No. 17-384

In the Supreme Court of the United States

CRYSTAL SELLS,
as personal representative
of the estate of Larry Sells, deceased,
Petitioner,

v.

CSX TRANSPORTATION, INC.,
Respondent.

On Petition for a Writ of Certiorari to the
Florida District Court of Appeal, First District

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Petitioner's husband Larry Sells was a conductor for respondent CSX Transportation, Inc. (CSXT). Sells passed away after suffering a non-work-related cardiac arrest while conducting switching operations in a remote, rural area. Petitioner sued CSXT under the Federal Employers' Liability Act (FELA), alleging that CSXT negligently failed to anticipate and prepare for the possibility that Sells might suffer a cardiac arrest and negligently delayed in obtaining emergency medical attention for him. After a jury verdict finding both CSXT and Sells responsible for Sells's death, the trial court entered judgment in favor of CSXT, holding both that CSXT owed no duty to anticipate a non-work-related medical emergency and that there was no evidence that Sells would have survived had CSXT summoned emergency medical assistance more promptly. The Florida District Court of Appeal affirmed both holdings and, after initially accepting jurisdiction, the Florida Supreme Court discharged jurisdiction as improvidently granted. Fairly characterized, the questions presented by petitioner are:

1. Whether railroads owe a duty under FELA to anticipate that their employees may suffer non-work-related medical emergencies while on the job; and

2. Whether the Florida District Court of Appeal correctly determined that there was no evidence that Sells would have survived had CSXT summoned emergency medical assistance more promptly.

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There is no dispute that Larry Sells's sudden cardiac arrest was unrelated to the safety of his work environment. If Sells had suffered his cardiac arrest while hiking, hunting, fishing, driving to the store, or simply watching television at home, it never would have crossed petitioner's mind to sue CSXT under FELA for causing his death. But because Sells *was* on the job when he died, petitioner did sue, alleging that CSXT negligently failed to anticipate and prepare for the eventuality that he might suffer a non-work-related cardiac arrest. Both the trial court and the Florida District Court of Appeal rejected that theory, invoking settled case law holding that railroads do not have a duty to anticipate and prepare for the possibility that an employee will suffer a non-work-related medical emergency.

Having been thwarted by the trial court, the Florida District Court of Appeal, and ultimately the Florida Supreme Court, petitioner attempts a final Hail Mary pass, asking this Court to review two questions: (i) whether railroads owe a duty under FELA to anticipate and prepare for non-work-related medical emergencies; and (ii) whether the District Court of Appeal erred in determining that there was no evidence that Sells would have survived had CSXT summoned emergency medical assistance more promptly. Neither of these questions warrants this Court's review.

The principle that an employer does not owe a duty to anticipate that an employee may suffer a non-work-related medical emergency is one of long standing that pre-dates the enactment of FELA and that courts—including this Court—consistently have continued to apply in FELA (and Jones Act) cases. Petitioner's

contention that the lower courts are divided on this issue is manifestly wrong. She cites only two cases—a nearly 60-year-old decision of the Second Circuit and an isolated decision of a district court denying a motion to dismiss—neither of which held that railroads owe a duty to anticipate non-work-related medical emergencies. There is thus no "divide among lower courts" (Pet. 20) that would warrant this Court's intervention.

Petitioner's second question presented is unworthy of review on its face. The question goes solely to whether the trial court and District Court of Appeal correctly determined that there was no evidence that Sells would have survived had CSXT summoned emergency medical assistance more promptly. As petitioner admits, because the question involves no issue of law and seeks mere error correction, it is of a sort "not typically worthy of certiorari review." Pet. 27. That is all the more true here, given that the District Court of Appeal gave conclusive effect to petitioner's concession that even if CSXT had done everything she claims it should have done, paramedics still would not have arrived in time to save Sells's life. That is an independent and adequate state-law ground that affirmatively precludes review by this Court

STATEMENT

A. Statutory background

Enacted in 1908, FELA establishes a compensation scheme for injuries sustained by railroad employees in the workplace. Unlike workers' compensation laws, which typically provide relief without regard to fault, FELA is a negligence statute. Section 1 of the Act provides:

> Every 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. The basic elements of a FELA cause of action are thus the same as those of any traditional tort: "breach of a duty of care (that is, conduct unreasonable in the face of a foreseeable risk of harm), injury, and causation." *Consol. Rail Corp.* v. *Gottshall*, 512 U.S. 532, 538 (1994).

