No. 23-1056

IN THE

Supreme Court of the United States

JOSEPH BRENT MATTINGLY,

Petitioner,

v.

R.J. CORMAN RAILROAD GROUP, LLC, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the lower courts correctly decided Petitioner was not entitled to maintain a claim under the Federal Employers Liability Act ("FELA"), 45 U.S.C. §§ 51-60, consistent with this Court's precedent and other circuit court FELA decisions?

2. Whether the Sixth Circuit correctly decided Respondents' corporate structure was not put in place to avoid FELA liability, and that state common law principles for piercing the corporate veil are consistent with the purpose and effect of 45 U.S.C. § 55?

3. Whether Petitioner presents an unreviewable issue about an alleged Sixth Circuit disposition of a Rule 56(f) challenge, which he did not raise in his appeal and is contradicted by the proceedings in the District Court?

CORPORATE DISCLOSURE STATEMENT

The Respondents do not have parent corporations and no publicly held company owns 10% or more of any Respondents' stock.

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STATEMENT OF THE CASE

I. Factual Background

A. The structure of the Corman entities

This case involves a FELA claim made by Petitioner, Joseph Mattingly, arising out of a workplace accident that occurred on January 26, 2017. At the time of the accident, Petitioner was employed by Respondent R.J. Corman Railroad Services, LLC ("Corman Services") as a bridge worker performing certain repair and construction work on railroad bridges. (1/3/24 Op., App. 4).

Corman Services is a construction company that performs repair and construction work on railroad tracks, bridges, and track structure throughout the country for Class I Railroads, as well as regional and short line railroads. (1/3/24 Op., App. 4). It was founded in 1973 as R.J. Corman Railroad Construction, performing material handling work and grade crossing repair. (RE 63-1, Page ID #2195, Memorandum in Support of Motion for Summary Judgment). In the late 1970s, the business expanded to include emergency response and repair work for railroads throughout the country responding to derailments and catastrophic weather events. *Id.* Corman Services is a construction company, performing its work with track equipment, backhoes, cranes, trucks and manual labor. In this regard, Corman Services is like numerous other railroad construction companies throughout the United States available for hire by Class I, regional and short line railroads. It owns no real estate, track, locomotives or rail cars. While the vast majority of Corman Services' business consists of construction and repair work for railroads other than Corman short

line railroads, Corman Services also may be retained by a Corman short line railroad such as Memphis Line to perform certain track and bridge work.

Corman Services is a subsidiary of Respondent R.J. Corman Railroad Group, LLC, ("Corman Group"), which was formed in 1998. (1/3/24 Op., App. 4; RE 63-1, Page ID #2197). Corman Group is a holding company that provides administrative services to several subsidiary companies, both rail carriers and non-rail entities, including Corman Services. (*Id.*, App. 8). Like Corman Services, Corman Group is not a common carrier.

Corman Group and Corman Services are separately organized and managed companies. Corman Services has its own president, vice president, managers and supervisors, all of whom run the day-to-day operations of the company separate and apart from any control or oversight by Corman Group. (*Id.*, App. at 8). Corman Services makes its own hiring, firing, promotion and disciplinary decisions, and independently manages its employees' schedules and daily operations. (*Id.*, App. 8, 21; *see also* Affidavit of Corman Services President, John Langston, RE 63-5, Page ID #2709 at ¶ 16, and Affidavit of Corman Group CEO, Ed Quinn, RE 79-2, Page ID #3414 at ¶ 10). Corman Group does not manage the day-to-day operations of its operating subsidiary companies, including Corman Services. (1/3/24 Op., App. 26; *see* also Quinn Affidavit, RE 79-2, Page ID #3414 at ¶ 7).

Corman Group also indirectly owns Respondent R.J. Corman Railroad Company/Memphis Line ("Memphis Line") and other short line railroads through a railroad holding company named R.J. Corman Railroad Company,

LLC ("Railroad Company"). (1/3/24 Op., App. 4.). Just as Corman Group and Corman Services are separately run and managed, so is Memphis Line, which has its own president and management team responsible for its daily operations. (Quinn Affidavit, RE 79-2, Page ID #3414 at ¶ 8). Of the three Respondents, only Memphis Line is a common carrier by railroad.

The R.J. Corman corporate structure exists for legitimate business purposes. Respondents presented undisputed evidence that: 1) the companies are in different, distinct businesses — the railroads have their own customers, clients, suppliers and operations, separate and apart from Corman Services; 2) the railroads are process-based businesses, while Corman Services is a project-based business; 3) the companies have separate risk profiles; 4) their separate employee bases require different skill sets, and their management requires different groups because the companies require different backgrounds and expertise; 5) the railroads are subject to the exclusive jurisdiction of the Surface Transportation Board and the Federal Railroad Administration, while the non-railroads, including Corman Services, are subject to OSHA regulations; 6) environmental regulations are different for the railroad companies and non-railroads; 7) there are preemption issues for the railroads and not the non-railroads; 8) applicable labor regulations are different — railroad employees are subject to the Railway Labor Act, while non-railroad employees are subject to the National Labor Relations Act; and, 9) railroad employees are exempt from overtime pay under the Fair Labor Standards Act, while non-railroad employees such as Corman Services employees qualify for overtime pay. (1/3/24 Op., App. 19-20; 8/12/22 Op., App. 55; *see also*

deposition of Corman Group General Counsel, William Booher, RE 63-6, Page ID #2737-2739 at 97-99).

