No. 18-1246

IN THE

Supreme Court of the United States

BNSF RAILWAY COMPANY, NANCY AHERN, AND JOHN DOES 1 -10,

Petitioners,

v.

MONTANA EIGHTH JUDICIAL DISTRICT COURT, CASCADE COUNTY, THE HONORABLE KATHERINE BIDEGARAY, PRESIDING JUDGE, AND ROBERT DANNELS,

Respondents.

On Petition for a Writ of *Certiorari* to the Supreme Court of the State of Montana

BRIEF OF THE ASSOCIATION OF AMERICAN RAILROADS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST OF AMICUS CURIAE[1]

Amicus curiae Association of American Railroads (AAR) is an incorporated, nonprofit trade association representing the nation's major freight railroads, many smaller freight railroads, Amtrak, and some commuter authorities. AAR's members operate approximately 83 percent of the rail industry's line haul mileage, produce 97 percent of its freight revenues, and employ 95 percent of rail employees. In matters of significant interest to its members, AAR frequently appears on behalf of the railroad industry before Congress, the courts and administrative agencies. AAR participates as *amicus curiae* to represent the views of its members when a case raises an issue of importance to the railroad industry as a whole.

This case is of interest to AAR's member railroads because it represents an effort by a railroad employee to seek multiple recoveries for losses arising from a single work-related injury and punishes a railroad for exercising its rights under the Federal Employers' Liability Act (FELA), 45 U.S.C. §§51-60. FELA covers all railroads in the United States, and provides railroad employees with a uniform, exclusive remedy against their employing railroad for work-related injuries. Here, in permitting respondent Robert Dannels to pursue a state-law action against petitioner BNSF Railway, his railroad employer, after he had successfully recovered a large award against

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[1] As required by Rule 37.2(a), counsel for AAR has timely notified the parties of AAR's intent to file this brief. Both parties have consented to AAR's filing of an *amicus* brief. Pursuant to Rule 37.6, AAR states that no person or entity other than AAR has made monetary contributions toward this brief, and no counsel for any party authored this brief in whole or in part.

BNSF under FELA, the Montana courts have ignored well-established precedent of this Court holding that state law cannot be used to affect in any way the parties' rights and obligations under FELA. AAR's member railroad have a strong interest in preventing state courts from using state law to expand the railroads' obligations to compensate their employees for workplace injuries.

SUMMARY OF THE ARGUMENT

Railroads' obligations to their employees with respect to workplace injuries flow solely and exclusively from federal law, specifically FELA. FELA employers are entitled to defend themselves against employee allegations of negligence, and to insist that a jury make that determination before they are obligated to provide compensation. Where negligence is shown, and the railroad is liable, federal law exclusively determines the nature of the remedy. Dannels' state lawsuit is preempted because it would impose claim-handling duties (typically applied to insurance companies) on BNSF that would supersede a railroad's rights under FELA to contest allegations of negligence made against it.

This Court has repeatedly held that states may not alter or add to a railroad's rights and obligations under FELA. BNSF's FELA rights include the right to try a case before a jury rather than settle. BNSF is not an insurer, and BNSF's obligations do not include duties insurers have related to settling claims, or paying a plaintiff's medical expenses and lost wages under certain circumstances pending a settlement or judgment.

ARGUMENT

DANNELS' STATE LAW CLAIMS AGAINST BNSF ARE PREEMPTED BY FEDERAL LAW.

This is an extraordinary case—in which the courts in Montana have sanctioned the use of state law to supersede a federal statute—that should be reviewed by this Court. In 2010, Dannels sued his employer, BNSF, under FELA. FELA is a federal statute that provides railroad employees with a negligence-based cause of action against their employer for workplace injuries. In 2013, after a jury trial, Dannels was awarded $1.7 million, which he has collected. The following year, Dannels initiated the current action against BNSF, seeking additional compensation related to the same workplace injury for which he had received an award under FELA. This time, however, Dannels sued under a Montana statute and state common law, which are aimed at the conduct of insurance companies. §33-18-201, MCA. *See Fode v. Farmers Ins. Exch.*, 719 P.2d 414, 417 (1986) (describing §33-18-201, MCA as having been enacted "to correct abuses being practiced by insurers"). Dannels claims he is due additional money because, by exercising its right to a jury trial rather than settling before trial, BNSF handled his FELA claim in a manner that is proscribed by Montana law.