"Absent express language to the contrary," these traditional tort elements and any defenses "are determined by reference to the common law." *Norfolk S. Ry.* v. *Sorrell*, 549 U.S. 158, 165-166 (2007). That said, the Act "did away with several common-law tort defenses that had effectively barred recovery by injured workers." *Gottshall*, 512 U.S. at 542. "Specifically, the statute abolished the fellow servant rule, rejected the doctrine of contributory negligence in favor of that of comparative negligence, * * * prohibited employers from exempting themselves from FELA through contract, * * * abolished the assumption of risk defense," and "relaxed [the] standard of causation." *Id*. at 542-543. It is "[o]nly to the extent of these explicit statutory alterations" that the Act may be understood as a "'departure from the rules of the common law.'" *Id.* at 544 (quoting *Sinkler* v. *Mo. Pac. R.R.*, 356 U.S. 326, 329 (1958)).

Finally, although FELA has in many instances made recovery by railroad employees easier, it "'does not make the employer the insurer of the safety of his employees while they are on duty.'" *Gottshall*, 512 U.S. at 543 (quoting *Ellis* v. *Union Pacific R.R.,* 329 U.S. 649, 653 (1947)). On the contrary, "[t]he basis of [a railroad's] liability [under FELA] is [its] negligence, not the fact that injuries occur." *Ibid.* (quoting same)

B. Factual background

1. In June 2005, while living in Long Island, New York, and anticipating a move to Florida, petitioner's husband, Larry Sells, underwent an electrocardiogram (EKG) that "indicat[ed] a possible abnormality." R17:91.[1] His physician referred him to a cardiologist to whom Sells reported that he had "had intermittent chest pain that comes and goes without any clear precipitants." R17:95. The cardiologist performed a second EKG, which revealed the "same area of abnormality." R17:97. She recommended that Sells visit a cardiologist for further testing once he arrived in Florida. R17:98, 101; R19:12-13. Sells did not do so. R17:101, 168; R18:297-98.

After his move, Sells applied to work at CSXT. R18:269, 305-06. As part of the hiring process, Sells completed a questionnaire concerning his health history. R6:1099-1100. The questionnaire asked whether Sells had experienced either "heart, vein or artery trouble" or "chest pains." R6:1099. Sells answered "no" to both questions. R6:1099. Unaware of Sells's cardiac history, CSXT hired him as a conductor. R18:307-08; R20:183.

2. Sells was working with Richard Wells, a CSXT engineer, on a "road switch[ing]" job in Clay County, Florida (R18:210-12; R15:56-57) when he suffered sudden cardiac arrest (*e.g.*, R17:184-85).[2]

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[1] References to "R__:__" are to the volume and page of the record on appeal in the Florida District Court of Appeal.

[2] Sudden cardiac arrest is a condition in which the heart suddenly and unexpectedly stops beating; it is not the same thing as a heart attack, which occurs when blood flow to part of the heart is blocked. During a heart attack, the heart usually does not stop beating. See R19:38-40.

Wells immediately radioed CSXT's dispatcher, reporting that Sells was "down" and that, as the only person in the vicinity, he would "try to help" him. R16:198; R18:217. By the time Wells reached Sells, two or three minutes had elapsed since they had last spoken. R18:219-20. Sells was not breathing and had no pulse. R18:217. Wells did not know how to perform CPR but "attempted" to apply "chest compressions." *Id.* He was unsuccessful in reviving Sells. *Id.* That was in part because Wells had to stop short: "[S]weat was pouring off me like crazy, and I just decided that since I did have a heart attack myself a few years earlier that was no sense in both of us being dead." R18:222.

After some confusion concerning Sells's location, CSXT's dispatcher called 911, and EMTs were dispatched to the scene. See, *e.g.*, R15:98-110; R18:224. It is undisputed that, regardless of any delay, "15 minutes was as quick as" the EMTs could have reached Sells. R17:78. Sells was declared dead at the scene. R17:67-68.