B. Petitioner's work for Corman Services

Although Corman Services primarily works for unaffiliated railroads, it also may be hired by Memphis Line to perform work on its tracks. Petitioner was injured while he and his Corman Services' crew were working on the Red River Bridge, which is part of the Memphis Line. (1/3/24 Op., App. 4). Petitioner was a supervisor on the crew, which consisted of himself and other Corman Services employees. (*Id.*, App. 5). Petitioner assigned equipment to his crew member, and ensured they had all the necessary tools for the work. (*Id.*). Although he was a supervisor, Petitioner also reported to the Corman Services bridge crew superintendent, and only Corman Services employees supervised him on this job. (*Id.*). Importantly, no Memphis Line or Corman Group employee was present or supervised Petitioner's work at the time of his accident. (8/12/22 Op., App. 59, fn. 2 and 77; *see also* September 17, 2019 Petitioner Depo, RE 79-3, Page ID #3419).

II. Procedural History

Petitioner initiated this action on April 19, 2019, by filing a Complaint against Corman Group and Corman Services[1] in the United States District Court for the Eastern District of Kentucky, seeking compensation under

1. Petitioner originally named R.J. Corman Railroad Construction, LLC as a defendant, but later amended the complaint to substitute Corman Services for R.J. Corman Railroad Construction, LLC. R.J. Corman Railroad Construction, LLC is the predecessor of R.J. Corman Railroad Services, LLC.

the FELA for on-the-job injuries. On October 6, 2021, the District Court granted Petitioner's motion to name Memphis Line as a defendant, substituting it for Corman Group on one of his theories for FELA coverage. (10/6/21 Mem. Op. & Order, App. 79).

The parties agreed to bifurcate the issue of the application of the FELA to this case from any issues related to Petitioner's claims for damages, and the parties engaged in significant discovery on this issue for over two years. (1/3/24 Op., App. 9). Although Memphis Line was not a formal party to the litigation until after the close of discovery, Petitioner took the depositions of key Memphis Line employees during the discovery phase of the case.

Because Corman Services is not a common carrier by railroad, Petitioner advanced two theories before the District Court for FELA coverage: 1) that he was a borrowed servant of Memphis Line (a common carrier); and 2) that Corman Group operated its subsidiaries "as an organized, unitary railroad system, rendering Corman Group and all of its subsidiaries — including Corman Services — common carriers for the purposes of FELA." (1/3/24 Op., App. 10).

In support of his unitary operation theory, Petitioner relied in part upon Corman Group legacy documents, entitled "Senior Staff Policies," which he has included in his Petition Appendix. (*See* App. 119–21). He claims that these "policies" applied to and controlled employees of all Corman Group's subsidiaries, including Corman Services. (*See* Petition at 9-11). However, Corman Group's CEO, Ed Quinn ("Quinn") presented undisputed testimony that, not only was he unaware of the existence of these policies until after this litigation was filed, but also that he never

ratified, approved, or required that anyone follow the policies. (Quinn Affidavit, RE 79-2, Page ID #3414 at ¶¶ 14-21).

Petitioner's unitary operation theory also relied in part upon a claim that Corman Services was merely an alter ego of Memphis Line because Memphis Line was its "largest customer." (Petition at 14). However, this theory was unsupported by the evidence. Corman Services' largest customers are Class I railroads and other short line railroads that are unaffiliated with the Corman family of railroads. (1/3/24 Op., App. 8-9). In fact, virtually all of Corman Services' work is performed for non-Corman affiliated railroads. For example, in 2016 only 1.29% of Corman Services' revenue was generated from work performed on Corman affiliated railroads, and in 2017 only 1.16%. (Affidavit of Langston, RE 72-11, Page ID #3327 at ¶¶ 4-5). Corman Services is also responsible for generating its own profit independent of any other R.J. Corman affiliated entity. Additionally, Corman Services would frequently leave a Memphis Line job early if it was awarded a job from another, unaffiliated railroad company. (1/3/24 Op., App. 26; Deposition of Memphis Line employee Jason Topolski at 158, RE 63-13, Page ID #2936).

Pursuant to a *Joint Status Report Regarding Proposed Discovery and Dispositive Motion Deadlines*, the parties agreed that the discovery deadline on the application of the FELA would be April 30, 2021, and the parties would file dispositive motions on or before June 30, 2021. (RE 47, Page ID #339). The parties filed cross motions for summary judgment, and the District Court granted Respondents' motion, finding that there was no genuine issue of material fact to support Petitioner's

unitary operation or borrowed servant theories. The court held that Petitioner was not entitled to maintain a FELA claim against Corman Services, Corman Group, or Memphis Line (8/12/22 E.D. Ky., App. 77), and the Sixth Circuit affirmed. (1/3/24 Op., App. 31). Petitioner does not seek this Court's review of the lower courts' decisions regarding the borrowed servant theory. Rather, he focuses solely on the unitary operation theory, arguing that there is an alleged conflict among the circuits in their interpretation and application of the caselaw.

Petitioner's appeal to the Sixth Circuit also included an argument that the District Court erred in dismissing the claims against Memphis Line because he did not have an opportunity to conduct discovery from Memphis Line. The Sixth Circuit rejected this argument because Petitioner failed to preserve the issue by submitting a Rule 56(d) affidavit prior to responding to Respondents' Motion for Summary Judgment. (1/3/24 Op., App. 30-31). In his Petition, he does not challenge the Sixth Circuit's ruling that he failed to preserve the issue, but instead asserts that the District Court erred by not providing notice under Rule 56(f) that the claims against Memphis Line could be dismissed. However, this Rule 56(f) argument was never raised before the courts below.

