No. 08-1034

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

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

As the petition demonstrates, this Court should grant certiorari, and either set the case for plenary review or summarily reverse, because (a) the decision below squarely conflicts with *Norfolk & Western Railway Co.* v. *Ayers*, 538 U.S. 135 (2003); (b) the reasoning employed in the decision is severely flawed; (c) the question presented is a recurring one of exceptional importance; and (d) this case is an ideal vehicle for deciding it. The need for review is confirmed by the amicus briefs, filed by a total of eleven organizations, which urge the Court to grant certiorari and reverse the Tennessee Court of Appeals' egregiously mistaken decision. The need for review is further confirmed by respondent's brief in opposition, which provides no serious response to any of petitioner's arguments and offers no persuasive reason why certiorari should be denied.

A. The Decision Below Squarely Conflicts With *Ayers*

Ayers holds that a plaintiff may recover for fear of cancer if, and only if, he "prove[s] that his alleged fear is genuine and serious." 538 U.S. at 157. Consistent with that holding, *Ayers* specifically entitles a defendant, "on [its] request," to "a charge that each plaintiff must prove any alleged fear to be genuine and serious." *Id.* at 159 n.19. The court below nevertheless held that there is no "requirement that the *Ayers* test * * * be communicated to the jury." Pet. App. 34a. As we explain in the petition (at 13-16), its decision is thus flatly inconsistent with *Ayers*.

Respondent makes the remarkable assertion that *Ayers* does *not* hold that a fear of cancer must be "genuine and serious." Opp. 13-14. In support of

that claim, he quotes the following summary of the Court's holding in the introduction to its opinion: "mental anguish damages resulting from the fear of developing cancer may be recovered under the FELA by a railroad worker suffering from the actionable injury asbestosis caused by work-related exposure to asbestos." Opp. 13 (quoting 538 U.S. at 141). But the omission of the "genuine and serious" limitation from that general statement obviously did not nullify in advance what the Court unambiguously said later: that "[i]t is incumbent upon such a complainant * * * to prove that his alleged fear is genuine and serious." 538 U.S. 157. As the court below correctly recognized, *Ayers* "*held* that a complainant with asbestosis can recover damages under FELA for fear of cancer * * * *with th[at] 'important reservation*.'" Pet. App. 33a (emphasis added) (quoting *Ayers*, 538 U.S. at 157).

Respondent also offers an alternative reading of *Ayers*. According to this interpretation—which, like his first one, was not adopted by the court below—a fear of cancer must be "genuine and serious" only if "there has not been 'proof of physical manifestations of the claimed emotional distress'" (something respondent claims is present here). Opp. 14 (quoting *Ayers*, 538 U.S. at 157). This is a slightly narrower theory, but it is equally groundless.

The language from *Ayers* that respondent quotes—the requirement of "physical manifestations"—came from the question presented in the certiorari petition. *Ayers*, 538 U.S. at 157 (quoting 01-963 Pet. Br. i). It reflected the defendant's position, not the Court's. The defendant argued that recovery for fear of cancer should be allowed "only if the claimant proved both a likelihood of developing can-

cer and physical manifestations of the alleged fear." *Id.* at 159. The Court *rejected* that theory, holding, instead, that recovery is permitted if the fear is "genuine and serious." *Id.* at 158-159. "Physical manifestations" may constitute *evidence* that a fear is "genuine and serious," see Pet. App. 71a (proposed instruction), and they may bear upon the amount of *damages* to be awarded if the jury finds a "genuine and serious" fear, see *Ayers*, 538 U.S. at 158 n.17. But *Ayers* unmistakably holds that the relevant question in deciding whether a plaintiff is *legally entitled* to recover is whether the fear is "genuine and serious." That is the question on which, under *Ayers*, a jury must be charged "on a defendant's request," 538 U.S. at 159 n.19, and it is the question on which, under the decision below, a defendant has *no* right to an instruction.

