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

PETITIONER'S REPLY BRIEF

ROGER A. PETERSEN
LAURA D. HUNT
CHRISTINE R. HARDY
LAW DEPARTMENT
NORFOLK SOUTHERN CORPORATION
3 Commercial Place
Norfolk, VA 23510
(757) 629-2892

CARTER G. PHILLIPS*
WILLIAM R. LEVI
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000
cphillips@sidley.com

Counsel for Petitioner

* Counsel of Record

June 8, 2018

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REPLY BRIEF

In its Petition, Norfolk Southern demonstrated that the ruling below implicates a square conflict between federal courts of appeals and the highest courts of several states over whether reading the jury an erroneous assumption of risk instruction constitutes reversible error in a FELA case. Respondent does not and cannot dispute the split, and provides no reason to question the consensus judgment of federal and state courts that such instructions undermine the railroad's contributory negligence defense with no corresponding benefit. The instruction merely creates confusion and prejudice. This Court should grant review to resolve the conflict on an important issue of federal law where uniformity is paramount to protect the balance of interests between railroads and their employees.

I. REVIEW IS WARRANTED TO RESOLVE A CONCEDED SPLIT OF AUTHORITY ON AN ISSUE OF CRITICAL IMPORTANCE TO RAILROADS AND THEIR EMPLOYEES.

a. Certiorari is warranted here because of a clear conflict in authority as to whether giving an instruction on assumption of risk when the defense is not pled or argued—a practice that is widely acknowledged to confuse juries about whether plaintiffs may be held responsible for their own contributory negligence—constitutes reversible error in a FELA case. Respondent does not dispute the existence of the split. Opp. 2, 8-12. This fact alone justifies this Court's review. FELA is a federal statute that demands a uniform rule. See, *e.g., N.Y. Cent. R.R.* v. *Winfield*, 244 U.S. 147, 150 (1917); Pet. 14.

b. Respondent instead attempts to downplay the significance of the split, but these efforts fail. Respondent argues that certain of the cases are dated,

raising the possibility that those courts might reconsider their judgments. See Opp. 11-12; *e.g., id*. at 12. But these decisions *are still good law*. There is no limitations period for the decisions of state high courts. No trial court in Utah or any other state where the challenged practice has been proscribed would instruct the jury on assumption of risk.

Importantly, as demonstrated by the decision below, the issue of whether a FELA plaintiff may obtain an inapplicable assumption of risk instruction to dilute the railroad's comparative negligence defense is still a serious problem. See AAR Amicus Br. 3 ("not uncommon for plaintiff's counsel to request an irrelevant instruction … as a tactic"). Each year, hundreds of FELA lawsuits are brought against the railroads, and the railroads spend hundreds of millions of dollars in the defense of these claims. *Id*. at 2. Disproportionately large awards are not uncommon. *Id*. at 15. These cases, like the case below, necessarily involve the litigation of fact-specific questions of negligence and causation, *see id*., and often present the question of whether, and to what extent, employee negligence caused an injury, see *id*. at 4; *id*. at 13. Significantly, a finding of comparative negligence can serve "substantially to reduce the damages a railroad must pay." *Id*. at 13. Thus, given FELA's design, including uncapped damages, *see infra* at 7-8, the "reduction of damage awards to account for contributory negligence can make a big difference in the outcome of a FELA case," AAR Amicus Br. 14. In this way, the magnitude of the verdict will often turn on the extent of the railroad's success in offering evidence that an employee's injury was caused by the employee's own negligence.

Knowing this, savvy plaintiffs' lawyers seek to inject into FELA cases inapplicable no-assumption-of-the-

risk instructions in order to undermine the comparative negligence defense that is often raised by the railroad. And despite the "strong consensus" among state and federal courts that the tactic is illegitimate and has no positive role to play in the litigation, because many courts let the verdicts stand, the practice continues unabated and leads to the kind of runaway jury verdict that occurred in this case. *Id.* at 4. In short, the question presented remains of pressing concern to the railroads and to the proper administration of FELA, and this Court's review here would be timely and is warranted.