Dannels' state law claims seeking to obtain additional damages arising from a workplace injury should have been dismissed because they are preempted by FELA. FELA is the exclusive remedy of railroad employees against their employer for workplace injuries, superseding and preempting all state laws purporting to provide such a remedy. The trial court accepted the flawed premise that as a railroad that self-insures against potential FELA liability, *i.e.*,

relies on its own assets, rather than an insurer to pay damage awards, BNSF assumes the obligations of an insurance company, and thus has a good faith obligation to handle and pay FELA claims in accordance with Montana law, and may be subject to a "bad faith" suit merely for defending itself on the merits against the underlying FELA suit. However, unlike insurance concepts, which are based on a contractual right to payment under specified conditions, the right to recover under FELA is based on negligence, *i.e.*, whether the employer breached a duty of ordinary care to an employee, and is governed exclusively by federal law. *CSX Transp., Inc. v. McBride*, 564 U.S. 685, 703 (2011) (liability under FELA requires a jury to find the railroad "fai[led] to observe that degree of care which people of ordinary prudence and sagacity would use under the same or similar circumstances"). Dannels sought and received compensation from BNSF under FELA; he is entitled to nothing more.

A. Workplace Injuries in the Railroad Industry are Governed Exclusively by the Negligence-Based Federal Employers' Liability Act.

As an employee compensation system, FELA differs fundamentally from those that cover virtually all other American workers (and, in fact, workers throughout the world). *See generally* Transp. Research Bd., *Compensating Injured Railroad Workers Under the Federal Employers' Liability Act* (1994).[2] Railroads

[2] Other than railroads, and the maritime industry, to which the substance of FELA applies by virtue of the Jones Act, 46 U.S.C. §30104, all industries in the United States are covered by either state or federal no-fault workers' compensation systems. Price V. Fishback and Shawn Everett Kantor, *The Adoption of*

are treated differently than other employers for historical reasons. At the turn of the twentieth century railroads were the nation's dominant industry other than agriculture. The work could be hazardous, and state law remedies for workplace injuries often were inadequate. *See Johnson v. Southern Pac. Co.*, 196 U.S. 1, 19-20 (1904) (describing the hazards of certain aspects of railroad work); *Nordgren v. Burlington N. R.R.*, 101 F.3d 1246, 1248 (8th Cir. 1996) ("Around the turn of the [twentieth] century, there was great concern that railroad employees who were injured in the course of their employment had no adequate remedy for their injuries.").[3] In 1908, before the concept of no-fault workers' compensation had gained a foothold in the United States, Congress enacted FELA to provide a uniform tort-based remedy to railroad employees injured on the job. Act of April 22, 1908, c. 149, 35 Stat. 65 (1908).

From the standpoint of railroad employees, FELA was a significant improvement over the prevailing common law. At the time, common law rules, such as the fellow servant doctrine, and assumption of the risk and contributory negligence rules, often made it difficult to recover for workplace injuries. When the negligence of a "fellow servant"—which typically was not attributable to the employer—caused the injury, the employer was absolved of liability. *Ryan v.*

Workers' Compensation in the United States, 41 J.L & Econ. 305, 319-20 (1998). No-fault workers' compensation is the prevailing model worldwide today. PETER M. LENCSIS, WORKERS' COMPENSATION: A REFERENCE AND GUIDE 14 (1998).

[3] In the year ending June 30, 1907, 4,534 rail workers were killed on the job and 87,644 were injured. Interstate Commerce Comm'n, *Statistics of Railways in the United States* 1908, 41, 99 (1909).

Cumberland Valley R.R., 23 Pa. 384, 386 (Pa. 1854) ("[W]here several persons are employed in the same general service, and one is injured from the carelessness of another, the employer is not responsible."). And when the employee "entered the employment of the defendant he assumed the usual risks and perils of the service" and "he could not call upon the defendant to make alterations to secure greater safety." *Gibson v. Erie Ry. Co.*, 63 N.Y. 449, 452 (N.Y. App. 1875); *see also Clark, Adm'x v. St. Paul & Sioux City R.R.*, 9 N.W. 581, 582 (Minn. 1881). In addition, in the majority of states, any contributory negligence by the plaintiff barred recovery even if the defendant also was at fault. *See Louisville, Nashville & Great S. R.R. v. Fleming*, 82 Tenn. 128, 135 (Tenn. 1884).

