No. 17-1376

IN THE

Supreme Court of the United States

NORFOLK SOUTHERN RAILWAY COMPANY,
Petitioner,

v.

MICHAEL PARSONS,
Respondent.

On Petition for a Writ of *Certiorari* to the Appellate Court of Illinois First Judicial District

BRIEF OF THE ASSOCIATION OF AMERICAN RAILROADS AND THE AMERICAN SHORT LINE AND REGIONAL RAILROAD ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST OF *AMICI 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 before Congress, administrative agencies and the courts on behalf of the railroad industry.

Amicus curiae the American Short Line & Regional Railroad Association (ASLRRA) is an international trade organization whose members include about 480 short line and regional small, locally-based railroads. These railroads operate about 50,000 miles of track in 49 states, constituting 32 percent of the nation's rail system, primarily connecting less populated, rural areas to the national rail network. ASLRRA member railroads participate in 40 percent of all carload movements, frequently providing the first and last mile of service on rail movements. Like AAR, the ASLRRA advocates on behalf of its members before Congress, the courts, and administrative agencies.

One matter of interest to *amici* is the Federal Employers' Liability Act (FELA), 45 U.S.C. §§51-60, a

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

negligence statute enacted over a century ago, under which railroad employees who are injured on the job may seek compensation from their employing railroad. Because it is a fault-based employee compensation law and thus differs fundamentally from the no-fault workers' compensation systems that today cover virtually all other U.S. industries, FELA presents unique challenges for railroads. Each year hundreds of FELA lawsuits, like the case below, are brought against AAR and ASLRRA member railroads. In each of these cases, the parties must litigate the fact-specific questions of negligence, causation and damages. The railroads spend hundreds of millions of dollars annually in the defense and payment of FELA claims.

AAR and ASLRRA work closely with their members to ensure consistent and correct application of FELA around the country. To help achieve that goal, AAR has participated as *amicus curiae* in many of the key FELA cases decided by this Court over the past few decades. *E.g., Monessen Southwestern Ry. Co. v. Morgan,* 486 U.S. 330 (1988) (holding that prejudgment interest is not available under FELA); *Consol. Rail Corp. v. Gottshall,* 512 U.S. 532 (1994) (applying the "zone of danger" test to FELA claims for negligent infliction of emotional distress); *Norfolk S. Ry. Co. v. Ayers*, 538 U.S. 135 (2003) (holding that joint and several liability applies to FELA cases); *Norfolk S. Ry. Co. v. Sorrell*, 549 U.S. 158 (2007) (holding that the same causation standard applies to both employer negligence and employee contributory negligence); *CSX Transp., Inc. v. McBride*, 564 U.S. 685 (2011) (holding that a relaxed causation standard applies in FELA cases); *BNSF Ry. Co. v. Tyrrell*, 137 S. Ct. 1549 (2017) (holding that the constitutional requirements for personal jurisdiction apply to FELA cases).

In this case, which resulted in a $21 million verdict, the efficacy of the railroad's comparative negligence defense was undercut when, at plaintiff's request, the trial court gave a confusing instruction on assumption of the risk—an issue which was irrelevant to the case. Comparative negligence is a key feature of FELA, and often is the only viable means for limiting damages. Some lower courts have taken the approach of the court below, acknowledging that the jury may have been confused by an instruction on assumption of the risk, but allowing the verdict to stand. Other courts have held that giving such an instruction is reversible error. Because the approach a court takes on this issue can greatly impact the outcome of the case, the members of AAR and ASLRRA have a strong interest in having this conflict resolved.

SUMMARY OF THE ARGUMENT

This Court should grant the petition to resolve a split among lower courts over whether it is reversible error to give an instruction on assumption of the risk in FELA cases when such a defense has not been offered by the defendant. FELA eliminated the common law assumption of the risk defense, and included a comparative negligence scheme by which the damages awarded to an injured plaintiff are reduced in the proportion that the plaintiff's negligence caused the injury. Comparative negligence is an important feature of FELA, as Congress believed that making each party responsible to the degree its own negligence caused the injury would create incentives for both employer and employee to act safely, thereby promoting overall railroad safety. It is not uncommon for plaintiff's counsel to request an irrelevant instruction on assumption of the risk as a tactic to dilute the railroad's comparative negligence defense.