REASONS FOR DENYING THE PETITION

I. There is no circuit court conflict in determining whether a defendant is a "common carrier"

There is no conflict among the circuit courts regarding the definition of a common carrier for FELA purposes. To the contrary, the circuit courts have consistently applied

this Court's precedent in determining common carrier status for more than 100 years. Petitioner's allegation of a conflict appears to be nothing more than an observation that in some appellate cases, defendants who are not plainly railroad common carriers are determined to have that status, and in others, not. Petitioner would have preferred that the Sixth Circuit find that at least one of the Respondents was a common carrier by railroad, but he has not shown that any circuit court's approach would have gained him that result. Therefore, Petitioner has presented no reason for this Court to review his case on this question.

The FELA provides in relevant part that "[e]very common carrier by railroad while engaging in [interstate] commerce ... shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce…." 45 U.S.C. § 51. The FELA expressly includes within the definition of common carriers covered by Section 51, "persons or corporations charged with the duty of the management and operation of the business of a common carrier." 45 U.S.C. § 57. For over 100 years, this Court has defined a common carrier by railroad as "one who operates a railroad as a means of carrying for the public — that is to say, a railroad company acting as a common carrier." *Wells Fargo & Co. v. Taylor,* 254 U.S. 175, 187 (1920).

The circuit court decisions addressing this issue in the last half-century, including *Kieronski v. Wyandotte Terminal R. Co.*, 806 F.2d 107 (6th Cir. 1986), have maintained consistency with the definition of a common carrier set forth in *Wells Fargo*, as well as *Kelley v. S. Pac. Co.*, 419 U.S. 318, 324 (1974). In *Kelley*, this Court

outlined alternative ways for a non-railroad worker to be characterized as a railroad "employee" for purposes of FELA, including whether he was a borrowed servant of a common carrier by railroad at the time of his injury, or whether he was a subservant of a company that was a servant of a common carrier by railroad. Because Petitioner was employed by Corman Services, which is not a common carrier itself, he asked the courts below to find that his employer was Corman Group, which he claimed should be deemed a common carrier under his "unitary railroad operation" theory. In conjunction with this theory, he argued that the corporate structure of Corman Group was established for the sole purpose of avoiding the FELA, in contravention of Section 55 of the Act, 45 U.S.C. § 55.

Under this Court's well-established precedent governing other federal statutes, and the consistent analysis and holdings of the circuit courts in addressing FELA questions, parent companies are not considered common carriers by railroad simply because they own a subsidiary railroad company. A non-carrier parent company may be transformed into a common carrier by railroad if the parent ignores the distinctions between the two companies regarding the day-to-day operation of the subsidiary. *Kieronski*, 806 F.2d at 109. In addition, a company may become a common carrier if it creates a physical connection between rail lines to form a necessary link for the transportation of goods in interstate commerce. *Id.* This case presents neither of these scenarios. Neither Memphis Line nor Corman Group controlled the day-to-day operations of Corman Services. (1/3/24 Op., App. at 21). And because it owns no real estate, track, locomotives or rail cars, under no analysis could Corman Services be deemed to have created a "physical link" for rail lines in interstate commerce.

Like the decisions of the lower courts in this case, *Kieronski* and other circuits have consistently followed this Court's guidance in determining whether a particular entity is deemed a common carrier, including whether the corporate structure is insufficiently separated or whether it was established for the purpose of avoiding the FELA. There is no circuit court split, and based on the factors utilized, each of the cases cited by Petitioner would have decided the outcome of this case in the same manner as the Sixth Circuit, finding that Corman Services and Corman Group are not common carriers by railroad, and that Memphis Line did not employ Petitioner.

This Court's earliest discussion of whether companies held in common ownership might be deemed common carriers was in the context of federal statutes other than the FELA. In *Southern Pacific Terminal Co. v. Interstate Com. Comm'n,* 219 U.S. 498 (1911), this Court held that Southern Pacific Terminal ("SP Terminal"), a business held by the Southern Pacific Company, was itself a common carrier. *Id.* at 517. SP Terminal was in the business of operating wharves and docks used for the import and export of various goods. *Id.* at 502. The wharves and docks were connected by SP Terminal's railroad tracks to the railroad tracks of SP Terminal's affiliates, forming the only physical connection for which goods passing over the wharves could reach interstate commerce by rail. *Id.* at 502-03. SP Terminal contended that it was not a "common carrier" subject to ICC prohibitions on rate discrimination. SP Terminal was held to be a common carrier in part because the Southern Pacific Company owned and operated it and its sister railroad companies, as well as the fact that Southern Pacific and SP Terminal had the same president. *Id.* at 502. "The control and operation

of the Southern Pacific Company of the railroads and the terminal company have united them into a system of which all are necessary parts, the terminal company as well as the railroad companies." *Id.* at 521. This Court also relied on the fact that SP Terminal "form[ed] a link in the chain of transportation" for the respective companies. *Id.* at 522. SP Terminal's wharves and docks were "necessary to complete the avenue through which move shipments over [the] lines owned by a single corporation," making SP Terminal a common carrier for purposes of ICC jurisdiction. *Id.*

In *United States v. Union Stockyard & Transit Co. of Chi.*, 226 U.S. 286, 303 (1912), the defendant stock yard company, Union Stockyards, was held to be a common carrier subject to the Interstate Commerce Act. Union Stockyard was a subsidiary of a parent that also held Junction Company, a railroad common carrier. Union Stockyards operated facilities to load and care for livestock in transit over Junction Company's railroad. It also received two-thirds of Junction Company's profits. *Id.*at 300. Like *Southern Pacific*, although the fact that Union Stockyard and Junction Company had a common owner was a consideration, the main factor in holding Union Stockyard to be a common carrier was that its facilities and services provided a necessary physical link in the chain of interstate commerce. *Id.* at 304-05. Moreover, in its operations, Union Stockyard "perform[ed] services as a railroad." *Id.* at 304.