C. Procedural background

1. Petitioner filed this lawsuit, alleging that CSXT's negligence contributed to Sells's death. Petitioner did not allege, and has not argued, that CSXT actually caused Sells's cardiac arrest. Instead, she alleges "that [CSXT] contributed to Mr. Sells' death by failing to furnish him with prompt * * * medical attention" after his cardiac arrest. R9:1592. Petitioner maintained that CSXT "should have trained its employees in [CPR]" and "provided automated external defibrillators [(AEDs)]" or taken other steps "in anticipation of the possibility that an employee might suffer severe cardiac problems" while on the job, even when those problems are not caused by the employee's work or the conditions of the workplace. R9:1592. She

"also argue[d] that [CSXT] negligently delayed the arrival of emergency medical personnel." *Id.*

2. CSXT moved for summary judgment (R1:15-36), and the trial court granted the motion in part. Specifically, the court held that the Federal Railroad Safety Act (FRSA), 49 U.S.C. § 20109(a)(2), precluded petitioner's theory that CSXT should have trained Wells in CPR. R14:3-4. Petitioner also conceded, and the trial court held, that the Locomotive Inspection Act (LIA), 49 U.S.C. § 20701, precluded "any claim [that] the locomotive didn't have [an AED on board]." R14:4. The court allowed petitioner's other claims to proceed, including her theory that CSXT should have required Wells to *carry* an AED in his equipment bag (rather than installing one on the train) and that it should have trained *the radio dispatcher* (rather than Wells himself) in CPR so that the dispatcher could have talked Wells through the procedure.

3. At trial, petitioner maintained that CSXT should have taken steps in anticipation of the possibility that Sells might suffer a sudden cardiac arrest (*e.g.*, R15:41-43) and that it negligently delayed the arrival of the EMTs (*e.g.*, R15:38-41). CSXT presented a comparative-negligence defense based on Sells's concealment of his cardiac condition. *E.g.*, R15:70-76.

With respect to petitioner's claim that CSXT negligently failed to anticipate and plan for non-work-related medical emergencies like Sells's cardiac arrest, petitioner's expert—industrial hygienist Michelle Copeland—acknowledged that CSXT could not be liable under FELA for failing to install AEDs on its locomotives; she thus opined instead that "CSX [was] negligent because the engineer and the conductor didn't carry an AED up on the locomotive with them." R16:183. Copeland also agreed that "the Railroad does

not have a duty to train its engineers in the administration of CPR" but opined that "you can increase the odds that [engineers are] able to provide CPR, either by having them call 911 directly, or by having your dispatcher prepared to coach them through how to do a CPR response." R16:154.

The undisputed evidence at trial showed that the soonest that emergency personnel could have begun treating Sells was 17-18 minutes after Sells' collapse. Specifically, petitioner conceded that Wells did not discover Sells until two to three minutes after Sells suffered cardiac arrest. See R15:38-39 (opening statement); see also R18:215-20, 255 (Wells's testimony). And it is undisputed that it took the EMTs just over 15 minutes from the time they were dispatched to the time they began treating Sells. R17:78 (testimony of EMT Brockwell). Copeland testified that it was "absolutely true" that Sells's chance of surviving 15 minutes after cardiac arrest without treatment was "nonexistent." R16:197-98.

The jury found that negligence on the parts of both CSXT and Sells contributed to Sells's death. R7:1275-76. It found $1.98 million in damages and held Sells to be 45% responsible for those damages. *Id.*

4. CSXT filed a motion to enter judgment in accordance with its directed verdict motion or, in the alternative, for a new trial. Petitioner, meanwhile, filed a motion to set aside the jury's comparative-negligence finding.

The trial court granted CSXT's motion to enter judgment in accordance with the directed verdict motion. Pet. App. 61a-72a. It held that CSXT "did not have a duty to make AEDs available to its employees, to train its employees to use AEDs [or CPR]," or to take "other steps in anticipation of the possibility that Mr.

Sells would suffer cardiac arrest." Pet. App. 64a. And the court rejected petitioner's theory that CSXT "breached its duty to provide timely medical care," holding that "plaintiff presented no evidence that" any delay in summoning EMTs "caused [Sells'] death." *Id.* at 69a.

5. The Florida District Court of Appeal affirmed. Pet. App. 1a-60a.

The court first rejected petitioner's theory that CSXT should have taken precautions in anticipation of the possibility that Sells might suffer a non-work-related cardiac arrest while on the job. The court began by observing that railroads' duty under FELA "to exercise reasonable care in providing a reasonably safe workplace" subsumes "the duty to * * * procure medical aid and assistance for an employee when, to the employer's knowledge, the employee becomes seriously ill and unable to care for himself." Pet. App. 6a-7a (citing *S. Pac. Co.* v. *Hendricks*, 339 P.2d 731, 733 (Ariz. 1959); *Szabo* v. *Pa. R.R.*, 40 A.2d 562, 563 (N.J. 1945)). But, the court explained, this obligation "to furnish prompt medical attention" is not a standing duty; rather, "'[i]t arises with the emergency and expires with it.'" *Ibid.* (quoting *Hendricks*, 339 P.2d at 733).