c. Respondent also suggests that the division in authority is somehow less deserving of this Court's review because the federal courts of appeals that have addressed the issue are in agreement that inapplicable assumption of risk instructions do not rise to the level of reversible error. Opp. 2, 9. Respondent's suggestion is wrong. A split between federal courts of appeals and state supreme courts is more, not less, problematic. It is untenable for inconsistent rules of law to apply in the same state depending on whether suit is brought in state or federal court. Thus, for example, within Nebraska, a plaintiff in federal court may seek with no risk of reversal to inject a wholly inappropriate assumption of risk instruction, but would face certain reversal in a state court for employing that precise tactic. See Pet. 14. In such circumstances, this Court's review is particularly appropriate to eliminate forum shopping and the unfairness of conflicting rules governing the same jurisdiction. See *Norfolk & W. Ry.* v. *Hiles*, 516 U.S. 400, 403 & n.2 (1996). Obtaining wildly different verdicts by litigating on one side of the street as opposed to another is unacceptable and only this Court can fix that problem.

d. Respondent's remaining contentions are equally unavailing. Respondent does not dispute that the Virginia Supreme Court has held, in conflict with the decisions of other state and federal courts, 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." Opp. 12 (quoting *Norfolk & W. Ry.* v. *Sonney*, 374 S.E.2d 71, 76 (Va. 1988)). Nevertheless, respondent complains that the decision is "undertheorized." Opp. 11-12. As an initial matter, respondent is simply incorrect. The decision recognizes and cites the courts that "have held that it is reversible error to grant such an instruction where neither the pleadings nor the evidence raise the issue," and the courts on the other side of the split. *Norfolk & W. Ry.* v. *Sonney*, 374 S.E.2d 71, 76 (Va. 1988). The court then expresses the logical position, based on its review of these authorities, that it is reversible error to grant an instruction on assumption of risk because "[n]owhere … do we find any indication that the railroad was invoking that defense." *Id.* In any event, it is the conflict in the authorities on an issue of importance, not the depth of any particular opinion on the issue, which justifies review.

Respondent (at 12) is also incorrect to suggest that the Utah Supreme Court's discussion of assumption of risk in *Siciliano* v. *Denver & Rio Grande W. R.R.*, 12 Utah 2d 183, 185 (1961), was dicta. The court simply identified two sufficient alternative grounds for its decision to reverse, one of which was that "it was prejudicial error to instruct the jury as to assumption of risk." *Id.*; *see Woods* v. *Interstate Realty Co.*, 337 U.S. 535, 537 (1949) ("where a decision rests on two or more grounds, none can be relegated to the category of *obiter dictum*").

Finally, respondent maintains that the Nebraska Supreme Court's opinion in *Ellis* v. *Union Pacific Railroad*, 148 Neb. 515, 522 (1947), is limited to the precise language of the inapplicable assumption-of-the-risk instruction in that case. See Opp. 11. But that is demonstrably not so. Indeed, *Ellis* goes so far as to find that such instructions are so clearly prejudicial that even a caveat included in the instruction that it was "'not intended to conflict with the instructions on the subject (sic) of negligence' certainly could not cure its erroneous character." 148 Neb. at 524. This is because it "would be expecting too much of ordinary lay jurors to assume that they could or would intelligently and correctly apply such an instruction." *Id.*

II. THE DECISION BELOW IS CLEARLY WRONG AND DIRECTLY CONFLICTS WITH FELA'S COMPARATIVE NEGLIGENCE SCHEME.

a. There is a "strong consensus," AAR Amicus Br. 16-17, among federal and state courts alike that where assumption of risk has not been raised as a defense, an irrelevant instruction on that defense invariably risks "caus[ing] such confusion as to water down or even eliminate the issue of contributory negligence," *DeChico* v. *Metro-N. Commuter R.R.*, 758 F.2d 856, 861-62 (2d Cir. 1985); see also Pet. 16-17. This is because a jury will naturally and reasonably assume that such an instruction is somehow relevant and applicable to the case, and thus will equate a no-assumption-of-the-risk instruction with a no-contributory-negligence instruction. See Pet. 16. Despite this consistent condemnation, respondent does not even attempt to provide, much less actually supply, any purpose in law, policy or logic for allowing such an instruction under any circumstances where the issue is not raised by the defendant. See, *e.g.*, Opp. 13 & 15 (referring to

such instructions as "mistaken" and "at worst, unneeded").