Comparative negligence continues to play a key role in FELA litigation today, as it did in this case in which petitioner, Norfolk Southern, offered substantial evidence that the respondent, Michael Parsons, had violated applicable safety rules. FELA damages are uncapped, and the statute has several features that promote recovery. Therefore, the reduction of damages in cases where the railroad can prove the plaintiff's negligence caused the injury in whole or in part often is the only viable means of defending a FELA lawsuit.

There is a strong consensus among state and federal courts that it is improper to give an assumption of the risk instruction in FELA cases. The courts have pointed out that such an instruction serves no purpose other than to confuse the jury about whether it may consider the plaintiff's negligence in assessing liability and damages. Nonetheless, some courts, like the court below, have let verdicts stand in those circumstances, speculating that the improper instruction may not have unduly prejudiced the jury. Other courts have held that giving such an instruction is not only improper, but is reversible error.

ARGUMENT

Lower courts consistently have held that it is improper to instruct a FELA jury on the non-availability of an assumption of the risk defense when the defendant has not raised that defense, because such an instruction confuses the jury and obscures the issues. These courts have repeatedly admonished that giving such an instruction dilutes the comparative negligence defense that often is raised by the railroad. Indeed, seeking an assumption of the risk instruction in those circumstances serves no other purpose. Yet, despite the consistent condemnation of giving an assumption of the risk instruction when no such

defense has been offered, lower courts disagree on whether doing so constitutes reversible error. *See* Pet. at 10-15 (describing the split among federal and state courts). This Court should resolve that split to preserve the integrity of FELA litigation and prevent the continued undermining of a key feature of this important railroad statute.

A. Comparative Negligence is a Key Aspect of FELA's Fault-Based Compensation Scheme.

The nature and structure of FELA elevates comparative negligence to a key feature of the statute, underscoring why giving an instruction that has no purpose other than to confuse the applicability of that defense should be unequivocally prohibited. At the time FELA was enacted, incorporating a comparative fault component into an employer liability law was an innovation in tort law. Congress believed this feature would promote railroad safety, explaining that "[b]y the responsibility imposed, both parties will be induced to the exercise of greater diligence, and as a result the public will travel and property will be transported in greater safety." H.R. REP. NO. 1386, at 5-6 (1908). Railroad employee representatives acknowledge 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 Transportation of the Senate Comm. on Commerce, Science and Transportation*, 100th Cong. 98 (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.").

Courts also recognize that FELA creates incentives for railroad employees to work safely and comply with applicable railroad safety rules, because failure to do so may be considered negligence, and limit or bar the employee's recovery. *E.g., Jenkins v. Union Pac. R.R.*, 22 F.3d 206, 211 (9th Cir. 1994) ("[W]hen an employee carries out his supervisor's general orders in an unsafe manner, he is responsible under FELA for his own contributory negligence."); *Plambeck v. Union Pac. R.R.*, 441 N.W.2d 614, 618 (Neb. 1989) ("An employee's failure to obey safety rules may be considered by the jury in assessing contributory negligence.") Thus, comparative negligence continues to play an important role in the management of employee injury claims.

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* Transportation Research Board, *Compensating Injured Railroad Workers Under the Federal Employers' Liability Act* (1994).[2] Workers' compensation laws are based on a no-fault insurance model. Under that model, employees who are injured on the job are entitled to compensation without regard to fault, their employer's or their own.

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[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. Most states enacted workers' compensation laws of general application between 1910 and 1920, and all had done so by 1948. Price V. Fishback and Shawn Everett Kantor, *The Adoption of 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).

Railroads are treated differently. At the turn of the twentieth century railroads were the nation's dominant industry other than agriculture, and the work could be hazardous. *See Johnson v. Southern Pac. Co*. 196 U.S. 1, 19-20 (1904) (describing the hazards of certain aspects of railroad work).[3] This motivated Congress to take action. In 1908, before the concept of no-fault workers' compensation had gained a foothold in the United States, Congress enacted FELA, which provided a tort-based remedy for railroad employees injured on the job. In contrast to workers' compensation laws, under FELA being injured on the job does not automatically entitle an employee to compensation. Instead, an employee may be awarded compensation only if the employer's negligence caused the injury in whole or in part. 45 U.S.C. §51. As with tort law generally, if the railroad and an injured employee cannot reach a settlement, the employee must resort to a lawsuit, which under FELA may be brought in either state or federal court. 45 U.S.C. §56.