Eight years later, in *Wells Fargo*, this Court explained that a "common carrier by railroad" is simply "one who operates a railroad as a means of carrying for the public — that is to say, a railroad company acting as a common

carrier." 254 U.S. at 187. This is the ordinary meaning, reinforced by "the mention of cars, engines, track, roadbed and other property pertaining to a going railroad." *Id.* at 187–88. This Court applied this definition in holding that an express company that neither owns nor operates a railroad but uses and pays for rail transportation as part of its business activity is not a common carrier within the scope of the FELA. *Id.* at 188.

This Court relied on the *Wells Fargo* definition in *Edwards v. Pacific Fruit Express Co.*, 390 U.S. 538 (1968), and held that a refrigerator car company that owns, maintains, and leases refrigerator cars to railroads for transporting products in interstate commerce is not within the scope of the Act. To be subject to FELA liability, an entity must "operat[e] a railroad" — that is, a "going railroad." *Id.* at 540. "[T]here exist a number of activities and facilities which, while used in conjunction with railroads and closely related to railroading, are yet not railroading itself." *Id.* This Court explained that in the 1939 amendments, Congress ratified limiting the scope of FELA by declining to expand coverage to include "activities and facilities intimately associated with the business of common carrier by railroad." *Id.* at 541 and n.3 (citing S.Rep. No. 1708, 76th Cong., 1st Sess. (1939)).

It is this precedent that framed the principal Sixth Circuit decision on this issue, *Kieronski*, 806 F.2d 107. In that case, Mr. Kieronski was injured while working for his employer, Wyandotte Terminal Railroad Company ("Wyandotte"), a wholly owned subsidiary of BASF Wyandotte Corporation ("BASF"). *Id.* at 107–08. Although Wyandotte owned railroad track that was connected to, and received railcars from, common carrier railroads,

its operations were almost entirely concerned with in-plant switching for BASF. *Id.* at 108. The district court in *Kieronski* relied on the Fifth Circuit's decision in *Lone Star Steel Co. v. McGee*, 380 F.2d 640 (5th Cir. 1967), to hold that Wyandotte "was not a 'common carrier,' and described *Lone Star* as setting forth a 'four-part test' to be used in determining whether a particular rail facility is a 'common carrier by railroad'…." *Kieronski*, 806 F.2d at 109.

The Sixth Circuit in *Kieronski* rejected the characterization of *Lone Star* as creating a strict test, but rather only a list of considerations to use in determining status as a FELA common carrier. *Kieronski*, 806 F.2d at 109. After reviewing a multitude of reported decisions from this Court, other federal courts, and state courts, *Kieronski* synthesized four categories of carriers consistent with that caselaw and the *Lone Star* considerations. *Id.* at 109-10. Carriers were categorized as: 1) in-plant operations that are not common carriers; 2) private carriers that are not common carriers; 3) linking carriers that are common carriers; and 4) carriers that initially look like in-plant operations but perform some of the functions that a related common carrier contracted with its customers to perform. *Id.* at 109. The court noted that the entities analyzed in *Southern Pacific* and *Union Stockyards* fit the third category; the entity in *Lone Star*, the fourth category. *Id.*[2] The *Kieronski* court then found that Wyandotte's operations involved in-plant switching for its

2. "Lone Star became, in effect, part of the common carrier by virtue of Lone Star's ownership of the common carrier, combined with performance of the common carrier's duties." *Kieronski*, at 109.

parent company (BASF) only and did not link common carriers or perform functions for which customers had contracted with a common carrier. *Id.* Therefore, its operations fit into the in-plant category and it was not subject to FELA liability. *Id.* at 110. This result is consistent with *Lone Star* and is founded in principles established by this Court.

Nevertheless, Petitioner erroneously claims that there is a conflict between the approaches taken by the Fifth and Sixth Circuits. (Petition at 29-30). The operations of the *Lone Star* entities, however, were distinguishable from the *Kieronski* in-plant operations. In fact, not only were the *Lone Star* entities "highly integrated and mutually dependent" upon one another, Lone Star, which was admittedly a "carrier" in its own right and owned locomotives and rolling stock, routinely moved freight on behalf of a common carrier (T&N), of which Lone Star was a part owner. *Lone Star*, 380 F.2d 648. The Fifth Circuit relied heavily upon the **rail services** performed by Lone Star on behalf of T&N in finding that its services were a necessary part of T&N's total rail operation. "As a consequence, Lone Star cannot claim to be a private carrier because by undertaking the obligations of a common carrier, T&N, it holds itself out to the public as being engaged in the business of public transportation." *Id.* at 646. Applying *Kieronski*'s analysis, Lone Star also would have been deemed a common carrier by railroad by virtue of fitting in the fourth category — for which *Kieronski* expressly lists Lone Star as an example. *Kieronski*, 806 F.2d at 109.

Lone Star's business, therefore, was more analogous to that of the entities in *Southern Pacific* and *Union Stock Yard* than of *Kieronski* or Corman Services. *Kieronski*

was simply an in-plant switching facility, and unlike Corman Services, Lone Star was moving freight on behalf of a common carrier and forming a necessary link in the chain of commerce. Although the facts of *Lone Star* were vastly different than those of this case, application of the *Lone Star* court's analysis to this case would have yielded the same result. As such, there is no conflict between the Fifth and Sixth Circuits.

