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 IN OPPOSITION

JOHN M. POWER
GEORGE T. BRUGESS
COGAN & POWER, P.C.
One East Wacker Drive
Suite 510
Chicago, IL 60601
(312) 477-2500
jpower@coganpower.com

NEAL KUMAR KATYAL
Counsel of Record
SEAN MAROTTA
ALLISON K. TURBIVILLE
HOGAN LOVELLS US LLP
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5600
neal.katyal@hoganlovells.com

Counsel for Respondent
[additional counsel listed on inside cover]

Additional counsel:

MICHAEL W. RATHSACK
10 South LaSalle Street – 1420
Chicago, IL 60603
(312) 726-5433
mrathsack@rathsack.net

QUESTIONS PRESENTED

1. Whether the First Judicial District of the Appellate Court of Illinois correctly held that the trial court's assumption-of-the-risk instruction—even assuming it was incorrectly given—was harmless in light of the jury instructions as a whole.

2. If not, whether an assumption-of-the-risk instruction was warranted on the facts of this case.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES:

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

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INTRODUCTION

In this Federal Employers' Liability Act (FELA) case, the trial court charged the jury that if Petitioner Norfolk Southern Railway Company's negligence caused Respondent Michael Parsons's injury, Parsons could not be denied recovery because he had assumed the inherent risks of being a railroad conductor. The trial court also charged the jury that it had to compare Petitioner's responsibility for Parsons's injury, if any, to Parsons's responsibility for his own injury, if any, and allocate fault for Parsons's injury between the two.

Petitioner does not contend that either instruction was an incorrect statement of the law. Petitioner instead argues that the assumption-of-the-risk instruction should not have been given and that its being given was necessarily harmful error. The First Judicial District of the Appellate Court of Illinois disagreed at the second step. It held that even if the assumption-of-the-risk instruction was error, it was harmless in light of the rest of the charge. The jury was properly instructed on comparative negligence, and comparative negligence was a hotly contested issue at trial. Against that backdrop, there was little risk that the jury—which is presumed to follow its instructions—shirked its duty to compare Petitioner's and Parsons's fault.

In so holding, the First Judicial District aligned itself with every federal court of appeals to address the issue. Petitioner nonetheless contends that the First Judicial District is in conflict with three state supreme courts. But the cases Petitioner relies on are a combination of not factually analogous, unreasoned, and decades old, including from a time when lower courts were still uncertain about the role assumption-of-the-risk played in FELA cases. There is no split worthy of this Court's review.

In any event, the First Judicial District's decision was correct; there was a slim chance that the assumption-of-the-risk instruction would confuse the jury in the context of the charge and record as a whole. Petitioner's argument to the contrary—that the jury *must* have been confused because it found Parsons not at all at fault—takes significant liberties with the record. Petitioner argues that Parsons *must* have been negligent because he supposedly violated Petitioner's written safety rules. Pet. 8, 15. But the First Judicial District held—and Petitioner does not challenge—that a plaintiff's violation of a safety rule is not negligence when the rule is seldom used or nullified by custom, a conclusion the evidence amply supported. Petitioner's bid for review turns on a view of the facts that the jury reasonably rejected.

The reasons to deny review run deeper still. The First Judicial District is an intermediate appellate court, the kind whose decisions do not normally qualify for this Court's discretionary review. If the Court were to grant review, Parsons can and would defend the judgment below on a ground the First Judicial District did not consider—that, on the facts of this case, an assumption-of-the-risk instruction was entirely warranted. There is no need for this Court to wade into that factbound question.

The petition should be denied.

STATEMENT

A. The Federal Employers' Liability Act

FELA allows a railroad employee who has suffered an injury in the course of his employment to sue for damages if the injury "result[ed] in whole or in part from the negligence of any of the officers, agents, or employees of" the railroad. 45 U.S.C. § 51. An employee's damages, however, must be "diminished by the jury in proportion to the amount of negligence attributable to" him. *Id.* § 53. FELA thus embodies the principle of comparative negligence. The jury must "weigh the fault of the injured employee and compare it with the negligence of the employer, and, in light of the comparison, do justice to all concerned." *Tiller* v. *Atl. Coast Line R.R. Co.*, 318 U.S. 54, 65 (1943) (quoting S. Rep. No. 76-661, at 4 (1939)).