To facilitate recovery, FELA addressed these obstacles. The fellow servant doctrine was eliminated. *Chesapeake & Ohio Ry. Co. v. De Atley*, 241 U.S. 310, 313 (1916) ("Congress . . . abrogated the common-law rule known as the fellow-servant doctrine by placing the negligence of a coemployee upon the same basis as the negligence of the employer."). The assumption of the risk doctrine also was removed from FELA cases. 45 U.S.C. §54; S. REP. NO. 460, at 2 (1908) (FELA set aside the "law which presumes that a workman have notice [sic] of and assume the risks incident to all dangers of his employment and defects in the machinery" and which "takes away the right of recovery for injuries arising out of imperfections and defects in the machinery which he uses or operates."). FELA was an early example of a comparative fault statute, which at the time was a significant innovation in tort law. Rather than barring any recovery if the employee's negligence contributed to the injury, FELA damages are to be reduced only in proportion to the employee's negligence. 45 U.S.C. §53. Under FELA,

"a recovery [is not] barred even though the injured one contributed by his own negligence to the injury." H.R. REP. NO. 1386, at 1 (1908). Thus, Congress struck a balance in FELA cases, requiring that each party bear the consequences of its own negligence. "What can be more fair than that each party shall suffer the consequence of his own carelessness." *Id.* at 5.

While FELA ameliorated some of the harsher aspects of early twentieth century common law, it retained what at the time was the universal compensation model in the United States: the law of negligence. *See New Orleans & N. E. R.R. v. Harris*, 247 U.S. 367, 371 (1918) ("negligence is essential to recovery"). The rights and obligations under FELA depend upon "applicable principles of common law. . . . Negligence by the railway company is essential to a recovery." *Southern Ry. Co. v. Gray*, 241 U.S. 333, 339 (1916). *See also Urie v. Thompson*, 337 U.S. 163, 182 (1949); *Adams v. CSX Transp., Inc.*, 899 F.2d 536, 539 (6th Cir. 1990). FELA incorporates ordinary negligence as the standard of care. *McBride*, 564 U.S. at 703. In order to recover damages under FELA, the plaintiff must prove all elements of a negligence case. *Fulk v. Ill. Cent. R.R.*, 22 F.3d 120, 124 (7th Cir. 1994). This critical feature of a FELA employer's relationship to its employees was disregarded by the lower court, which characterized BNSF's counsel as acting as a "claims adjuster" and as "the insurer's agents." Corrected Order on Sanctions (Nov. 16, 2018). Pet. App. 21a.

Under FELA there is no employer-provided "insurance" for workplace injuries. Instead, railroads' obligations to their employees with respect to workplace injuries flow solely and exclusively from a federal

statute, under which employer fault must be shown as condition of recovery. Where there is no employer fault, there is no obligation to provide compensation even if the injury was sustained on the job.[4] Even where employer fault is shown, federal law exclusively determines the nature of the remedy. *Consol. Rail Corp. v. Gottshall*, 512 U.S. 532 (1994) (damages for negligent infliction of emotional distress are available under FELA, but only to plaintiffs who were in the "zone of danger" of the defendant's negligent conduct); *Monessen SW Ry. Co. v. Morgan*, 486 U.S. 330 (1988) (prejudgment interest is not available under FELA); *Anderson v. Burlington N., Inc*., 469 F.2d 288 (10th Cir. 1971) (loss of consortium damages not available under FELA); *Kozar v. Chesapeake & Ohio Ry. Co.*, 449 F.2d 1238 (6th Cir. 1971) (punitive damages not available under FELA).

B. The Workers' Compensation Systems That Cover Employers Outside the Railroad Industry are Based on a No-Fault Insurance Model.