Petitioner also argues that the Second Circuit's decision in *Greene v. Long Island R. Co.*, 280 F.3d 224 (2d Cir. 2002), evidences a conflict between the circuits. (Petition at 33). However, the *Greene* court analyzed the same factors as this Court and its sister circuits. The Second Circuit addressed the issue of corporate form versus operations in determining whether the Metropolitan Transportation Authority ("MTA") was a common carrier under FELA. *Id.* at 229. In 1996, MTA acquired the common carrier Long Island Railroad Company ("LIRR") as a subsidiary; and, until 1998, LIRR maintained its own police force to monitor its parking lots and railroad stations. *Id.* at 227, 236. Mr. Greene was employed by LIRR from 1991 through December 1997. On January 1, 1998, all LIRR police officers, including Greene, became MTA employees. *Id.* Greene was subsequently injured during his employment with MTA and brought a FELA claim against MTA and LIRR. *Id.*

After reviewing *Wells Fargo*, *Pacific Fruit, Southern Pacific, Union Stockyard, Lone Star*, and numerous other cases, the Second Circuit grouped the entities into categories to assist in its evaluation of common carrier status. *Greene*, 280 F.3d at 235. After an extensive factual analysis of MTA's involvement in the management of its

subsidiary LIRR, the Second Circuit found that MTA was a common carrier, *inter alia,* because it had the power to: 1) acquire transportation facilities; 2) establish, construct…operate… any facility acquired; 3) establish and collect fares and tolls; 4) lease railroad cars for use in passenger service; and 5) "do all things it deems necessary to **manage, control, and direct** the maintenance and **operation of transportation facilities**, equipment, or real property operated by or under contract lease or other arrangement with MTA." *Id.* at 228 (emphases added). In addition, MTA raised funds to subsidize the operations of LIRR by issuing bonds in MTA's name because LIRR revenues were generally not sufficient to cover its operating expenses. *Id.* at 237. The court noted that "Since LIRR is 'not a self-sustaining enterprise', LIRR could not remain in the commuter railroad business in the absence of subsidies such as those provided by MTA." *Id.* Therefore, the common carrier subsidiary LIRR was clearly just an arm of MTA, and MTA controlled virtually every aspect of its business. Finally, MTA's Director of Labor Relations testified that one of the benefits that MTA perceived from consolidating MTA's and LIRR's security forces was to get the LIRR workers out of the FELA system. *Id.* at 239.

Unlike LIRR, Corman Services managed its own daily operations, maintained corporate officers and personnel distinct from Corman Group, was financially independent of Corman Group, and maintained substantial business relationships beyond the Corman Group's subsidiary railroads. (1/3/24 Op., App. 21). Contrary to Petitioner's suggestion, *Greene* does not reflect a circuit split or represent a divergent view, but is perfectly consistent with *Lone Star*, *Kieronski*, and this Court's precedent, in

analyzing whether a particular entity should be deemed a common carrier. Applying the *Greene* court's analysis to the facts of this case would have yielded the same result as the District Court and the Sixth Circuit.

Finally, Petitioner relies upon *Smith v. Rail Link, Inc.*, 697 F.3d 1304, 1308 (10th Cir. 2012), to suggest that the Tenth Circuit failed to follow this Court's precedent by "minimiz-[ing]" the degree that a parent controls a non-common carrier subsidiary. (Petition at 31). In *Smith*, the plaintiff was injured while working as a freight operator for Rail Link. Rail Link is a switching company that facilitates the internal movement of railcars within certain locations, including industrial facilities and coal mines. *Rail Link*, 697 F.3d at 1306. Rail Link contracted with private businesses to provide on-site operational assistance at such facilities, and the plaintiff was injured in one such facility. Although Rail Link was also the corporate parent of short line rail companies, the plaintiff argued that the defendant was a common carrier by virtue of entering into a contract for oversight and management services for a railroad client, BNSF. The Tenth Circuit rejected this argument, holding that "[o]versight and management services necessarily implicate the existence of some underlying carrier whose operations are being overseen. The underlying company—the true carrier by rail—is the one which is subject to FELA liability, not the company (Rail Link), which is called upon for advice and consultation in ensuring that the carrier's workers operate efficiently." *Id.* at 1309. The Tenth Circuit concluded that the oversight services did not amount to "operation of a railroad as contemplated by FELA," and affirmed summary judgment in favor of Rail Link. *Id.* at 1310.

Importantly, the *Rail Link* decision relied on an earlier Tenth Circuit case for its analysis of common carrier status. *Rail Link*, 697 F.2d at 1309-10, *citing Sullivan v. Scoular Grain Company of Utah*, 930 F.2d 798 (10th Cir. 1991). In *Sullivan*, the court rejected the FELA claim of an employee of a grain storage company after finding that the grain storage company did not operate "a going railroad that carries for the public." *Sullivan*, 930 F.2d. at 800. In reaching this conclusion, the court relied mostly on *Wells Fargo* and *Pacific Fruit*, and focused on the operation of a going railroad. *Id.* The Tenth Circuit also discussed the *Kieronski* court's characterization of the four *Lone Star* elements as considerations in determining status as a common carrier by railroad. *Id.* at 801. The *Sullivan* court further recognized that the Fifth and Sixth Circuits' approaches were not materially different, and expressly found that "application of either the *Lone Star* or *Kieronski* approach would not change the result in this case." *Id.* at 801.

Thus, the circuit courts have consistently followed the guidance set forth by this Court in *Southern Pacific, Union Stock Yard, Wells Fargo,* and *Pacific Fruit*. In this case, the Sixth Circuit applied the same precedent, in the same manner, as the Second, Fifth and Tenth Circuits:

> Here, Corman Services' bridge repair and construction services do not provide such an inextricable function for Memphis Line's common carrier services.... Granted, the maintenance and repair of railroad tracks and bridges is surely integral to the operation of railroads. But maintenance is not a rail service contracted for by the public when it

> engages Memphis Line as a common carrier. In the leading cases, the plaintiffs functioned to actively keep things — freight and livestock respectively — moving in interstate commerce. In this case, Corman Services maintained the physical structure of the railroad, but it was not an active participant in the chain of commerce itself.