As the court further explained, it follows that FELA imposes no *pre*-emergency duty on railroads "to take preventive actions in anticipation of" medical emergencies that might arise on the job, when such emergencies are not related to railroad work itself. Pet. App. 7a (citing *Wilke* v. *Chi. Great W. Ry.*, 251 N.W. 11, 13 (Minn. 1933)). "Thus," the court concluded, "long-standing case law establishes that * * * CSX had to procure prompt emergency medical treatment for Sells once it knew that he was seriously ill," but "it did not

have a duty to take anticipatory measures to prevent such emergency situations." *Ibid.*

As for petitioner's theory that CSXT negligently failed to summon the EMTs in a timely manner, the court held that petitioner had "presented no evidence to establish that CSX's delay in summoning medical assistance caused Sells' death." Pet. App. 12a. The court explained that "[t]he uncontroverted trial testimony established that, absent any delays, the EMTs could not have arrived on scene until fifteen minutes after Sells went into cardiac arrest," and "[a]s conceded by counsel at oral argument, the medical testimony conclusively demonstrated that the administration of emergency medical treatment at that point in time, without more, could not have prevented Sells' death." *Id.* at 13a.

6. Petitioner filed a petition for rehearing in the District Court of Appeal.

The petition argued principally that the panel's holding that railroads owe no duty to anticipate that an employee will suffer a non-work-related medical emergency on the job conflicted with the Florida Supreme Court's decision in *Limones* v. *School District of Lee County,* 161 So. 3d 384 (Fla. 2015). According to petitioner, under *Limones* once it was established that "CSX has a duty to provide a safe work place and prompt medical care during emergencies[,] that should end the duty inquiry." Appellant's Motion for Rehearing, Rehearing En Banc, or, Alternatively, Certification at 6.

With respect to the panel's holding that there was no evidence that CSXT's delay in summoning the EMTs played a causal role in Sells's death, petitioner argued, among other things, that her counsel's conces-

sion at oral argument "should not be given the conclusive effect assigned by the majority." *Id*. at 17.

The District Court of Appeal denied the rehearing petition.

7. Petitioner then sought review in the Florida Supreme Court, contending that the District Court of Appeal's no-duty holding conflicted with *Limones*. The Florida Supreme Court accepted jurisdiction, and the parties then briefed and argued the case. Approximately one month after the oral argument, the Florida Supreme Court issued a *per curiam* decision stating: "We initially accepted jurisdiction to review the decision of the First District Court of Appeal in *Sells* v. *CSX Transportation, Inc.*, 170 So. 3d 27 (Fla. 1st DCA 2015), based on express and direct conflict. *See* art. V, § 3(b)(3), Fla. Const. Upon further consideration, we conclude that jurisdiction was improvidently granted. Accordingly, we exercise our discretion and discharge jurisdiction." Pet. App. 76a.

REASONS FOR DENYING THE PETITION

Neither question presented by petitioner warrants review. The Florida courts' resolution of the duty issue is consistent with every appellate decision addressing the topic—dating back to before enactment of FELA. The two cases upon which petitioner relies—one of which is almost 60 years old and the other of which is a federal district court ruling denying a motion to dismiss—are not in conflict with those decisions. There is accordingly no need for this Court's intervention. The causation issue meanwhile is entirely fact-bound and, to make matters worse, was decided on the basis of an independent and adequate state-law ground—namely, a concession made by counsel for petitioner during oral argument. There is thus no conceivable warrant for reviewing that issue.

A. The First Question Presented Does Not Warrant Review.

1. The decision below does not conflict with the decision of any federal court of appeals or state court of last resort.

a. The common-law rule in master-servant cases was that an employer owed no duty to anticipate an emergency by keeping on hand equipment needed to respond to such an emergency. Insofar as such a duty existed in particular states, "[it] [was] not a common-law duty, but one newly created by statute, and which, but for the statute, might be omitted." *Wolf* v. *Smith*, 42 So. 824, 825 (Ala.1906); accord *Sourwine* v. *McRoy Clay Works*, 85 N.E. 782, 783 (Ind. App. 1908) (statute requiring mining company to keep on hand specified equipment for responding to an accident was "in derogation of the common law") (quotations omitted).