During the era when FELA was enacted, the legal landscape was far different than it is today. Specifically, the prevailing common law of negligence erected a number of often-insurmountable barriers to recovery by an employee seeking a remedy for a workplace injury. *See 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."). For example, claims could be defeated if the

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

employer alleged that a worker who was injured in the workplace assumed the inherent risks of the job. As one court explained, "it is well settled . . . that if a servant chooses to enter into an employment involving dangers of personal injury which the master might have avoided, he takes upon himself the risk of all the hazards incident to the employment, the existence and nature of which were known to him when he entered the service, and which he had no reason to expect would be obviated or removed." *Clark, Adm'x v. St. Paul & Sioux City R.R.*, 9 N.W. 581, 582 (Minn. 1881); *see also Gibson v. Erie Ry. Co.*, 63 N.Y. 449, 452 (N.Y. App. 1875) (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").

Other prevailing legal doctrines also made recovery for workplace injuries difficult. When the negligence of a "fellow servant"—which typically was not attributable to the employer—caused the injury, the employer was absolved of liabiity. *E.g., Ryan v. 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.") In addition, in the majority of states, any contributory negligence by the plaintiff barred recovery even if the defendant was also at fault. *See Louisville, Nashville & Great S. R.R. v. Fleming*, 82 Tenn. 128, 135 (Tenn. 1884) ("In England and a majority of the States of the Union, the negligence of the plaintiff which contributes to the injury is held to be an absolute bar to the action.").

Despite being later viewed as an archaic and counterproductive means of addressing workplace

injuries, when FELA was enacted it was considered a progressive piece of legislation.[4] FELA adopted 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"). However, though recovery under FELA was conditioned on proving fault on the part of the employer, Congress took specific steps to ameliorate the harsh results which often were a consequence of prevailing legal doctrines. *See Consol. Rail Corp. v. Gottshall,* 512 U.S. 532, 542-43 (1994).

The fellow servant rule 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 co-employee upon the same basis as the negligence of the employer.") Congress also addressed the assumption of the risk defense, which it recognized often was utilized to defeat liability. S. REP. NO. 460, at 2 (1908) (FELA would set aside the "law which presumes that a workman have notice 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."); H.R. REP. NO. 1386, at 2 (1908) ("It is a

[4] By the middle of the twentieth century members of this Court openly lamented Congress' decision to utilize tort concepts in an employer liability statute. *See e.g., Bailey v. Cent. Vermont Ry*., 319 U.S. 350, 354 (1943) (describing FELA as "crude, archaic, and expensive as compared with the more modern systems of workmen's compensation"); *Stone v. N.Y. Cent. & St. Louis R.R.,* 344 U.S. 407, 410 (1953) (deploring "the injustices and crudities inherent in applying the common law concepts of negligence to railroading") (Frankfurter, J., dissenting).

very hard rule [ ] to compel men . . . to assume the risks and hazards of the employment, when these risks and hazards could be greatly lessened by the exercise of proper care on the part of the employer."). Initially, however, the assumption of risk defense was eliminated only in cases where it could be shown that the railroad had violated a safety statute. Act of April 22, 1908, c. 149, §4, 35 Stat. 66 (1908).

Perhaps most significantly, FELA was an early example of a comparative fault statute, at the time a significant innovation in tort law. *See Norfolk & W. Ry. Co. v. Ayers*, 538 U.S. 135, 161 (2003) ("Among [FELA's] innovations, the Act expressly directs apportionment of responsibility between employer and employee based on comparative fault."). Under FELA, rather than barring any recovery if the employee's negligence contributed to the injury, damages were to be reduced only in proportion to the employee's negligence. 45 U.S.C. §53.[5] 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. As Congress clearly intended, this opened the opportunity for recovery in many instances where it previously would have been denied.