(1/3/24 Op., App. 16-17 (citations omitted)).

The Sixth Circuit's application of *Kieronski* is not inconsistent with any other circuit court's approach, or the principles set forth by this Court. As shown above, had Petitioner's case been brought in the Second, Fifth or Tenth Circuits, the result would have been the same. Accordingly, Petitioner has not identified any relevant circuit court split for this Court to review.

II. Use of state law veil piercing jurisprudence does not frustrate the purpose and effect of the FELA

"[I]t is long settled as a matter of American corporate law that separately incorporated organizations are separate legal units with distinct legal rights and obligations." *Agency for International Development v. Alliance for Open Society International, Inc.*, 591 U.S. 430 (2020). Federal statutes are not construed to require disregard of the corporate form "where no violence to the legislative purpose is done by treating the corporate entity as a separate legal person." *Schenley Distillers Corp. v. U.S.*, 326 U.S. 432, 437 (1946) (interpreting the Interstate Commerce Act). This Court has rejected arguments interpreting a federal statute as categorically deeming

subsidiaries to be the same as the parent corporation, respecting that "piercing the corporate veil … is the rare exception applied in the case of fraud or certain other exceptional circumstances, and usually determined on a case-by-case basis." *Dole Food Co. v. Patrickson*, 538 U.S. 468, 475 (2003) (citations omitted; construing the Foreign Sovereign Immunities Act).

The FELA only voids "[a]ny contract, rule, regulation or device" to the extent its "purpose or intent shall be to enable any common carrier to exempt itself from any liability" under the Act. 45 U.S.C. § 55. This may include disregarding the corporate structure of a parent and subsidiary if the structure was established to avoid FELA coverage. Proof of domination by a parent over a subsidiary is required under the FELA to pierce the corporate veil. "[S]ection 55 encodes the 'domination' doctrine to the extent the FELA permits the use of this doctrine to pierce the corporate veil; common law 'domination' is therefore relevant only to the extent to which it may evidence intent or purpose to exempt the parent here from FELA liability." *Selser v. Pacific Motor Trucking Co.*, 770 F.2d 551, 554 (5th Cir. 1985) (holding that parent railroad and employer subsidiary were not alter egos for FELA purposes).

State law principles also require "undue domination or influence resulting in an infringement upon the rights of the subservient corporation for the benefit of the dominant one." *Fawcett v. Missouri Pacific Railroad Co.*, 242 F.Supp. 675, 678 (W.D. La. 1963) (citations omitted; holding that employer company was not an adjunct or alter ego of the parent railroad company). This domination theory is applied in FELA cases analyzing whether to set

aside the corporate structure as in *Selser* and *Fawcett*, and also in determining whether a subsidiary's status as an "interstate common carrier by railroad" is attributable to a corporate parent.[3] For example, the Second Circuit in *Greene*, 280 F.3d at 236, 239, citing 45 U.S.C. §§ 51 and 57, determined that the Metropolitan Transit Authority had FELA liability because of the level of its participation and control over the management and operation of the Long Island Railroad's business. The common application of the domination theory under state common law and FELA analysis indicates that the outcome of the case will not vary depending upon the court (federal or state) or the venue state.

The Sixth Circuit applied both Section 55 and state law principles to Petitioner's claims and rejected his argument that the corporate veil should be pierced. Contrary to Petitioner's complaint, the Sixth Circuit did not "expressly defer" to state law on this question. (Petition at 22). The Sixth Circuit applied fundamental corporate law principles accepted by this Court in the construction and application of other federal statutes, using the "age-old principle of corporate common-law deeply ingrained in our economic and legal systems" — that a parent is generally not liable for the acts of its subsidiaries. (1/3/24 Op., App. 17, (internal quotation marks omitted)). The Sixth Circuit held that Section 55 did not authorize setting aside the Corman corporate structure because Petitioner

3. This reference to common-law principles comports with the determination of the elements of a FELA claim by reference to the common law (absent express language to the contrary), *Norfolk So. Ry. Co. v. Sorrell*, 549 U.S. 158, 166-67 (2007), and the allowance for variations among the states in adjudication of FELA claims, *id.* at 167 n.2.

did not present facts to establish that the structure was designed with the purpose or intent to exempt itself from FELA liability. "To the contrary, undisputed record testimony reflects numerous legitimate purposes for the corporate segregation of the companies, including their diverse functions, clientele, suppliers, and management requirements." (1/3/24 Op., App. 20). Secondarily, the Sixth Circuit held that Petitioner fared "no better if we instead apply corporate common-law principles." (1/3/24 Op., App. 20). The Sixth Circuit's common law analysis, citing Kentucky law, relied upon substantially similar considerations as FELA, *i.e.* domination and exceptional circumstances, and yielded the same result: "[T]he evidence advanced does not warrant the exceptional measure of disregarding corporate formalities among the entities." (1/3/24 Op., App. 21).

Notwithstanding the common core for state law and FELA veil-piercing principles, Petitioner argues that the application of state law results in conflicting outcomes depending on the venue. (Petition at 37). He urges this Court to use the analysis in *United States v. Kimbell Foods, Inc.*, 440 U.S. 715 (1979), to create a uniform, nationwide veil-piercing standard. (Petition at 35). In *Kimbell Foods*, this Court determined that no national rule was necessary to determine relative priority of federal loan program liens or mortgages and that priority for government liens should be determined under the various, nondiscriminatory, state laws. 440 U.S. at 740. Even for a federally administered program, "when there is little need for a nationally uniform body of law, state law may be incorporated as the federal rule of decision. Apart from considerations of uniformity, we must also determine whether application of state law would frustrate

specific objectives of the federal programs" and whether application of a national rule would be disruptive of relationships predicated on state law. *Id.* at 728-29.

