) (quoting *Kernan v. Am. Dredging Co.*, 355 U.S. 426, 439 (1958)).

In virtually all of these cases, and in future ones, the plaintiffs are likely to seek damages for fear of cancer. See Br. of Ass'n of Am. R.R. as Amicus Curiae, *Ill. Cent. R.R.*, *supra*, at *9 & n.7. If those cases proceed to trial, the defendants are certain to seek the “genuine and serious” instruction that this Court said was available in *Ayers*. The Court should confirm now that it meant what it said in that case, so that there is no uncertainty about defendants’ entitlement to the instruction in these thousands of other cases.

4. As things currently stand, a FELA defendant’s right to a “genuine and serious fear” instruction will depend on where the case is filed.

a. In Missouri, for example, a FELA defendant has no such right. The Missouri Approved Jury Instruction on injury-related damages in FELA cases—MAI 8.02—does not require an instruction on “fear of cancer,” much less an instruction that such a fear must be “genuine and serious.” Based on the mistaken belief that “th[is] Court in *Ayers* did not discuss or authorize jury instructions on this issue,” the Missouri Court of Appeals in *Hedgecorth* concluded that “*Ayers* does not require not-in-MAI instructions detailing or explaining damages based on a fear of developing cancer,” and that “the *Ayers* holding [therefore] does not require a change to the form of approved MAI instructions.” 210 S.W.3d at 228-229. The court accordingly held that MAI 8.02 “must be given” in fear-of-cancer cases in Missouri trial courts, and that the instruction identified in *Ayers* may not be. *Id.* at 228.

As a consequence of the decision below, which followed *Hedgecorth* in its misreading of *Ayers* (App., *infra*, 33a-34a), the same is now true in state trial courts in Tennessee. Although the court of appeals here did not hold that any particular instruction must be given in a FELA fear-of-cancer case, it did say that delivering a “genuine and serious fear” instruction would make “little sense” and serve “little if any purpose.” *Id.* at 34a. In light of these statements, Tennessee trial judges can be expected to reject defense requests to give such a charge in future cases. The combined effect of *Hedgecorth* and the decision below is thus that FELA defendants in Missouri and Tennessee courts have no right to a jury instruction on the “genuine and serious fear” limitation.

b. In other jurisdictions, trial courts faithfully apply *Ayers*. For example, Kansas’ pattern jury instruction on FELA damages “suggests that defendant would be entitled to an instruction that ‘plaintiff must prove any alleged fear to be genuine and serious.’” Pattern Inst. Kan. 4th Civil § 132.30 cmt. (citing *Ayers*). Although “[t]he use of pattern * * * instructions is not mandatory” in Kansas, it “is strongly recommended.” *State v. Gallegos*, 190 P.3d 226, 233 (Kan. 2008). Unlike their counterparts in Missouri and Tennessee, therefore, Kansas trial judges can be expected to give a “genuine and serious fear” instruction on a defendant’s request.

Similarly, in *Blackburn v. Illinois Central R.R. Co.*, 882 N.E.2d 189 (Ill. App. Ct. 5 Dist.), appeal denied, 889 N.E.2d 1114 (Ill.), cert. denied, 129 S. Ct. 497 (2008), the Appellate Court of Illinois approved the trial court’s instruction that a “genuine and serious fear of cancer” is one of the “elements of dam-

ages” in an asbestos case brought under FELA. *Id.* at 193. Although the court did not specifically state that the instruction was required, it did say that the trial court had “instructed the jury in accordance with * * * *Ayers*.” *Ibid.* In light of *Blackburn*, therefore, trial judges in Illinois, like their counterparts in Kansas, can be expected to grant defense requests for such an instruction.

Trial courts in other States, including Kentucky, Ohio, and Pennsylvania, have also given a “genuine and serious fear” instruction in FELA fear-of-cancer cases post-*Ayers*. See App., *infra*, 74a-78a.

c. The decision below thus deepens a conflict among the jurisdictions on whether *Ayers* should be followed or disregarded. Given the critical importance of the “genuine and serious fear” instruction as a “verdict control device[]” (*Ayers*, 538 U.S. at 159 n.19), the defendant’s right to such an instruction should not depend upon the happenstance of where the case is filed—particularly because one of the very purposes of FELA was to “create uniformity throughout the Union” (*Norfolk & W. Ry. Co. v. Liepelt*, 444 U.S. 490, 493 n.5 (1980) (quoting H.R. Rep. No. 1386, 60th Cong., 1st Sess. 3 (1908))).

The lack of uniformity in instructing on this element is especially problematic because it is certain to lead to forum shopping. A FELA plaintiff may file an action in either state or federal court in any district in which the railroad conducts business (45 U.S.C. § 56), and if a case is filed in state court, the railroad may not remove it to federal court (28 U.S.C. § 1445(a)). Each of the four largest railroads in the United States, including petitioner, operates in more than 20 States. See Br. of Ass’n of Am. R.R. as Amicus Curiae, *Ill. Cent. R.R.*, *supra*, at *13. If the

conflicting practices are allowed to persist, FELA plaintiffs can be expected to file asbestos-related actions in jurisdictions in which a “genuine and serious fear” instruction is not given. The foreseeable effect will be to dilute *Ayers*’ “important” limitation on recovery (538 U.S. at 157) even further.