FELA prohibits a railroad from arguing that its responsibility for negligently causing an employee's injury is offset by the employee's assumption of the inherent risks of the job, thereby "insulat[ing] the [railroad] from bearing the 'human overhead' which is an inevitable part of the cost * * * of the doing of industrialized business." *Id.* at 59; *see also Norfolk S. Ry. Co.* v. *Sorrell*, 549 U.S. 158, 166 (2007); S. Rep. No. 76-661, at 3 (noting that assumption of the risk resulted in "some grave injustices to * * * railroad employees"). The statute provides that an employee "shall not be held to have assumed the risks of his employment in any case where * * * injury or death resulted in whole or in part from the negligence of any of the officers, agents, or employees" of the railroad, 45 U.S.C. § 54, and "releas[es] the employee from the burden of assumption of risk," *Tiller*, 318 U.S. at 64.

B. Proceedings Below

1. In 2011, Parsons was working as a conductor at Petitioner's Chicago railyard. During a routine procedure in which cars were switched from one track to another, Parsons's left foot was crushed between the railcar he was riding and a car he had temporarily left on an adjacent track. Pet. App. 1a-2a. Parsons sued Petitioner for negligence in Illinois state court. *See BNSF Ry. Co.* v. *Tyrrell*, 137 S. Ct. 1549, 1557 (2017) (noting that FELA "provide[s] for the concurrent subject-matter jurisdiction of state and federal courts over actions under FELA" (emphasis omitted)).

The case went to a jury. Pet. App. 2a. The evidence showed that prior to 2010, the two train tracks on which Parsons had been working were at least 12 feet apart. *Id.* In 2010, Petitioner decided to narrow the distance between the tracks such that, at the site of Parsons's injury, the tracks were only

10.5 feet apart. *Id.* at 2a-4a. Parsons testified that he never received notice that the distance between the tracks had been reduced to as little as 10.5 feet. *Id.* at 3a. He also testified that he could have safely passed by the stationary car on the other track if the tracks had still been 12 feet apart. *Id.* at 4a. And Parsons's expert witness testified that the distance between the tracks violated an Illinois Commerce Commission regulation, which required the tracks to be at least 13.5 feet apart. *Id.* at 5a.

Petitioner responded that its rules forbid conductors from leaving cars short of the "clearance point"—a marked point beyond which there would have been "sufficient distance for cars to safely pass." *Id.* at 2a, 8a-9a. Parsons acknowledged that he had left the stationary car short of the clearance point. *Id.* at 4a. But he, along with three other conductors and an expert on railroad practices, confirmed that "it was custom and practice at the railyard to temporarily leave cars south of the clearance point." *Id.*; *see also id.* at 5a-6a. Indeed, during switching moves, like the one Parsons was performing when the accident occurred, "it was 'standard operating procedure' to temporarily leave a car" short of the clearance point. *Id.* at 4a.

Petitioner also argued that its rules forbid conductors from riding on railcars in the "[b]ody of [the] yard," *id.* at 2a, 4a, 7a-8a, and that Parsons could have "safely walked" instead of riding on the railcar, Pet. 8; *see also* Respondent's App. Ct. Br. 27-28. Parsons explained and the three other conductors confirmed, however, that "it was common practice for conductors to ride on the side of cars" before reaching the clearance point. Pet. App. 4a; *see also id.* at 5a. Parsons's testimony was confirmed by

Petitioner's conductor-training video, which showed a conductor doing just that. Tr. 422-425. Parsons further testified "that it was never explained to him what 'body of the yard' meant." Pet. App. 5a. Even Petitioner's conductor-training coordinator admitted that "he was not aware of any rule defining the term 'body of the yard.' " *Id.* at 7a.

2. The trial court concluded that Petitioner's evidence that Parsons could have safely walked instead of riding on the railcar raised the issue of assumption of the risk—that Parsons's injury was caused by both Petitioner's negligence and the inherent risks of being a railroad conductor. *See* Tr. 1364, 1366. For that reason, the court instructed the jury (as FELA provides) that a railroad employee

> shall not be held to have assumed the risks of his employment in any case where the injury resulted in whole or in part from the negligence of any of the officers, agents or employees of the railroad, or by reason of any defect, due to the railroad's negligence, in its track, roadbed, or other equipment.

Pet. App. 9a (internal quotation marks omitted).