Even if the relevant question *were* whether the fear of cancer either has "physical manifestations" *or* is "genuine and serious," that would mean only that the jury should have been so instructed. It would not mean, as the court below held, and as respondent contends, that there is no need for *any* instruction on the prerequisites to recovery.[1]

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[1] Respondent's assertion (Opp. 14) that the trial court "properly instructed the jury consistent with" *Denton* v. *Southern Railway Co.*, 854 S.W.2d 885 (Tenn. Ct. App. 1993), is a curious one. *Denton* antedated *Ayers* by more than a decade, and it did not address whether a defendant is entitled to a "genuine and serious"—or any other—fear-of-cancer instruction. See *id.* at 887-889.

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

As we explain in the petition (at 16-19), the court of appeals' reasoning is fundamentally flawed in multiple respects. In particular, (1) the court overlooked the language in *Ayers* making clear that a defendant has a right to a "genuine and serious fear" instruction; (2) the court held that the jury decides whether a fear of cancer is "genuine and serious" but that the jury need not—and apparently *should* not—be told to exercise that responsibility; (3) the court recognized that the emotionally charged issue of cancer can lead jurors to return a verdict based on their passions, but then reached the inexplicable conclusion that that risk makes an instruction unnecessary; and (4) under the court's reasoning, *no one* decides whether there is *in fact* a "genuine and serious" fear of cancer.

Respondent does not engage these arguments; indeed, he offers no real defense of the court of appeals' reasoning. Instead, he merely summarizes the reasoning and then conclusorily asserts that it is correct.

For example, respondent says that the court "correctly held that the purpose of the 'genuine' and 'serious' requirement is to protect defendants from excessive verdicts." Opp. 15. But he does not explain why that purpose makes an instruction on the requirement *less* rather than *more* necessary. Respondent also says that the court of appeals "noted that courts must serve as gatekeepers to ensure that fear-of-cancer claims do not go [to] the jury unless there is credible evidence that the fear is 'genuine and serious.'" *Ibid.* But he does not explain why, when the "gatekeeper" determines that the evidence

is such that the jury could make a finding either way, there is no need to inform the jury that it must decide whether the fear is in fact "genuine and serious."

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

1. As we explain in the petition (at 19-27), the question presented is one of far-reaching importance. In particular, (1) the court below eliminated a critical mechanism for limiting recoveries in asbestos cases; (2) the need for that mechanism is at least as great today as when *Ayers* was decided; (3) there are hundreds, if not thousands, of pending cases in which the instructional issue could arise; and (4) defendants currently have a right to the instruction in some jurisdictions but not in others.

Respondent does not take issue with any of this. He does not deny that the question presented is a recurring one of exceptional importance; and he offers no direct response to petitioner's arguments on that point.

Respondent does assert that petitioner cannot identify "any court, federal or state," that has required a "genuine and serious fear" instruction. Opp. 16. But of course *this* Court required such an instruction in *Ayers*. That is the central point of the petition. As the petition explains (at 25-26), moreover, there are many States—for example, Illinois, Kansas, Kentucky, Ohio, and Pennsylvania—in which trial judges faithfully apply *Ayers* and give a "genuine and serious" instruction in fear-of-cancer cases.

Respondent also points out that, in light of *Hedgecorth* v. *Union Pacific Railroad Co.*, 210

S.W.3d 220 (Mo. Ct. App. E.D. 2006), cert. denied, 128 S. Ct. 59 (2007), on which the court below relied, trial judges in two States—Missouri and Tennessee—will not give a "genuine and serious fear" instruction. Opp. 16. But the fact that there are now *two* appellate decisions that conflict with *Ayers*—and with the practice in several other States—means only that the conflict among the jurisdictions has grown deeper. It therefore argues *in favor of* certiorari, not against it.[2]