D. This Case Is An Ideal Vehicle For Deciding The Question Presented

This case is an ideal vehicle for confirming that *Ayers* means what it says. For one thing, the question presented was squarely pressed and passed upon in the Tennessee Court of Appeals; it was squarely pressed in petitioner’s application for permission to appeal to the Tennessee Supreme Court (which denied review without explanation); and the decision below does not rest upon any independent state-law ground. See Pet. C.A. Br. 48-51; App. for Permission to Appeal 15-31; App., *infra*, 33a-34a, 45a. For another, a properly instructed jury might well have found that petitioner had not met his burden under *Ayers* and, as a result, eliminated this category of damages from its award. The issue on which review is sought could therefore prove to be outcome-determinative. Indeed, in multiple respects, this case is a textbook example of why a “genuine and serious fear” jury instruction is necessary.

First, there was very little evidence that respondent had a “genuine and serious” fear of cancer. The evidence consisted mainly of respondent’s own testimony that he felt “concern” and “anxiety” about the possibility of contracting the disease. Trial Tr. 1462-1463; cf. *Ayers*, 538 U.S. at 158 & n.18 (observing that proof that fear of cancer was “genuine and serious” was “notably thin” where there was no “corroborative objective evidence of [the] fear”). While there

was also evidence that respondent took medication for his anxiety, the medication was prescribed before he was diagnosed with asbestosis, and the prescribing physician was unable to identify the cause of the anxiety. Trial Tr. 1245, 1255, 1305, 1369, 1464-1465. Under these circumstances, a properly instructed jury that “weigh[ed] [respondent’s] evidence against the countervailing evidence” (App., *infra*, 36a) could easily have found that any fear of cancer here was not “genuine and serious.”

Second, respondent’s counsel incorrectly stated the legal standard in his summation. At one point, he suggested that respondent could recover for a “genuine” fear of cancer, omitting the additional requirement that the fear be “serious.” Trial Tr. 2782. At another point, he omitted the requirement of “fear” altogether, suggesting that respondent could recover for a mere “risk” of cancer. *Id.* at 2799. A “genuine and serious fear” instruction would have minimized the possibility that the jury was influenced by counsel’s misstatements.

Third, apart from misstating the law, respondent’s summation repeatedly appealed to the jurors’ passions and emotions. Among other things, counsel argued that petitioner had “refused to take responsibility for ruining [respondent’s] life,” had engaged in “outrageous” and “medically unethical” conduct, had “broke[n] * * * the law,” was willing to “spend any amount of money to convince [the jury that] the truth is not the truth,” and had caused the suffering and death of other railroad workers from the same “human tragedy” that it inflicted on respondent. Trial Tr. 2773, 2791, 2795-2796, 2802-2803. Because “[o]ne purpose of the ‘genuine and serious’ requirement * * * is to protect defendants from excessive

verdicts based on appeals to jurors' passions * * * [and] raw emotions" (App., *infra*, 34a), respondent's inflammatory summation made the failure to instruct on that requirement all the more prejudicial.

Fourth, the trial court not only refused to deliver a "genuine and serious" instruction, but refused to give *any* instruction on fear of cancer. Instead, it delivered a remarkably broad and unilluminating charge on pain and suffering, which informed the jury that respondent could recover for "*any* physical suffering and emotional suffering," and that pain and suffering "is simply what it means." Trial Tr. 2897 (emphasis added). This is therefore not a case in which the instructions that were *given* could be said to have adequately informed the jury of the principle of law in the instructions that were *refused*.

Fifth, the sheer size of the damages award—a staggering \$5,000,000—provides a further reason to believe that the award would have been lower if the jury had been informed of the "genuine and serious fear" limitation. The jury was instructed that it could award damages for "reasonable and necessary medical expenses," for "loss in [respondent's] earning capacity," and for "pain and suffering." Trial Tr. 2895-2897. Given the record in this case, it is highly likely that the massive award was at least in part a function of the jurors' mistaken belief that they could award pain-and-suffering damages for *any* fear of cancer, no matter how insubstantial, or even for a "risk" of contracting the disease.³

³ For example, despite his claimed toxic encephalopathy, respondent never misrepared a locomotive due to memory problems or injured himself or a co-worker due to inattention or lack of concentration; he continued to hold a second job as a success-

CONCLUSION

The petition for a writ of certiorari should be granted and the case set for plenary review. In the alternative, the petition should be granted and the judgment below summarily reversed.

Respectfully submitted.

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ful preacher, and delivered sermons on a popular radio program; he gave intelligent and medically sophisticated testimony at trial; and he was still driving a car at the time of trial, when he was 67. Trial Tr. 240-241, 1367 1377, 1389-1390, 1429, 1434-1438, 1441-1442, 1451-1452.