But the court also "repeatedly instructed the jury that any" damages it awarded to Parsons "must be reduced in proportion to his contributory negligence." *Id.* at 18a. "[T]he verdict form also reiterated this point." *Id.* And Petitioner argued comparative negligence extensively at trial. Its counsel reminded the jury in closing that "it would * * * 'have to decide what is [Parsons's] responsibility for this incident.' " *Id*. Petitioner's counsel even urged the jury to find Parsons "90 percent responsible" for his injury. *Id.* (internal quotation marks omitted).

The jury concluded that Petitioner was completely at fault for Parsons's injuries and returned a verdict for Parsons. *Id.* at 11a. The trial court upheld the jury's verdict, minus a remittitur of the jury's lost-earnings award. *Id.* at 34a-35a.

3. The Appellate Court of Illinois, First Judicial District, affirmed. *Id.* at 33a. The court held that the trial court's assumption-of-the-risk instruction was not reversible error. The court explained that whether there had been reversible error depended on whether Petitioner had put forth "some indication that the jury was confused by the assumption of risk instruction." *Id.* at 17a. Under that standard, and "[e]ven assuming that [the assumption-of-the-risk] instruction * * * should not have been given," Petitioner could not "show any * * * prejudice." *Id.* After all, "[t]here is nothing to suggest that [the] instruction * * * caused the jury to believe that it could not consider contributory negligence," particularly "[i]n light of the jury instructions in their entirety." *Id.* at 17a-18a. "To the contrary, the jury's ability to reduce any damages in proportion to plaintiff's contributory negligence was thoroughly argued by the parties and repeatedly explained by the trial court." *Id.* at 17a.

The court further explained that the jury's finding that Parsons was not negligent was not against the manifest weight of the evidence. *Id.* at 14a. The court recognized that there was some "evidence that [Parsons] violated [Petitioner]'s rules" about leaving cars short of the clearance point and riding cars in the body of the yard. *Id.* at 15a. But that evidence could not be decisive because the fact that a plaintiff's conduct "may have violated safety rules d[oes] not establish negligence as a matter of law or that [plaintiff's] actions were the sole cause of his injuries, particularly in light of evidence that the rules were seldom utilized or were nullified by custom." *Id.* (quoting *Hamrock* v. *Consol. Rail Corp.*, 501 N.E.2d 1274, 1279-1280 (Ill. App. Ct. 1986) (citation and emphasis omitted; second brackets in original)). Here, "conflicting trial testimony" had been presented "that it was customary to leave cars south of the clearance point during switching operations and for conductors to ride cars" before reaching the clearance point. *Id.* at 14a-15a. For that reason, "[t]he jury could find that [Parsons]'s conduct was reasonable" and return a verdict finding Parsons not liable for his injuries. *Id.* at 15a.

The Illinois Supreme Court denied review. *Id.* at 36a. This petition followed.

ARGUMENT

I. THE FIRST JUDICIAL DISTRICT'S DECISION IS CONSISTENT WITH ALL FEDERAL COURTS OF APPEALS TO ADDRESS THE ISSUE, AND ANY DISAGREEMENT IN A FEW STATE SUPREME COURTS IS LIMITED AND STALE.

Petitioner portrays the First Judicial District as perpetuating an intractable split with the decision below, the Second, Fifth, Sixth, Seventh, and Eighth Circuits, and the Alabama and Washington Supreme Courts on one side and three state supreme courts on the other. Pet. 11-14. That framing is incorrect.

1. For starters, as Petitioner concedes (at 3), the decision below is consistent with the vast majority of decisions addressing Petitioner's question presented. *DeChico* v. *Metro-N. Commuter R.R.*, 758 F.2d 856,

862 (2d Cir. 1985); *Almendarez* v. *Atchison, Topeka & Santa Fe Ry. Co.*, 426 F.2d 1095, 1098 (5th Cir. 1970); *Weese* v. *Chesapeake & Ohio Ry. Co.*, 570 F.2d 611, 614-615 (6th Cir. 1978); *Heater* v. *Chesapeake & Ohio Ry. Co.*, 497 F.2d 1243, 1249 (7th Cir. 1974); *Clark* v. *Burlington N., Inc.*, 726 F.2d 448, 452 (8th Cir. 1984); *Ill. Cent. Gulf R.R. Co.* v. *Elliott*, 572 So. 2d 1263, 1266 (Ala. 1990); *Kelley* v. *Great N. Ry. Co.*, 371 P.2d 528, 534 (Wash. 1962). Indeed, every federal court of appeals to consider Petitioner's question presented has unanimously agreed that an erroneous assumption-of-the-risk instruction does not require reversal when the charge as a whole minimizes the risk of juror confusion.