In accordance with the interpretive methodology articulated by this Court in *Gottshall* and *Sorrell* (see page 3, *supra*), courts in FELA cases have consistently applied this common-law rule. For example, the Minnesota Supreme Court held that a railroad's duty "to use ordinary care to avert the peril and give proper care during [an] emergency" arises only once an employee is actually "by accident or illness suddenly rendered helpless and exposed to serious peril or death." *Wilke*, 251 N.W. at 13. Or as the New Jersey Supreme Court put it, a railroad's duty with respect to non-work-related medical emergencies "arises with the emergency and expires with it." *Szabo* v. *Pa. R.R.*, 40 A.2d 562, 563 (N.J. 1945); accord *S. Pac. Co.* v. *Hendricks*, 339 P.2d 731, 733 (Ariz. 1959); *Pulley* v. *Norfolk S. Ry.*, 821 So. 2d 1008, 1014-15 (Ala. Civ. App. 2001); *Bell* v. *Norfolk S. Ry.*, 476 S.E.2d 3, 5 (Ga. Ct. App. 1996); *Handy* v. *Union Pac. R.R.*, 841 P.2d 1210, 1221

(Utah Ct. App. 1992). In other words, FELA does not impose a duty, applicable when no emergency is at hand, "to anticipat[e] that the physical health and ability of a servant to care for himself while doing his ordinary work will suddenly cease." *Wilke*, 251 N.W. at 13.

Indeed, this Court has said much the same thing in the context of the Jones Act, which of course is patterned on FELA. See *De Zon* v. *Am. President Lines, Ltd.*, 318 U.S. 660, 668 (1943) (although a vessel owner must take "reasonable measures to get" seriously ill employees to a doctor, it need not "carry a physician" onboard in anticipation of a medical emergency).

b. Petitioner asserts that in embracing this line of authority, the decision below "has deepened a divide among the lower courts." Pet. 20. In particular, she maintains that these decisions conflict with decisions of the Second Circuit and U.S. District Court for the Western District of Pennsylvania. See *id.* at 15-16 (citing *Powers* v. *New York Cent. R.R.*, 251 F.2d 813 (2d Cir. 1958) and *Monheim* v. *Union R.R.*, 788 F. Supp. 2d 394 (W.D. Pa. 2011)). But there is no conflict, and even if there were, it is not the sort that would justify granting review.

Powers involved a crane operator who worked on the railroad's "docks, piers and float bridges" along the Hudson River. 251 F.2d at 814. Shortly after he had completed his last duties of the day, he was found floating in the water by a co-worker. He was plucked from the water by a tug boat crew, resuscitated, and taken to the hospital, where he later died. *Id.* at 815. The jury found the railroad liable for, among other things, "failing to have blankets, inhalator, pulmotor, stretcher, [and] life-saving equipment" near the docks in case someone fell in the water, and also for failing to

summon emergency first responders, who could have brought all the necessary life-saving equipment to the scene. *Id*. at 816. The Second Circuit affirmed the verdict. *Id.* at 818.

Powers cannot be said to conflict with the decision below—and the century-old line of authority on which it relied—for two reasons. First, the Second Circuit did not separately analyze the two theories of liability at issue in *Powers*—and it did not cite, much less repudiate, the cases holding that railroads owe no duty to anticipate medical emergencies. It therefore cannot be deemed to have held anything more than that railroads owe a duty to promptly summon assistance for employees in peril—a holding that is fully consistent with the decision below and the cases on which it relied. Second, even if the Second Circuit had held that the railroad in *Powers* owed a duty to anticipate and prepare for the possibility that an employee might fall into the water, that risk arose out of the work environment. The decision below involved the distinct situation in which an employee's medical emergency had nothing to do with his work environment. The District Court of Appeal held only that railroads owe no duty to anticipate non-work-related medical emergencies, so its decision cannot possibly conflict with *Powers*.