In contrast to FELA, the workers' compensation laws that cover most American workers are based on a no-fault insurance model. Though they differ in detail from state to state, under workers' compensation an employee who is hurt on the job is entitled to compensation regardless of whether the employer was at fault or the employee's negligence contributed to the

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[4] Railroad employers may have other obligations to injured employees that arise from collective bargaining agreements negotiated between the railroads and representatives of employee unions. Disabled railroad workers may also be entitled to certain benefits under other federal statutes. *See, e.g.*, 45 U.S.C. §231a(a)(1)(iv) & (v) (providing benefits to disabled employees who meet certain age and service criteria).

injury. *Compensating Injured Railroad Workers Under the Federal Employers' Liability Act*, at 18-19, 85. Typically, benefits consist of a percentage (commonly, two-thirds) of lost wages, capped at a prescribed amount. *Id.* at 87. Injured workers also are entitled to medical expenses incurred as a result of the injury. *Id.* at 86. Most workers' compensation laws also include a schedule of benefits, payable for the loss, or loss of use, of certain body parts or functions. *Id.* at 92. Beyond that, however, noneconomic (pain and suffering) losses generally are not compensable. *Id.* at 3. Thus, under workers' compensation, the level and scope of compensation are prescribed by statute, in exchange for the employer relinquishing the right to contest fault, and instead adopting the role of insurer with the obligation to compensate all workplace injuries. While employers covered by workers' compensation are obligated to provide benefits to employees who are injured on the job, they generally are immune from negligence suits by injured employees. *Id.* at 85.

Thus, a fundamental difference between FELA and workers' compensation laws—which is critical to the analysis here—is that payment to injured railroad employees is not guaranteed simply because an injury is work-related. *Gottshall*, 512 U.S. at 543 ("FELA does not make the employer the insurer of the safety of his employees while they are on duty." (internal quotation marks omitted)); *O'Hara v. Long Island R.R.*, 665 F.2d 8, 9 (2d Cir. 1981) ("FELA is not an insurance program. Claimants must at least offer some evidence that would support a finding of negligence.").

C. The Parties to a FELA Case Are Entitled to Have a Jury Decide Contested Issues of Fact.

In FELA cases, the caps and limitations on recovery that characterize workers' compensation do not apply, and injured workers may seek both economic and noneconomic damages. *Frazier v. Norfolk & W. Ry. Co.*, 996 F.2d 922, 925 (7th Cir. 1993). Juries typically are given wide discretion to make determinations of fact, including questions about the extent of damages suffered. Damage awards under FELA will be deemed excessive only if they "shock [the] judicial conscience," *Schneider v. Nat'l R.R. Passenger Corp.*, 987 F.2d 132, 137 (2d Cir. 1993), and awards that are "monstrously excessive" may be vacated. *DeBiasio v. Ill. Cent. R.R.*, 52 F.3d 678, 687 (7th Cir. 1995) ($4.2 million award affirmed); *Frazier*, 996 F.2d at 925 ($2.3 million award affirmed).

FELA cases turn on their specific facts. Employer negligence, and causation, must be proved as a condition of recovery. In addition, FELA's comparative negligence scheme often leads to disputed trial issues. Because FELA damages must be reduced in proportion to the employee's negligence, employees suffering similar injuries, who are otherwise similarly situated, may receive widely different awards depending on whether, and the extent to which, the jury finds the employee's negligence contributed to the injury. *Jenkins v. Union Pac. R.R.*, 22 F.3d 206, 211 (9th Cir. 1994) ("[W]hen an employee carries out his supervisor's general order in an unsafe manner, he is responsible under FELA for his own contributory

negligence.").[5] Indeed, comparative negligence often is contested because it can serve substantially to reduce the damages a railroad must pay. *E.g., Shepherd v. Metro-North Comm. R.R.*, 791 F. Supp. 1008 (S.D.N.Y. 1992) (evidence supported a jury finding that plaintiff's negligence was 90% the cause of the injury); *Plambeck v. Union Pac. R.R.*, 441 N.W.2d 614 (Neb. 1989) (same). Regardless of whether an employee's contributory negligence is at issue, damages must be proven—with the burden of proof on the plaintiff—and often are contested, with both parties offering expert witnesses to testify about the level of lost wages and other economic losses.