The Second Circuit explained that even though "it would have been better had [an assumption-of-the-risk] instruction not been given, we do not believe that there was reversible error here" because "[t]he court's charge on contributory negligence stated an employee's duty of care with sufficient clarity to make the danger of jury confusion negligible." *DeChico*, 758 F.2d at 862. The Fifth Circuit likewise recognized that an assumption-of-the-risk instruction like the one here "is merely a restatement of Section 4 of the Act" and therefore disagreed that "the charge on assumed risk practically eliminated its chances to successfully defend the suit." *Almendarez*, 426 F.2d at 1098. The assumption-of-the-risk charge "was harmless, and if inadvisable, certainly not reversible error." *Id*. And the Sixth Circuit held that when both an assumption-of-the-risk and comparative-negligence instruction were given, the assumption-of-the-risk instruction, "if error, was harmless and does not constitute ground for reversal." *Weese*, 570 F.2d at 615.

The list goes on. The Seventh Circuit emphasized that it could "find no case * * * in which the giving of the improper assumption of risk instruction in a FELA case was alone held to be reversible error." *Heater*, 497 F.2d at 1249. The Eighth Circuit similarly noted that the railroad could "cite[ ] no case * * * in which the giving of the assumption of risk instruction in an FELA case was held to be reversible error," especially where the jury's comparative-negligence finding "comports with the evidence in the record and does not demonstrate confusion traceable to the assumption of risk instruction." *Clark*, 726 F.2d at 452. And the Alabama and Washington Supreme Courts agree. *See Ill. Cent. Gulf R.R.*, 572 So. 2d at 1266 ("We do agree * * * with the majority of the courts that have addressed this question and have held that a correct statement that assumption of risk is not a defense under the FELA is not reversible error where the charge to the jury, when viewed as a whole, correctly requires proof that the plaintiff's injury was caused, at least in part, by the railroad's negligence and properly charges on the effect of the plaintiff's contributory negligence, if any."); *Kelley*, 371 P.2d at 534 ("[W]here the jury is instructed that the carrier is not liable unless it was negligent, and then that there is no assumption of risk where the injury results in whole or part from the negligence of the officers, agents, or employees of the carrier, we see no error or, at least, no prejudice."). The First Judicial District's decision was in line with every one of these cases.

2. Petitioner contends that the Nebraska, Utah, and Virginia Supreme Courts have charted a different course. *See* Pet. 11-12 (citing *Ellis* v. *Union Pac. R.R. Co.*, 27 N.W.2d 921 (Neb. 1947); *Siciliano* v. *Denver & Rio Grande W. R.R. Co.*, 364 P.2d 413 (Utah 1961); and *Norfolk & W. Ry. Co.* v. *Sonney*, 374 S.E.2d 71 (Va. 1988)). But those cases are either not factually analogous, undertheorized, stale, or a combination of all three.

Start with the Nebraska Supreme Court's opinion in *Ellis*. Unlike in this case and those of the federal courts of appeals, the trial court's assumption-of-the-risk instruction did not track the statutory language. *Ellis*, 27 N.W.2d at 925-926. Instead, the trial court told the jury that "[y]ou are instructed that the doctrine of assumption of risk has no place in this case, and that * * * the plaintiff cannot be held to have assumed the risk of his employment." *Id.* at 925. As the Nebraska Supreme Court explained, the instruction's "substance was * * * prejudicially erroneous for failure to correctly state the rule" that an employee does not assume the risk only if his injury has resulted from his employer's negligence. *Id.* at 926. *Ellis* is limited to assumption-of-the-risk instructions that do not correctly state the law of assumption of the risk.

Ellis is also uninformative because it dates from 1947, a time when courts seemingly "still ha[d] differences of opinion concerning the proper application of the doctrine of assumption of risk in [FELA] cases." *Id.*; *see also* An Act to Amend the Employers' Liability Act, ch. 685, 53 Stat. 1404 (1939) (codified at 45 U.S.C. § 54) (abolishing the assumption-of-the-risk defense). In the decades since, a consensus has coalesced around the instruction being harmless if coupled with a correct comparative-negligence instruction, and the decision below is entirely consistent with the weight of that authority. *See supra* pp. 8-10.