Moreover, *Powers* is a nearly 60-year-old decision. In the intervening time, its holding with respect to preparedness to assist employees has been cited precisely once—in *Monheim*, which, as we discuss below, does not reject the no-duty-to-anticipate cases either. "[I]t is to be doubted that a contrary opinion rendered 30 or 40 years ago, without any indication that it has current validity, will be enough to convince the Court that there is a live conflict that should be

resolved." STEPHEN M. SHAPIRO ET AL., SUPREME COURT PRACTICE 248 (10th ed. 2013).

The decision below does not conflict with *Monheim* any more than it does with *Powers*. Like *Powers*, *Monheim* involved a work-related accident—a train collision resulting in a rail worker being buried under tons of freight. 788 F. Supp. 2d at 397. The plaintiff alleged that the railroad negligently failed to rescue her decedent after the collision, not that it had negligently failed to anticipate and plan for non-work-related medical emergencies. And the plaintiff thereafter abandoned the failure-to-rescue claim and focused her case solely on the collision itself. See Pl.'s Opp. to Def.'s Mot. for Summ. J. at 1-2, *Monheim v. Union R.R.*, No. 2:10-cv-00913 (W.D. Pa. Dec. 3, 2013), ECF No. 162. Stray language notwithstanding, *Monheim* cannot seriously be taken as a break from nearly a century of FELA case law holding that railroads have no duty to anticipate non-work-related medical emergencies.[3]

2. The duty-to-anticipate issue does not arise with sufficient regularity to warrant review.

Review is unwarranted for the additional reason that the issue presented rarely arises. Nearly all of the cases even potentially implicating this issue were decided many decades ago: *Wilke* was decided in 1933, *Szabo* in 1945, *Powers* in 1958, and *Hendricks* in 1959.

Petitioner maintains that "medical emergencies occur with frequent regularity." Pet. 22. But the per-

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[3] Even if *Monheim* could be so understood, this Court "will not grant certiorari to review a decision of a federal court of appeals [or state court of last resort] merely because it is in direct conflict on a point of law with a decision rendered by a district court." Stephen M. Shapiro et al., *supra*, at 257.

tinent question is whether the duty-to-anticipate issue arises frequently *in litigation*. It does not. That may be because the no-duty rule is deeply entrenched; or it may be because railroads often are able to summon medical assistance in time to respond to the emergency. Either way, there is no pressing need to reconsider the no-duty-to-anticipate rule.

3. Review is unwarranted because the decision below is correct.

Even if there were a square conflict between the decision below and *Powers*, review would be unwarranted because the former is correct and the latter—if construed as petitioner advocates—would be an outlier that misapplies long-standing precedent.

As noted above, before the enactment of FELA the common-law rule was that employers owed no duty to anticipate medical emergencies. FELA did not change that. To the contrary, "[a]bsent express language to the contrary," the elements of a FELA claim—duty, breach, injury, and causation—"are determined by reference to the common law." *Sorrell*, 549 U.S. at 165-166. Petitioner does not—and cannot—contend that FELA expressly expanded the duties owed by employers to employees. Accordingly, the rule that employers owed no duty to anticipate medical emergencies is conclusively presumed to have been incorporated into FELA. And that, no doubt, is why *Wilke*, *Szabo*, and *Hendricks*—not to mention *DeZon*—all held that the employer's duty is limited to summoning medical assistance or bringing the employee to a place where he or she could receive such assistance.

Petitioner asserts that the decision below is inconsistent with "FELA and its remedial purposes." Pet. 20. But this Court has time and again made clear that FELA is not "a workers' compensation statute,"

and it "'does not make the employer the insurer of the safety of his employees while they are on duty.'" *Gottshall*, 512 U.S. at 543 (quoting *Ellis*, 329 U.S. at 653). Thus, liability under FELA may not be based solely on the "fact that injuries occur." *Ibid.* (quoting same).

Petitioner's theory of liability is out of step with that basic limitation on FELA liability; after all, the crux of petitioner's case is that CSXT should be made to pay damages, not because any unreasonable hazards of the job caused Sells's sudden cardiac arrest, but because Sells happened to suffer his cardiac arrest while he was on duty for CSXT, and CSXT wasn't prepared to save his life. Adoption of that position would effectively transform railroads into general risk insurers for their on-duty employees.

Petitioner's theory is, moreover, boundless—it would apply not just to sudden cardiac arrest, but to all manner of emergencies arising from "the myriad of possible consequences of living in a complex world." *Gottshall* v. *Consol. Rail Corp.*, 988 F.2d 355, 380 (3d Cir. 1993), *rev'd on other grounds*, 512 U.S. 532 (1994).