However, the efficacy of the comparative fault rule was somewhat diluted because, other than in cases where a safety statute was violated, the doctrine of assumption of the risk remained a viable defense. Assumption of the risk involves an employee

[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). And, the same standard of causation applies to employer negligence and employee contributory negligence. *Norfolk S. Ry. Co. v. Sorrell,* 549 U.S. 158 (2007).

voluntarily accepting dangerous conditions that are necessary to perform the duties of the job. Contributory negligence constitutes careless acts or omissions by an employee tending to add new dangers to, or increase the risk of the job. *Taylor v. Burlington N. R.R.,* 787 F.2d 1309, 1316 (9th Cir. 1986). Though they are distinct legal doctrines, as a practical matter courts had difficulty distinguishing contributory negligence from assumption of the risk, with railroads often arguing that employee conduct that contributed to the injury constituted the latter, thereby barring recovery entirely other than in cases where the railroad violated a safety statute. *See Tiller v. Atlantic Coast Line R.R.*, 318 U.S. 54, 62-64 (1943).

In 1939, Congress addressed this concern by eliminating the assumption of the risk defense in all FELA cases, Act of Aug. 11, 1939, c. 685, §1, 53 Stat. 1404 (1939), thereby "making the principles of comparative negligence the guiding rules of decision in accident cases." *Tiller*, 318 U.S. at 65; 45 U.S.C. §54. As this Court explained, with assumption of the risk removed as an issue under FELA, the jury's role is to "weigh the fault of the injured employee and compare it with the negligence of the employer, and, in the light of the comparison, do justice to all concerned." *Tiller*, 318 U.S. at 65.

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." H.R. REP. NO. 1386, at 5. Indeed, Congress consider the modification of the prevailing contributory negligence rule to be a key aspect of the legislation, and anticipated that it would have a positive effect on safety. *See infra* at pp. 5-6.

B. Comparative Negligence Can Have a Great Impact on Damages in FELA Cases.

The railroad industry is far safer today than it has ever been.[6] Nonetheless, as an industry where much of the work is performed out-of-doors, on and around moving heavy equipment, and in all sorts of terrain and weather, a strong commitment to safety by the employer remains essential. Equally important is a continuous attention to the working environment and adherence to safety rules on the part of employees.

As Congress intended, FELA's comparative negligence scheme continues to play an important role in FELA litigation. In *Uhrhan v. Union Pac. R.R.*, 617 N.E.2d 1182 (Ill. 1993), the Illinois Supreme Court reversed the Appellate Court and affirmed a 40% reduction in damages to account for the employee's negligence, finding that evidence that plaintiff did not comply with a railroad safety rule requiring that employees watch for tripping hazards when walking in rail yards warranted an instruction on comparative negligence. In *Harris v. Ill. Cent. R.R.*, 58 F.3d 1140, 1144 (6th Cir. 1995), the court held that a plaintiff who was injured while stepping off of a rail car had "a duty to look carefully, . . . and failure to do so would have been negligence," granting a new trial due to failure to instruct the jury on contributory negligence.

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[6] Over the past few decades, the rates of railroad accidents and employee injuries have decreased markedly. Since 2000, the rates of train accidents and employee injuries have each declined by about 44 percent. *See* Fed. R.R. Admin., *Railroad Safety Statistics Annual Report*, 2000-2010, Tables 1-1, 1-2, 4-1. For more recent data see http://safetydata.fra.dot.gov/officeofsafety/publicsite/summary.aspx.

Numerous scenarios can give rise to a comparative negligence defense. For example, when an employee injured his back while attempting to move a 175 pound manhole cover by himself, the jury's finding that he was 50% negligent for failing to seek help or to use a safer method was affirmed. *Gish v. CSX Transp., Inc.,* 890 F.2d 989 (7th Cir. 1989). Another employee was found to be 50% negligent when "electing to position himself directly under the primary source of peril, [he] engaged in a voluntary act which added a new danger . . . to the (employer permitted) conditions of the work area." *Higgins v. CSX Transp., Inc.,* 455 S.E.2d 129, 131 (Ga. App. 1995) ("An employee has a duty to exercise reasonable and ordinary care for his own safety."). Even an employee's behavior outside of the workplace may be considered contributory negligence. *Zarow-Smith* v. *N.J. Transit Rail Operations, Inc.*, 953 F.Supp. 581 (D. N.J. 1997) (where employee claimed her lung cancer was the result of exposure to asbestos on the job, her smoking could be considered contributory negligence).