The Utah Supreme Court's 1961 decision in *Siciliano* is similarly not helpful to Petitioner. There, the Utah high court reversed the trial court's judgment because there was no evidence presented of employer negligence at all, obviating the need to consider assumption of the risk or comparative negligence. *Siciliano*, 364 P.2d at 414. But the Utah Supreme Court added in dicta—without quoting the instruction given—that "in the usual case it is prejudicial error" to give an assumption-of-the-risk instruction. *Id.* at 415. Given the intervening case law in the last half-century, the Utah Supreme Court may well today repudiate what it said in passing in *Siciliano*.

Finally, there is the Virginia Supreme Court's decision in *Norfolk*. The court acknowledged the majority of cases holding that an assumption-of-the-risk instruction is not reversible error absent some evidence of jury confusion and cited the Nebraska and Utah Supreme Courts as purportedly taking a different view. *Norfolk*, 374 S.E.2d at 76. The Court then took sides with the bare statement that "[w]e think the better view is that it is reversible error to grant an instruction on assumption of risk in any FELA case, absent an allegation or proof on the question." *Id.* The court did not provide any analysis, or even reasoning, to go with its holding. The decision hardly undermines the wealth of contrary authority.

II. THE DECISION BELOW AND THOSE THAT IT JOINED ARE CORRECT AND DO NOT CONTRAVENE FELA.

1. The First Judicial District's decision and those of the courts it joined were correct. Petitioner does not argue that the assumption-of-the-risk instruction was an incorrect statement of the law under FELA. Although Petitioner paints this case as about the need to maintain FELA's comparative-negligence scheme (at 16-22), the decision below is about something far more basic—that even a mistaken jury instruction can be harmless in context.

These principles are well-settled. "[A] single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge." *United States* v. *Park*, 421 U.S. 658, 674 (1975) (quoting *Cupp* v. *Naughten*, 414 U.S. 141, 146-147 (1973)). The Court has also "often applied harmless-error analysis to cases involving improper instructions." *Neder* v. *United States*, 527 U.S. 1, 9 (1999). The question for the Court is whether the trial court's alleged error has caused a deprivation of "substantial justice" for the opposing party. *Mercer* v. *Theriot*, 377 U.S. 152, 154 (1964) (per curiam); *see also McDonough Power Equip., Inc.* v. *Greenwood*, 464 U.S. 548, 553 (1984) (harmless-error rule "embod[ies] the principle that courts should exercise judgment in preference to the automatic reversal for 'error' and ignore errors that do not affect the essential fairness of the trial").

The court below and the courts that it joined correctly recognized that giving an accurate assumption-of-the-risk instruction—even if technically unnecessary—cannot deprive a railroad of substantial justice. After all, "juries are presumed to follow the court's instructions." *CSX Transp., Inc.* v. *Hensley*, 556 U.S. 838, 841 (2009) (per curiam); *accord Weeks* v. *Angelone*, 528 U.S. 225, 234 (2000); *Jones* v. *United States*, 527 U.S. 373, 400 (1999). This Court has accordingly held that where a challenged instruction is simply "superfluous," it is suited to harmless-error review. *Rose* v. *Clark*, 478 U.S. 570, 581 (1986).

Petitioner nonetheless contends that the "differences" between assumption of the risk and contributory negligence "will almost certainly go unappreciated by a lay jury." Pet. 2. Petitioner gives juries too-little credit. The trial court's instructions here amply explained the relationship between assumption of the risk and comparative negligence. The assumption-of-the-risk instruction advised the jury that Parsons cannot be denied recovery if his injury was the result of both Petitioner's negligence and the inherent dangers of his job. Pet. App. 9a (Parsons "shall not be held to have assumed the risks of his employment in any case where the injury resulted in whole or in part from the negligence of any of the officers, agents or employees of the railroad"). The separate comparative fault instruction, meanwhile, "instructed the jury that any recovery by plaintiff must be reduced in proportion to his contributory negligence." *Id.* at 18a.