Thus, as we explained below—and petitioner conceded during the oral argument in the Florida Supreme Court (at 16:04-16:55)—petitioner's theory would put railroads on the hook to plan and prepare for all sorts of non-work-related medical emergencies, including choking, strokes, acute asthma attacks, anaphylactic allergic reactions, and diabetic hypoglycemia, to name just a few. Any railroad employee suffering emergencies of those sorts while on the job would have grounds for asserting that FELA requires the railroad to equip fellow employees not only with AEDs, but also with emergency inhalers, insulin shots, and epinephrine injectors; and to train fellow employ-

ees not only in CPR but also in the Heimlich maneuver, the administration of insulin and epinephrine, and the recognition of and proper response to stroke and other emergencies. That would entail not only countless millions of dollars in medical supplies, but millions more spent on constant training and retraining.

Petitioner's expert, Michelle Copeland, was clear on this point, explaining that "because emergency response is not something that happens every day," there must be constant training and re-training of employees to respond to emergencies as they arise. R16:126. That includes "a considerable amount of planning around how we're going to address [emergencies] and making sure that the procedures are [in] place." *Id*. "[T]he logistics have been considered, the equipment has been provided, people are prepared to follow the established procedures, understand what they are, and know how to just jump into them almost automatically rather than having to, you know, go back and forth and wonder and worry and try to figure it out as you go. You want it to be click, click, click." *Id*. According to this approach, CSXT should have trained and equipped Wells not just as a train engineer, but as an EMT as well, prepared to react on the spot to any medical emergency that might come to pass.

And the burden on railroads would not end there. As the District Court of Appeal recognized, "if an employee attempts to respond to a medical emergency but does so inadequately, the employer and the employee may be subject to a claim for having negligently rendered emergency medical services." Pet. App. 20a. This case proves the point. If Wells had been carrying an AED in his bag (as petitioner claims he should have been) but panicked and failed to apply the paddles properly, petitioner would have brought a

claim for negligent use of the AED. Or if the dispatcher had been trained to coach Wells in CPR, but Wells either refused to perform it out of fear for his own health or performed it incorrectly despite the coaching, petitioner would have brought a claim for negligent failure to perform CPR adequately. In every on-the-job medical emergency that does not end well, in other words, railroads would be on the hook for something akin to medical malpractice claims.

And that still isn't the full extent of the burden. As the District Court of Appeal recognized, "[i]mposing a duty on employers to require [their] employees to render medical treatment implicates complex labor and collective bargaining issues," especially given that "there is no law requiring railroads to train [their] employees in life-saving measures, and there is no mechanism in place to indemnify and hold harmless those employees that do attempt to render medical care." Pet. App. 20a n.8; see also R20:209 (testimony of CSXT's medical director that CSXT could not "mandate the union work force to learn CPR and be available to resuscitate someone if need be" because "[t]hat would have to be negotiated at a bargaining table"). It is thus unclear whether railroads would be legally able to compel their employees to accept CPR and AED training or to provide advanced medical aid if the need ever arose. That is true not only at the general level, as a matter of collective bargaining, but also at the individual level. What, after all, is a railroad to do when an employee simply refuses to perform CPR or use an AED because he is not comfortable with it? Cf. R18:222 (Wells's testimony that he was afraid that he might suffer a heart attack if he continued attempting chest compressions).

Given all of the costs, burdens, and complexities associated with a duty to anticipate non-work-related

medical emergencies, and given that such emergencies are comparatively rare and that the time, location, and nature of such emergencies are entirely unpredictable, adoption of the duty for which petitioner advocates would be unlikely actually to result in additional precautions. Instead, the rational response would be simply to accept liability when lightning does strike.[4] That, however, is the functional equivalent of turning FELA into a general insurance statute, which, as this Court has held, it manifestly is not. *Gottshall*, 512 U.S. at 543.

For all of these reasons, the Florida courts' refusal to recognize a duty to anticipate non-work-related medical emergencies was correct. And the petition therefore should be denied for this reason as well.