Contributory negligence played a significant role in this case, as Norfolk Southern argued that Parsons' failure to follow safety rules was a substantial contributor to his injury. Pet. at 8. *See also* Pet. App. 4a-5a (Illinois Appellate Court recounting that Parsons acknowledged he did not comply with the railroad's safety rules).

A finding of comparative negligence can serve substantially to reduce the damages a railroad must pay. *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*, 441 N.W.2d at 618 (affirming jury finding that employee was 90% negligent). In fact,

an employee's negligence can completely bar recovery if the jury finds that it is the sole cause of the injury. *E.g., Taylor v. Ill. Cent. R.R.*, 8 F.3d 584, 586 (7th Cir. 1993) ("[I]f the sole cause of [plaintiff's] injuries was his own negligence, then under FELA the jury is not permitted to hold [the railroad] liable.").

Given the potential magnitude of FELA verdicts, reduction of damage awards to account for contributory negligence can make a big difference in the outcome of a FELA case. Unlike workers' compensation laws, FELA imposes no caps or limitations on the amount of damages that may be recovered.[7] Juries typically are given wide discretion to make determinations of fact, including questions about the extent of damages suffered. *Schirra v. Delaware, L. & W. R.R.,* 103 F.Supp. 812, 823 (M.D. Pa. 1952) ("[T]he jury would be justified in awarding plaintiff a substantial sum of money to fairly compensate him for past and future pain, suffering and inconvenience, and the amount to be awarded is peculiarly within the discretion of the jury, provided it is within reason.") A compensatory damages award under FELA will be deemed excessive only if it "shock[s the] judicial conscience," *Schneider v. Nat'l R.R. Passenger Corp.*, 987 F.2d 132, 137 (2d Cir. 1993) ($1.75 million verdict, including over $1.25 million in intangible damages, not excessive), and may be vacated only if the award is "monstrously excessive." *Frazier v. Norfolk & W. Ry. Co.*, 996 F.2d 922, 925 (7th Cir. 1993)

[7] Though workers' compensation laws vary from jurisdiction to jurisdiction, benefits generally are based on wage loss or lost earning capacity, typically with caps or limitations on the amounts available. *See* General Accounting Office, *Workers' Compensation: Selected Comparisons of Federal and State Laws* 12-16 (April 1996).

(denying remittitur because the court could not "say that a $2,300,000 award for a back injury, although large, shocks our judicial conscience" *id*. at 926.); *Cent. of Georgia R.R. v. Swindle,* 260 Ga. 685, 686 (1990). Thus, large awards, while not the norm, are not uncommon. *E.g., DeBiasio v. Ill. Cent. R.R.,* 52 F.3d 678 (7th Cir. 1995) ($4.2 million award affirmed). This case, in which a verdict of over $ 21 million was returned, is illustrative of that aspect of FELA.

C. Giving an Assumption of the Risk Instruction Confuses the Jury and Undermines the Railroads' Comparative Negligence Defense.

Offering evidence that an employee's injury was caused, at least in part, by the employee's own negligence often is the only viable means for mitigating FELA damage awards. In addition to abrogating traditional common law defenses, FELA has generally been construed to promote recovery. *CSX Transp., Inc. v. McBride*, 564 U.S. 685 (2011) (a more relaxed standard than traditional proximate cause applies to the element of causation); *Urie v. Thompson*, 337 U.S. 163, 180 (1949) (referring to FELA's "humanitarian purposes"); *Hane v, Nat'l R.R. Passenger Corp.,* 110 F.3d 573 (8th Cir. 1997) (FELA is "a broad, remedial statute"). Hobbling a railroad's ability to present a meaningful comparative negligence defense undermines the only counterbalancing factor Congress included in FELA.

Since 1939, FELA cases are tried "as though no doctrine of assumption of risk had ever existed" and with "the principles of comparative negligence [being] the guiding rules of decision." *Tiller*, 318 U.S. at 65. Nonetheless, trial courts continue to give assumption of the risk instructions when requested by plaintiff's

counsel, despite that practice being "widely acknowledged to confuse juries about whether or not plaintiffs can be held responsible for their own contributory negligence." Pet. at 1-2.