2. The exceptional importance of the question presented is confirmed by the remarkable array of amici—eleven in all—that have filed briefs urging the Court to grant review. They include the world's largest business federation (the Chamber of Commerce of the United States of America); the Nation's largest industrial trade association (the National Association of Manufacturers); the legal arm of the Nation's largest small-business organization (the National Federation of Independent Business); and the association that represents the Nation's major freight railroads and Amtrak (the Association of

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[2] In this context, respondent again suggests that a "genuine and serious" instruction is required only when there is no "physical manifestation" of the fear of cancer. Opp. 16. As we have already explained, the holding of *Ayers* is not so limited. See *supra* pp. 2-3. As far as we are aware, moreover, no lower court on either side of the issue—including the court below—has understood *Ayers* as respondent does. *Jones* v. *CSX Transportation*, 337 F.3d 1316 (11th Cir. 2003) (per curiam), on which respondent relies, assuredly does not. Consistent with *Ayers*, *Jones* held only that "a plaintiff who has asbestosis can recover damages for fear of cancer if the alleged fear is 'genuine and serious,'" and that "a plaintiff [need not] produce evidence of objective manifestations of purported emotional distress." *Id.* at 1317.

American Railroads).[3] Many members of these organizations are directly affected by the "asbestos-litigation crisis." *Amchem Prods., Inc.* v. *Windsor*, 521 U.S. 591, 597 (1997). The amicus briefs trace the history of that crisis; explain how the rule adopted by the Missouri and Tennessee appellate courts exacerbate it; and demonstrate that the question presented has significance far beyond this case.

It was in 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 *Ayers* emphasized the availability of "verdict control devices" in fear-of-cancer cases, including a "genuine and serious fear" instruction. 538 U.S. at 159 n.19. As one group of amici explain, "[t]his case represents an important opportunity to reaffirm the Court's commitment to the sound public policy protecting resources for seriously injured claimants, and to ensure that the standards the Court sets forth in this regard are not diluted or eviscerated by inconsistent lower court interpretations." ATRA Br. 18. As another amicus explains, the issue here "will be faced by state and federal courts throughout the country in virtually every FELA asbestos case." AAR Br. 3.

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

As we explain in the petition (at 27-29), this case is a textbook example of why a "genuine and serious

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[3] The other amici are the American Chemistry Council, the American Insurance Association, the American Petroleum Institute, the American Tort Reform Association, the Coalition for Litigation Justice, Inc., the Property Casualty Insurers Association of America, and the Washington Legal Foundation.

fear" instruction is necessary, and thus an ideal vehicle for confirming that *Ayers* means what it says. In particular, (1) there was only the thinnest evidence that respondent had a "genuine and serious" fear of cancer; (2) respondent's counsel misstated the legal standard in his summation; (3) respondent's summation repeatedly appealed to the jurors' passions; (4) the trial court did not give *any* instruction on fear of cancer; and (5) the damages award—$5,000,000—was enormous.

Respondent does not meaningfully engage these arguments either.[4] Instead, he suggests that this case is not an appropriate vehicle because (1) petitioner's requested instructions were inconsistent with *Ayers* (Opp. 16-19) and (2) other "verdict control devices" were adequate substitutes for a jury charge (Opp. 20-21). These contentions are baseless.

1. *Ayers* held that "the trial judge correctly stated the law when he charged the jury that an asbestosis claimant, upon demonstrating a reasonable fear of cancer stemming from his present disease, could recover for that fear as part of asbestosis-related pain and suffering damages." 538 U.S. at 145. *Ayers* also held that "[i]t is incumbent upon such a complainant * * * to prove that his alleged fear is genuine and serious." *Id.* at 157. Petitioner's proposed instruction No. 30 was consistent with

[4] Respondent does suggest that there was abundant evidence that he had a "genuine and serious" fear. Opp. 9-12. But he recites only his own testimony concerning his fear of cancer and a doctor's testimony concerning his *risk* of cancer. He identifies no "corroborative objective evidence of his fear." *Ayers*, 538 U.S. at 158 n.18.

Ayers in every particular; indeed, it closely tracked the opinion's language.

The requested charge 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.