State veil piercing laws are not inconsistent with the purpose and intent of FELA. State-law factors inform consideration of the express "purpose or intent" requirement of Section 55 and have long been used to determine whether a defendant is a covered employer under 45 U.S.C. §§ 51 and 57. Petitioner cited nothing to demonstrate that use of state law veil piercing principles frustrates the objectives of FELA. Furthermore, Petitioner's suggestion that 45 U.S.C. §§ 51, 55, and 57 "compels disregard of state corporate charter laws" or contemplates the "disregard of corporate structures" to treat all members of a corporate family as a single entity is misplaced. (Petition at i; and 34-35). This would result in the "device" of separate incorporation being voided regardless of its intent or purpose, and despite the express requirement in 45 U.S.C. § 55. Accordingly, this Court should deny review of Petitioner's first Question Presented.

Amici Curiae make the same misplaced arguments as Petitioner, urging this Court to grant the Petition claiming that that the Sixth Circuit's refusal to pierce the corporate veil would "encourage all common carriers to… isolate…crafts into subsidiary companies to eliminate the need to provide a reasonably safe place for…employees under the FELA" in contradiction of 45 U.S.C. § 57.[4] In

4. Petitioner implies that Corman Services' work in this case "ha[s] long been part and parcel to the operation of a railroad and railroad workers providing those precise services have routinely

support of this position, Amici Curiae rely on *Dagon v. BNSF Railway Company,* 2020 WL 4192348 (S.D. Ill. July 21, 2020). However, *Dagon* does not signal that the Sixth Circuit's decision would endorse structuring companies for the purpose of avoiding FELA. In *Dagon*, a switchman who was employed by non-common carrier, U.S. Steel, was killed while working with a locomotive operator to weigh a BNSF-owned railcar at a U.S. Steel railyard. The court relied upon *Wells Fargo* and *Pac. Fruit Express, Co.,* as well as the Sixth Circuit's decision in *Kieronski,* and rejected plaintiff's claim that U.S. Steel was a common carrier simply because it conducted switching operations. *Id.* at *6. Therefore, Amici Curiae's reliance upon *Dagon* provides no support for their position that the Sixth Circuit's decision was in contradiction of 45 U.S.C. § 57.

In addition, Amici Curiae's claim that the lower courts' decisions would encourage railroads to ignore federal bridge and track safety standards is a red herring. (Amici Curiae brief at 10). Federal regulations require railroads and their **contractors** to comply with bridge and track

availed themselves of the benefits of FELA, without objection to its application to them." (Petition at 37). He then incorrectly claims that "no other reported case is found where an injured track, trestle or bridge railroad worker is denied FELA coverage because he is nominally employed by a non-common carrier." *Id.* In fact, the Corman Services business, which is railroad construction, is often performed by non-common carrier construction companies like Corman Services, and employees of those companies, just like employees of Common Services, are routinely denied FELA coverage in favor of state workers' compensation systems. *See Royal v. Missouri & Northern Arkansas Railroad Company, Inc.*, 857 F.3d 759 (8th Cir. 2017); *Thomas v. Union Pacific Railroad Company*, 2018 WL 3747467 (W.D. Ark. August 7, 2018).

safety and construction standards regardless of whether non-common carrier contractors are employed to perform construction or repair services. *See, e.g.,* Bridge Safety Standards, 49 C.F.R. § 237.3(e) ("Where any person, including a contractor for a railroad or track owner, performs any function required by this part, that person is required to perform the function in accordance with this part."), and Track Safety Standards, 49 C.F.R. § 213.5 (f).

III. Petitioner raised no Rule 56(f) issue below about the summary judgment in favor of Memphis Line, and the Sixth Circuit did not create a Rule 56(d) exception to Rule 56(f)'s notice requirement

Petitioner's third question for review asks whether "and to what extent" a failure to file a Rule 56(d) affidavit "can serve as the basis" for granting summary judgment to a non-moving party (Memphis Line) "where the trial court has provided no notice of its intent to grant summary judgment to the non-moving party as required by Fed.R.Civ.P. 56(f)." (Petition at i). He complains that the Sixth Circuit's affirmance of the summary judgment relies upon Rule 56(d) "as a permissible exception to the district court's notice requirements under Fed.R.Civ.P. 56(f)," and this "precedent set by the Sixth Circuit … will cause confusion and chaos for lower court's [sic] in reconciling those procedural rules." (Petition at 39). However, the Sixth Circuit's opinion refers nowhere to Rule 56(f) — which was not raised by Petitioner as grounds for reversal on appeal — but instead discusses his failure to file a Rule 56(d) affidavit in rejecting his challenge that summary judgment was premature because he had outstanding discovery disputes. (1/3/24 Op., App. 30-31). Furthermore, Petitioner did have notice of the issues and

grounds relating to Memphis Line prior to the grant of summary judgment and an opportunity (which he took) to present evidence and arguments to try to withstand summary judgment.

Petitioner never argued to the Sixth Circuit for reversal of the summary judgment granted to Memphis Line because he had not been given Rule 56(f) notice by the District Court. Indeed, Petitioner did not cite to or mention Rule 56(f) at the Sixth Circuit. "Because this is a court of review, not of first view, it is generally unwise to consider arguments in the first instance…." *Byrd v. United States*, 584 U.S. 395, 404 (2018) (internal quotation marks and citation omitted) (declining to consider alternative argument for a cognizable Fourth Amendment issue raised for the first time on appeal, when neither the district court nor the Court of Appeals had the opportunity to address the issue). This Court normally declines to entertain such "forfeited" arguments,[5] and needs a persuasive reason to depart from that rule. *Ohio v. Environmental Protection Agency*, 603 U.S. ___, 144 S.Ct. 2040, 2057 (2024). Petitioner has not provided any reason to depart from this rule, and Respondents know of none.