B. The Second Question Presented Does Not Warrant Review.

1. The second question does no more than seek correction of a fact-bound sufficiency-of-the-evidence ruling.

As for the second question presented, petitioner asserts that the District Court of Appeal "failed to follow this Court's dictates" by applying the wrong causation standard and therefore "has created conflict as to the scope of the jury's role to evaluate the weight of the evidence and the inferences that could be drawn

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[4] Consider that the verdict here, after reduction for Sells's comparative fault, was slightly more than $1 million. Needless to say, the cost to CSXT of obtaining AEDs for use throughout its rail network, continuously maintaining those AEDs, and continuously training and re-training employees in the use of those AEDs would far exceed that amount. And that disparity would be even greater, given the number of other medical conditions for which a railroad would have to prepare if a duty to anticipate were recognized.

therefrom." Pet. 26. That simply is not so. The District Court of Appeal meticulously applied this Court's precedents in a careful and fact-bound opinion. Petitioner disagrees with the outcome, but such case-specific requests for error correction do not warrant this Court's attention.

As both lower courts held, no rational juror could have found that the delay in summoning the EMTs contributed to Sells's death. The undisputed evidence at trial showed that the soonest that the EMTs could have begun administering CPR was 17-18 minutes after Sells's collapse. Petitioner conceded below that Wells did not discover Sells until two to three minutes after Sells suffered cardiac arrest. See Petr's Fla. S. Ct. Br. 3; R15:38-39 (opening statement); see also R18:215-20, 255 (Wells's testimony). And it is undisputed that it took the EMTs just over 15 minutes from the time they were dispatched to the time they began treating Sells. R17:78.[5]

Both Dr. Michael Fifer, petitioner's expert cardiologist, and Dr. Orlando Bautista, Sells's treating physician from New York, testified that "[b]rain death begins to occur after four or five minutes" following cardiac arrest (R17:186) and that a person will be irrevocably "brain dead" after ten minutes (R17:116; see also R17:120, 123). In Florida, legal death is defined to include brain death (Fla. Stat. Ann. § 382.009), so the medical testimony unambiguously confirmed that Sells would have died before the EMTs could have

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[5] Petitioner asserts that the EMTs "arrived" within 13 minutes of being dispatched. Pet. 26. That is a red herring. Because it naturally takes time after an emergency vehicle arrives before emergency responders can begin administering care, one of the on-scene EMTs testified that it took 15 minutes, not 13, from when they were dispatched to when they began treating Sells. R17:78.

reached him, *no matter what*. Dr. Fifer thus concluded that it did not "matter if the EMTs got there 15 minutes or 35 minutes" after Sells went into cardiac arrest, because "he would not be able to be resuscitated" at either time. R17:185, 191; see also, *e.g.*, R17:135. CSXT's expert cardiologist, Dr. Michael Zile, agreed, testifying that the delay in calling 911 "did not" "make any difference to Mr. Sells' survivability." R19:64.

Petitioner dismisses this testimony as establishing only that "Mr. Sells would *likely* have been brain dead after ten to fifteen minutes without medical intervention." Pet. 26. But the District Court of Appeal disagreed, holding that "the medical testimony conclusively demonstrated that the administration of emergency medical treatment [after fifteen minutes], without more, could not have prevented Sells' death." Pet. App. 13a.

Petitioner does not maintain that there is a pattern of confusion in the lower courts regarding when the issue of causation may be taken from the jury. To the contrary, she concedes that the second issue presented is not one that is "typically worthy of certiorari review" and argues only that the issue "is a simple one to resolve if the Court grants certiorari on the first question." Pet. 27. That is a patently inadequate reason for granting review of a fact-bound question that has no import beyond the parties to the case.

2. The District Court of Appeal's ruling rests on an independent and adequate state ground.

Even if the second question did present an important issue of law on which lower courts are divided, this Court could not grant certiorari because the District Court of Appeal's decision rests on an in-

dependent and adequate state-law ground. As petitioner conceded below, the District Court of Appeal's determination that her counsel conceded that Sells would have died no matter how quickly CSXT had summoned the EMTs (Pet. App. 13a) was "given * * * conclusive effect." Appellant's Rehearing Mot. 17.

The Court accordingly cannot reach the issue. There is, after all, no serious doubt that the binding effect of a concession made by counsel is an issue of state law. And when the lower court has based its decision on "an independent and adequate state-law ground," this Court is "prevent[ed]" from reviewing that decision. *Osborne* v. *Ohio*, 495 U.S. 103, 123 (1990); see generally STEPHEN M. SHAPIRO ET AL., *supra*, at 207. Accordingly, review must be denied.

CONCLUSION

The petition should be denied.

Respectfully submitted.

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