To state the obvious, FELA employers are entitled to defend themselves against employee allegations of negligence, and to insist that a jury make that factual determination before they are obligated to provide compensation. Hundreds of FELA lawsuits are filed by railroad employees each year. In some cases, liability is clear, and settling quickly makes sense. In others, the outcome is far from certain, as the facts may call into question whether the employer was negligent and/or the degree to which the employee's negligence caused the injury. In such cases, the parties may opt to go to trial if a compromise cannot be reached. In some of those cases the employee prevails; in others, a defense verdict is rendered. Indeed, Congress intended that the parties have the opportunity to have a jury determine contested issues

[5] Just as the burden of proof for showing employer negligence is on a FELA plaintiff, the burden of proving employee contributory negligence is on the defendant. *Cent. Vermont Ry. Co. v. White*, 238 U.S. 507, 512 (1915). The same standard of causation applies to employer negligence and employee contributory negligence. *Norfolk S. Ry. Co. v. Sorrell*, 549 U.S. 158, 171 (2007).

of fact. *Bailey v. Cent. Vermont Ry.*, 319 U.S. 350, 354 (1943) ("The right to trial by jury is . . . fundamental."); *see also Dice v. Akron, Canton & Youngstown R.R.*, 342 U.S. 359, 363 (1952); *Wilkerson v. McCarthy*, 336 U.S. 53, 58 (1949); *Tennant v. Peoria & Pekin Union Ry. Co.*, 321 U.S. 29, 35 (1944).

D. The Rights and Obligations of Parties to a FELA Case May Not Be Altered by State Law.

FELA is the exclusive remedy of railroad employees against their employer for workplace injuries. FELA cases are governed by federal law that must be applied uniformly nationwide. *New York Cent. R.R. v. Winfield*, 244 U.S. 147, 150 (1917) (FELA "was intended to be very comprehensive, to withdraw all injuries to railroad employees in interstate commerce from the operation of varying state laws, and to apply to them a national law having a uniform operation throughout all the states."); *South Buffalo Ry. Co. v. Ahern*, 344 U.S. 367, 371-72 (1953); *Brady v. Southern Ry. Co.*, 320 U.S. 476, 479 (1943); *Seaboard Air Line Ry. v. Horton*, 233 U.S. 492, 501 (1914). States may not superimpose new or different duties on railroads with respect to their obligations to compensate employees who are hurt on the job.

Dannels' current state lawsuit is preempted because it seeks to impose claim-handling duties on BNSF that would supersede its right under federal law to contest allegations of negligence made against it in a FELA case. FELA governs the "rights and obligations" of railroad employers and employees who are parties to a FELA suit, and those rights and obligations cannot be altered by state law. *Chesapeake & Ohio Ry. Co. v. Stapleton*, 279 U.S. 587, 590 (1929) (By FELA, "Congress took possession of the field of employers'

liability to employees in interstate transportation by rail; and all state laws upon that subject were superseded. The rights and obligations of the [railroad] depend upon that Act and applicable principles of common law as interpreted by the federal courts." (citations omitted)); *Chicago, Milwaukee & St. Paul Ry. Co. v. Coogan*, 271 U.S. 472, 474 (1926) (same). BNSF declined to settle Dannels' FELA claim, but instead opted to go to trial. FELA required Dannels to prove BNSF's negligence before a jury, and gave BNSF the right to insist on that proof and refuse to compensate Dannels in the absence of such proof. Subjecting a railroad to a state lawsuit, vexatious discovery, and additional damages for choosing to exercise such rights under FELA is inconsistent with federal law. *New York Cent. & Hudson River R.R. v. Tonsellito*, 244 U.S. 360, 362 (1917) ("liability can [not] be extended . . . by common or statutory laws of the state").[6]

The fact that the particular relief sought by Dannels is not available under FELA does not mean that such relief may be sought under state law. Dannels may (indeed did) bring an action under FELA to recover for his workplace injuries. In that suit he was entitled to

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[6] As BNSF points out, in the course of the Montana lawsuit extensive discovery demands have been made for privileged documents related to BNSF's claims-handling practices, and BNSF has been subject to sanctions for asserting privilege. Pet. at 12-13. The District Court's sanctions order "require[d] BNSF to produce documents that are otherwise undiscoverable, *but for the case's status as a UTPA action*." Order of the Supreme Court of the State of Montana (Mar. 12, 2019) (McKinnon, J., dissenting) Pet. App. 11a. (emphasis in the original). Thus, the consequences of allowing the state-law action to proceed goes beyond just subjecting railroads to additional monetary liability arising from workplace injuries.