Pet. App. 70a. Respondent cannot identify a single feature of the proffered instruction that misstates the law. Instead, he claims that the charge "w[as] confusing, used terms not defined, and w[as] duplicative of other items in the jury instruction." Opp. 18. But the instruction speaks for itself. It could not have been clearer; it used plain English that required no further definition; and the fact that it reminded the jury of the standard of proof is hardly objectionable, much less a fatal flaw.

Respondent's similar criticisms of requested instruction No. 33 (Pet. App. 70a-71a) lack merit for similar reasons. The instruction was not remotely "confusing" or "inconsistent." Opp. 18. And it did not "attempt[] to inject [any] qualifiers for recovery" (*ibid.*); the charge merely sought to inform jurors of some considerations they "may take into account" in deciding whether respondent had a "genuine and serious" fear of cancer (Pet. App. 71a). Nor would it have violated *Ayers* to instruct the jury that respondent must have suffered "actual emotional injury." Opp. 19. The trial court itself instructed the jury

that respondent could recover for "emotional suffering" (Pet. App. 62a), and it is surely uncontroversial that such an injury must be an "actual" one. Finally, even if the trial court were not obligated to give instruction No. 33, that would not justify its refusal to give instruction No. 30, a separate charge that was clearly required by *Ayers*.[5]

2. Respondent also faults petitioner for not "request[ing] a special verdict * * * asking the jury to separate any fear-of-cancer damages" and for not "challeng[ing] the verdict amount in the Court of Appeals." Opp. 20. But those litigation decisions have no bearing on petitioner's entitlement to a jury charge.

Ayers identified three "verdict control devices": "[1] on a defendant's request, a charge that each plaintiff must prove any alleged fear to be genuine and serious, [2] review of the evidence on damages for sufficiency, and [3] particularized verdict forms." 538 U.S. at 159 n.19. Petitioner sought to avail itself of the first two but not the third. *Ayers* obviously does not put a defendant to the choice of seeking either all three or none; the exercise of the right to a jury instruction and sufficiency-of-the-evidence review is not conditioned upon a request for a particularized verdict form. Even if there had been such a request, moreover, the trial court surely would have

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[5] Respondent contends that "[t]he charge given to the jury was an accurate and complete instruction"—and, in particular, that the instruction on pain and suffering was "consistent with the Restatement (Second) of Torts § 456 cited by the Court in *Ayers*." Opp. 16, 18. Unlike *Ayers* itself, however, that Restatement provision does not address recovery for fear of cancer, much less whether any such fear must be "genuine and serious."

denied it, having already refused even to *instruct* the jury on fear of cancer. Indeed, a particularized verdict form would have been pointless without instructions on all the questions the form directed the jury to answer.

Appellate review of the verdict for excessiveness cannot take the place of a properly instructed jury either. *Ayers* holds that a plaintiff cannot recover unless his fear of cancer is "genuine and serious." Because the jury is responsible for deciding whether that requirement has been met, it must be instructed to exercise that responsibility. A properly instructed jury might find that any fear of cancer is *not* "genuine and serious" and therefore award no damages on that claim—particularly in a case, like this, in which the evidence is thin (even if legally sufficient). An after-the-fact challenge to a damages award cannot remedy a failure to instruct, because an appellate court addressing such a challenge will presume that there was in fact a "genuine and serious" fear of cancer that justified some award; the most it will do is reduce the size of the award; and it will not do even that unless, exercising deferential review, it finds the award to be "patently excessive," *Palanki ex rel. Palanki* v. *Vanderbilt Univ.*, 215 S.W.3d 380, 386 (Tenn. Ct. App. 2006), cited in Opp. 21.

In short, there is simply no substitute for the instruction to which a defendant is entitled under *Ayers*. Without it, the "important" limitation on recovery (538 U.S. at 157) is rendered meaningless.

CONCLUSION

The Court should grant the petition and either set the case for plenary review or summarily reverse.

Respectfully submitted.

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