Petitioner's challenge to the summary judgment argued before the Sixth Circuit was a complaint that he had been denied discovery as to Memphis Line. The Sixth Circuit held that Petitioner did not preserve this complaint,

5. *Kingdomware Technologies, Inc. v. U.S.*, 579 U.S. 162, 173 (2016) (declining to address argument the Government failed to raise in the courts below); *U.S. v. Ortiz*, 422 U.S. 891, 898 (1975) (declining to consider issue which was raised by the Government "for the first time in its petition for certiorari").

finding "no indication that Mattingly had sought to initiate a discovery conference or sought additional discovery as to Memphis Line," and that he failed to comply with Rule 56(d) as to the need for additional discovery. (1/3/24 Op., App. 30). Petitioner does not seek this Court's review of this ruling on the discovery issues, but now seeks "review" of an issue not raised or ruled on by the Sixth Circuit — that he was not given notice required by Rule 56(f) that summary judgment might be entered in favor of Memphis Line. This challenge is inconsistent with his earlier position that he needed additional discovery to defend against summary judgment in the District Court, which presupposes that one knows about and is trying to stave off a possible summary judgment.

The proceedings in the District Court also fully reflect that Petitioner and Respondents Corman Group and Corman Services cross-moved for summary judgment as to coverage under FELA in June 2021. In October 2021, the District Court granted Petitioner's motion to file a second amended complaint so that on his "second theory of liability under FELA, liability based on the specific direction and supervision of Plaintiff at the time of his injury, [Memphis Line] should be **substituted** for Corman Group." (10/6/21 Order App. 79 (emphasis added); *see also id.* App. 84-85, 91, 94)[6]. In prosecuting his motion and defending against Respondents' motion for summary judgment, Petitioner relied upon evidence he obtained in discovery relating to Memphis Line, the relationships

6. Had Memphis Line been added as a defendant rather than substituted for an existing one on a previously-pleaded theory of liability, the claims against Memphis Line would have been subject to dismissal for being brought outside the limitations period. *See* 10/6/21 Mem. Op. & Order, App. 94.

among Corman Group subsidiaries and testimony from key Memphis Line employees.

In August 2022, the District Court granted summary judgment as to Memphis Line, concluding that "a reasonable jury could not find that Memphis Line either controlled or had the right to control the work of Mattingly on the day of the accident, precluding Mattingly from being a subservant of Memphis Line." (8/12/22 Op., App. 76). Specifically, the court held:

> While only Group and Services filed the motion for summary judgment, the Court recognizes that the third defendant, Memphis Line, was not a part of the action until Mattingly's motion to file a second amended complaint was granted, which occurred after the deadline for filing dispositive motions. Because the Court's findings clearly apply to Memphis Line and preclude the applicability of FELA, the Memphis Line defendants are included in this order and corresponding judgment.

Id., App. 76-77. Given Petitioner's successful argument that Memphis Line was being substituted (for Corman Group) on a theory for which there were already cross-motions for summary judgment, it is questionable whether any of the Rule 56(f) *sua sponte* scenarios were involved. Furthermore, Petitioner had full notice that the FELA claim against Memphis Line could be dismissed because it was substituted for Corman Group on his borrowed servant theory. The issues relating to Memphis Line were fully briefed in both sides' motions for summary judgment. Any Rule 56(f) notice that Memphis Line was a subject of

the existing summary judgment motions was unnecessary and would have been superfluous.

Although the Sixth Circuit was not presented with a Rule 56(f) challenge, its existing precedent would have led to a conclusion that there was no reversible abuse of discretion by the District Court, without any reliance on Petitioner's failure to file a Rule 56(d) affidavit. The Sixth Circuit reviews a district court's procedures relating to a *sua sponte* summary judgment for abuse of discretion. *Nissan N.A., Inc. v. Continental Auto. Sys., Inc.*, 92 F.4th 585, 596 (6th Cir. 2024). A Rule 56(f) challenge requires the losing party to show that it lacked notice of the possible summary judgment. *Id.* Petitioner cannot claim that he did not have notice that the District Court might enter a summary judgment about Memphis Line, because his arguments for and against summary judgment expressly addressed FELA liability relating to Memphis Line. The issues related to Memphis Line and its relationship to Petitioner and the other Respondents were brought before the District Court by both parties — this was not an unbidden, *sua sponte* summary judgment.[7]

7. Even if the summary judgment were determined to be on behalf of a non-moving party (despite Memphis Line's substitution for Corman Group on these issues), *see* Fed.R.Civ.P. 56(f)(1), Sixth Circuit precedent looks to whether the losing party "had sufficient notice of the possibility that summary judgment could be granted against it," considering whether the prevailing party or losing party moved for summary judgment, issues focused on in the briefing, and factual materials submitted. *Smith v. Perkins Bd. of Educ.*, 708 F.3d 821, 829 (6th Cir. 2013) (quoting and citing *Turcar, LLC v. I.R.S.*, 451 Fed. Appx. 509 (6th Cir. 2011). If the losing party had actual notice, the lack of specific Rule 56(f) notice is not reversible error.

It is necessarily speculation what the decision and reasoning of the Sixth Circuit would have been on a Rule 56(f) challenge, because Petitioner did not raise one on his appeal. However, it is known that: (a) the Sixth Circuit did not rule as Petitioner claims it did and for which he now seeks this Court's "review"; and (b) Petitioner did have notice and an opportunity to present evidence and argument about whether Memphis Line could have FELA liability to him; therefore, this Court should decline to review the question Petitioner presents.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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