the kinds of recovery that are available under FELA. The state law duties that Montana would impose arise directly from BNSF's obligations to compensate its employees for work-related injuries, obligations that are established, and exclusively governed by, FELA. BNSF's FELA obligations do not include state law duties aimed at insurers related to settling claims, or payment of a plaintiff's medical expenses and lost wages under certain circumstances pending a settlement or judgment. Such duties cannot be added by the state.

In denying BNSF's motion to dismiss Dannels' state law claims on preemption grounds, the District Court relied on the Montana Supreme Court's decision in *Reidelbach v. Burlington N. & Santa Fe Ry. Co.*, 60 P.3d 419 (Mont. 2002). Pet. App. 61a-63a. The Montana Supreme Court considered that reliance appropriate and a sufficient basis for declining to issue a supervisory writ. Pet. App. 6a-7a. In *Reidelbach*, the Montana Supreme Court imported a preemption analysis used in cases arising under the National Labor Relations Act and stated, despite acknowledging the significant differences between FELA and the NLRA, that "we see no reason why the [NLRA] preemption test cannot serve in FELA cases as well. 60 P.3d at 429. The *Reidelbach* decision does not mention, let alone discuss and attempt to distinguish, this Court's decisions in *Ahern, Horton, Stapleton, Coogan* or *Tonsellito.* As noted by Justice McKinnon in her dissent, those cases stand for the proposition that "there is ample federal authority . . . which appears to provide FELA is the exclusive remedy for injured railroad workers; that Congress intended FELA to 'occupy the field'; and that FELA preempts state-law claims based on injuries arising from a railroad's conduct." Pet. App. 11a.

As a matter of policy, some have opined that maintaining an adversarial tort system as a means of compensating employees for workplace injures may be inefficient and counterproductive because it creates antagonism between employers and employees and incentivizes both parties to be less than forthright about the cause of an accident. *See* Thomas E. Baker, *Why Congress Should Repeal the Federal Employers' Liability Act of 1908*, 29 HARV. J. ON LEGIS. 79, 97-98 (1992); Victor E. Schwartz and Liberty Mahshigian, *The Federal Employers' Liability Act, a Bane for Workers, a Bust for Railroads, a Boon for Lawyers*, 23 SAN DIEGO L. REV. 1, 11 (1986). As a result, Congress has considered replacement of FELA with a no-fault system. *See*, *e.g., Hearings on the Federal Employers' Liability Act Before the Subcomm. on Transp. and Hazardous Materials of the Comm. on Energy and Commerce*, 101st Cong. (1989); Baker at 90-91 (summarizing various efforts to replace FELA with an alternative compensation system for railroad employees). However, railroad employees and their representatives have strenuously opposed any change, arguing that a fault-based tort system meets their needs. *See, e.g*., *Hearings on the Federal Employers' Liability Act*, at 125-27 (statement of Larry D. McFather, President, International Brotherhood of Locomotive Engineers). Indeed, they have embraced the position that reducing damages when an employee's negligence is partially responsible for the injury is appropriate. *See Hearing to Receive Testimony on the Federal Employers' Liability Act (FELA) in Relation to Amtrak, Before the Subcomm. on Surface Transp. of the Senate Comm. on Commerce, Science and Transp.*, 100th Cong. 82 (1988) (statement of Fred A. Hardin, President, United Transportation Union) ("If the railroad can prove that we caused the

accident ourselves, we were negligent, then I do not think the railroad owes us anything.").

Regardless of the merits of FELA as a compensation system for workplace injuries, Congress has declined to replace FELA with a no-fault insurance-based system, but instead has maintained the tort-based, adversarial FELA system as the exclusive remedy of railroad workers. As a result, states are not free, through the guise of insurance regulation or otherwise, to alter or add to the rights and remedies available to railroad employees under FELA.

CONCLUSION

For the foregoing reasons, the petition should be granted.

Respectfully submitted,

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