There is a strong consensus among federal courts on this point. As the Court of Appeals for the Second Circuit explained, "[o]rdinarily it is a mistake to give instructions on subjects not directly in issue in a case" and in particular that [an assumption of the risk] "instruction is not proper because it might well cause such confusion as to water down or even eliminate the issue of contributory negligence." *Clark v. Pennsylvania R.R.,* 328 F.2d 591, 595 (2d Cir. 1964). Similarly, the Seventh Circuit remarked that "the use of an assumption of risk instruction in an FELA case has been condemned" by numerous courts because "a jury might be confused when suddenly presented with an uncontested issue in jury instructions." *Heater v. Chesapeake & Ohio Ry. Co.,* 497 F.2d 1243, 1249 (7th Cir. 1974). This assessment was echoed by the Third Circuit in *Seaboldt v. Pennsylvania R.R.,* 290 F.2d 296, 300 (3d Cir. 1961) ("It seems very clear . . . that for this difficult concept to be thrown into the jury's mind at the last minute without much explanation was almost sure to have left it in confusion."); *see also Casko v. Elgin, Joliet & E. Ry. Co.,* 361 F.2d 748, 751 (7th Cir. 1966) (instructing a jury on assumption of the risk "where that 'defense' has been neither pleaded nor argued, serves only to obscure the issues in the case."); *Clark v. Burlington N., Inc.,* 726 F.2d 448, 452 (8th Cir. 1984) (same); *see also Almendarez v. Atchison, Topeka & Santa Fe. Ry. Co.,* 426 F.2d 1095, 1098 (5th Cir. 1970) (giving an assumption of the risk defense when it is not an issue in the case is "inadvisable").

This also reflects the consensus of state courts that have confronted this issue. *Shultz v. N.E. Ill. Reg'l Commuter R.R.,* 775 N.E.2d 964, 978 (Ill. 2002) ("giving of an instruction on assumption of risk in a case where the 'defense' has been neither pleaded not argued has been condemned by several courts as 'a confusing, negative statement which refers to issues not involved in an FELA case.'"); *Ill. Cent. Gulf R.R. v. Elliott,* 572 So. 2d 1263, 1266 (Ala. 1990) (courts unanimously "disapprove of the use of the [assumption of the risk] instruction where the defense has not been raised"); *Kelley v. Great N. Ry. Co.,* 371 P.2d 528, 534 (Wash. 1962) (expressing disapproval of plaintiff's counsel's employment of a "hazardous legal tool by requesting assumption of the risk instructions in FELA cases") (internal quotation marks omitted).

Given the lack of justification for an assumption of the risk instruction, and the confusion it is likely to cause, several state courts have held that giving such an instruction is reversible error. The Nebraska Supreme Court explained that an assumption of the risk instruction "could have no other effect except to have confused and misled the jury" and that "without question the instruction clearly inferred that plaintiff could not be found to be negligent, thereby in fact superseding and conflicting with the instructions theretofore given on negligence and contributory negligence." *Ellis v. Union Pac. R.R.,* 27 N.W.2d 921, 926 (Neb. 1947) The Supreme Courts of Virginia and Utah have reached the same conclusion. *Norfolk & W. Ry. Co. v. Sonney,* 374 S.E.2d 71 (Va. 1988); *Siciliano v. Denver & Rio Grande W. R.R.,* 364 P.2d 413 (Utah 1961).

However, based on speculation that an improper assumption of the risk instruction may not have actually confused the jury to the extent it prejudiced

the outcome of the case, other appellate courts have opted to allow the verdict to stand in these circumstances. Taking that approach, the court below acknowledged that the plaintiff admitted to violating safety rules, and that several witnesses contradicted the plaintiff's assertion that his conduct was consistent with "custom and practice." Pet. App. 4a – 9a. Yet it would not allow that the jury's finding of zero percent contributory negligence might have been the result of confusion caused by the trial court's decision to give an improper assumption of the risk instruction. *Id*. at 17a. As long as courts take such an approach they will maintain an incentive for plaintiffs' counsel to seek an improper assumption of the risk instruction in order to thwart a viable comparative negligence defense the railroad may have, undermining one of FELA's key features.

CONCLUSION

For the foregoing reasons, the petition should be granted.

Respectfully submitted,

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