There is nothing contradictory about those two instructions. The first cautions the jury not to conclude that if Parsons's injury was caused both by Petitioner's negligence and the inherent risks of Parsons's job, the inherent risks mitigate Petitioner's liability. The second requires the jury to set off Parsons's recovery by the percentage by which his own negligence contributed to his injuries. The assumption-of-the-risk instruction might have been, at worst, unneeded. But that does not make it prejudicial.

2. The risk of jury confusion was particularly low on this record. Petitioner's counsel reminded the jury in closing that "it would * * * have to decide" Parsons's contributory negligence. *Id.* (internal quotation marks omitted). Indeed, Petitioner's counsel urged the jury to find Parsons "90 percent responsible" for his injury. *Id.* (internal quotation marks omitted).

The trial court also consistently instructed the jury regarding Parsons's contributory negligence. The court explained "[w]hen I use the expression 'contributory negligence,' I mean negligence on the part of Michael Parsons that caused or contributed in whole or in part to the alleged injury." Tr. 1531. The court also instructed the jury that any damages it awarded to Parsons "shall be diminished * * * in proportion to the amount of negligence attributable to" him. Tr. 1532-1533. After giving the assumption-of-the-risk instruction, Tr. 1533, the court again reminded the jury that "[i]f you find that Michael Parsons'[s] injury was caused by a combination of negligence of Norfolk Southern and contributory negligence of Michael Parsons, you must * * * determine the percentage of such negligence attributable solely to Michael Parsons[ ] [and] reduce the total amount of Michael Parsons'[s] damages by the proportion or percentage of negligence attributable solely to Michael Parsons," Tr. 1542-1543. Finally, the jury's "verdict form also reiterated this point." Pet. App. 18a; *see* Tr. 1545-1546 ("[W]e find that the percentage of such negligence attributable solely to Michael Parsons is, then there's a blank line and it says 'percent' with a percentage sign." (internal quotation marks omitted)); Tr. 1546 ("[A]fter reducing the total damages sustained by Michael Parsons by the percentage of negligence attributable solely to Michael Parsons, we assess Michael Parsons'[s] recoverable damages in the sum of, then there's a dollar sign and blank line." (internal quotation marks omitted)).

In sum, as the First Judicial District explained, "the jury's ability to reduce any damages in proportion to [Parsons]'s contributory negligence was thoroughly argued by the parties and repeatedly explained by the trial court." Pet. App. 17a. And the court therefore correctly concluded that there was "nothing to suggest that [the] instruction * * * caused the jury to believe that it could not consider contributory negligence" in violation of FELA. *Id.* Petitioner had not met its burden to put forth "some indication that the jury was confused" by the assumption-of-the-risk instruction. *Id.*

Petitioner responds that the jury must have been confused because it concluded that Parsons was not at all negligent "in the face of overwhelming and uncontroverted evidence" to the contrary. Pet. 15. Petitioner, however, vastly overstates the record.

For example, Petitioner contends that Parsons must have been negligent because he supposedly violated Petitioner's work rules about leaving cars temporarily short of the clearance point and riding on cars in the "body of the yard." *See id.* But the First Judicial District held—and Petitioner does not contest—that "[w]hether a company rule applies in the current situation" is a jury issue and that a plaintiff's violation of a safety rule does "not establish negligence as a matter of law or that [plaintiff's] actions were the sole cause of his injuries, particularly in light of evidence that the rules were seldom utilized or were nullified by custom." Pet. App. 14a-15a (citation, emphasis, and internal quotation marks omitted; second brackets in original).

Under those legal standards, the parties presented "conflicting trial testimony" regarding Parsons's negligence. *Id.* at 14a. As for Parsons leaving a car temporarily short of the clearance point, Parsons and his witnesses testified that it was customary in the yard to do just that, *id.* at 4a-6a, suggesting that the rule was seldom enforced or nullified by custom. And as for Parsons riding on the car rather than walking alongside it, not even Petitioner's own witness could define the "body of the yard" where riding on cars is prohibited, suggesting that the rule was either inapplicable to Parsons's conduct at the time of his accident or nullified by custom. *See id.* at 7a; *see also id.* at 4a-5a (Parsons's testimony that it was customary to ride on cars in the part of the yard where his accident occurred).

A jury could have perhaps credited Petitioner's "evidence that [Parsons] violated [its] rules." *Id.* at 14a-15a. But this jury chose not to. *Id.*; *see also Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986) ("Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts" are quintessential "jury functions."). As the First Judicial District recognized, the jury concluded that Parsons's "conduct was reasonable, given the evidence that it was customary to leave cars south of the clearance point during switching operations and for conductors to ride cars" before reaching the clearance point. Pet. App. 15a. That a contrary conclusion might have been also supported by the evidence does not show jury confusion relating to the assumption-of-the-risk instruction. Nor has Petitioner sought review of the First Judicial District's reasonable determination that the jury's allocation of fault was not against the manifest weight of the evidence. *See id.* at 14a. It cannot do so through the backdoor of challenging the trial court's instructions, and FELA's comparative-negligence regime remains alive and well. *See Tiller*, 318 U.S. at 62.

III. THIS CASE IS A POOR VEHICLE FOR RESOLVING PETITIONER'S QUESTION PRESENTED.

Finally, this case is a poor vehicle for resolving Petitioner's question presented.

1. Granting certiorari would require this Court to grapple with two factbound questions. First, the Court would need to comb through the record and determine whether, under the circumstances, the First Judicial District correctly held that even if the trial court's assumption-of-the-risk instruction was erroneous, there was nonetheless minimal risk of jury confusion. Petitioner contends that there was jury confusion (at 15), but that is a fact-specific quibble with the decision below, and "[a] petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law," Sup. Ct. R. 10.

Second, the Court would need to decide the question the First Judicial District did not reach: Whether the trial court's assumption-of-the-risk instruction was erroneous. On that review, the Court would discover that it was not. Even Petitioner's proffered cases hold an assumption-of-the-risk instruction is warranted where "the issue was not pleaded but where the evidence so emphasizes the fact that the employee recklessly and foolishly took on a known and dangerous hazard as to 'create improper inferences' that should be 'dispelled' by a cautionary instruction." *Siciliano*, 364 P.2d at 415; *see also Norfolk*, 374 S.E.2d at 76 (holding that "it is reversible error to grant an instruction on assumption of risk[,] * * * absent an allegation or proof on the question").

Contrary to Petitioner's contention that the assumption-of-the-risk instruction was "inapplicable" (at i), this case presents facts under which even the Utah Supreme Court would allow assumption of the risk to be charged. *Siciliano*, 364 P.2d at 415. The trial court correctly found that Petitioner's argument that Parsons could have safely walked instead of riding on the railcar as required by custom raised the specter of assumption of the risk by suggesting that Parsons's injury was caused by the inherent dangers of being a railroad conductor, who customarily rides on the sides of railcars. *See* Respondent's App. Ct. Br. 27-28; Tr. 1364, 1366. A cautionary instruction to dispel the suggestion raised by Petitioner's argument was therefore proper. *Siciliano*, 364 P.2d at 415.

If the Court were to grant review, Parsons would be entitled to defend his judgment on this ground. *Washington* v. *Confederated Bands & Tribes of*

Yakima Indian Nation, 439 U.S. 463, 476 n.20 (1979). And that renders this case a poor one for this Court's review. Whether the assumption-of-the-risk instruction was supported by the record evidence is inherently factual, and the Court "do[es] not grant * * * certiorari to review evidence and discuss specific facts." *United States* v. *Johnston*, 268 U.S. 220, 227 (1925).

2. Review is also unwarranted "because this case comes to [the Court] on review of a decision by a state intermediate appellate court." *Huber* v. *N.J. Dep't of Envtl. Prot.*, 562 U.S. 1302 (2011) (Alito, J., statement respecting the denial of certiorari). This Court reserves its limited discretionary docket for disagreements between the federal courts of appeals and state courts of last resort. *See* Sup. Ct. R. 10(b). It should not grant the writ when the decision below affects—at most—only one district of Illinois's intermediate appellate court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

JOHN M. POWER
GEORGE T. BRUGESS
COGAN & POWER, P.C.
One East Wacker Drive
Suite 510
Chicago, IL 60601
(312) 477-2500
jpower@coganpower.com

MICHAEL W. RATHSACK
10 South LaSalle Street
– 1420
Chicago, IL 60603
(312) 726-5433
mrathsack@rathsack.net

NEAL KUMAR KATYAL
Counsel of Record
SEAN MAROTTA
ALLISON K. TURBIVILLE
HOGAN LOVELLS US LLP
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5600
neal.katyal@hoganlovells.com

Counsel for Respondent

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