Instead, respondent's only answer is to fantasize that a separate instruction on contributory negligence is somehow sufficient to "amply explain[] the relationship between assumption of the risk and comparative negligence" and mitigate any contradiction between the two. *Id.* at 14. But respondent does not explain why this is so. The mere presence of a separate instruction—or repeated instructions, see *id.* at 15—on contributory negligence does nothing to "intelligently explain" the differences between these two easily confused defenses when one is not at issue in the case. *Ellis*, 148 Neb. at 522 (noting that an instruction on assumption of risk will "supersede[] and conflict[] with the instructions theretofore given on … contributory negligence"); see *Seaboldt* v. *Pa. R.R.*, 290 F.2d 296, 300 (3d Cir. 1961) (same). Indeed, even if an instruction were provided that *did* attempt to explain the difference between contributory negligence and assumption of the risk and clarify any apparent conflict, which did not happen in this case, it still is not at all clear that the prejudicial effect of the improper instruction would be ameliorated. See 148 Neb. at 524 (curative instruction insufficient to mitigate prejudice from inapplicable assumption of risk instruction); see also Pet. 18.

b. Respondent trains most of his fire on the evidence in the case, speculating that the improper assumption of the risk instruction may not have actually confused the jury here and thus may not have prejudiced Norfolk Southern's comparative negligence defense. According to respondent, "[t]hat a contrary conclusion might have been also supported by the evidence does not show jury confusion relating to the assumption-of-

the-risk instruction." Opp. 18. This approach is curious because it is difficult to imagine a case where the inference could be stronger that the jury's verdict of no comparative negligence was the product of the assumption of risk instruction than in this case. As the court below acknowledged, respondent *admitted* to violating safety rules designed to prevent the precise type of accident that occurred here. Pet. App. 4a-9a; see also Pet. 8 & 15. Yet the jury found *zero* contributory negligence. This record allows only one conclusion: the jury misunderstood the import of the assumption of risk instruction, as respondent hoped it would, and stripped the railroad of the protections of comparative negligence.[1] The facts here prove why the Court should intervene and stop this tactic that accomplishes nothing but to undermine the delicate balance Congress adopted in creating a comparative negligence system.

c. Finally, respondent's *ipse dixit* that "FELA's comparative-negligence regime remains alive and well" is wishful thinking. Opp. 18. As fully recounted by Amicus and in the petition, comparative negligence is a central feature of FELA's tort-based remedy for railroad employees injured on the job. See AAR Amicus Br. 5-11; Pet. 18-22. Among FELA's many innovations to facilitate employee recovery is "apportionment of responsibility between employer and employee based on comparative fault," instead of barring recovery if the

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[1] Respondent's assertion that these rules were "nullified by custom" is no answer. Opp. 17. For example, respondent undeniably violated work-safety rules that prohibited placing cars in the foul of adjacent tracks, because they may be hit by passing cars, which is exactly what happened in this case. Pet. 7. If, as respondent suggests, it was nonetheless "customary in the yard to do just that," then rail cars would have collided every day, not just on the day of this accident. Opp. 17.

employee's negligence contributed to the injury. *Norfolk & W. Ry.* v. *Ayers*, 538 U.S. 135, 161 (2003). Later, FELA was amended to eliminate the common law assumption of the risk defense, which had been used by employers to defeat liability in circumstances involving dangerous conditions that were necessary to perform the duties of the job. See *Tiller* v. *Atl. Coast Line R.R.*, 318 U.S. 54, 62-64 (1943). The resulting scheme is simple: each party is responsible for its own negligence, and any damages awarded to an injured plaintiff must be reduced by the extent to which the plaintiff's own negligence caused the injury. See *id.* at 65.

But this entire apportionment scheme is destabilized when FELA plaintiffs may still request an inapplicable "no-assumption-of-the-risk" instruction without fear of reversal and thereby attempt to eliminate the issue of contributory negligence from the case. Left with no "viable means for mitigating FELA damage awards," defendant railroads are completely unprotected from the kind of runaway recovery seen here. AAR Amicus Br. 15. This Court should grant certiorari to curb the gamesmanship of FELA plaintiffs' attorneys and to preserve the "longstanding apportionment between carrier and worker of the costs of railroading injuries." *Monessen Sw. Ry.* v. *Morgan*, 486 U.S. 330, 339 (1988).

III. THIS CASE IS A PROPER VEHICLE FOR REVIEW.

Respondent attempts to deflect this Court's attention by raising the specter of two "factbound questions." Opp. 18. But one presents a pure legal question that was pressed and passed upon below, and the other this Court can ignore.

First, respondent claims that whether the instruction was prejudicial is a fact question that the Court

"would need to comb through the record" to decide. *Id.* Not so. Whether an error is subject to harmless error analysis or requires automatic reversal is a legal question. See, *e.g., Sullivan* v. *Louisiana*, 508 U.S. 275, 279 (1993) ("The question in the present case is to which category the present error belongs."); see also *Arizona* v. *Fulminante*, 499 U.S. 279, 310 (1991) ("other cases have added to the category of constitutional errors which are not subject to harmless error."). Accordingly, all the Court needs to decide here is the clean legal question of whether the concededly erroneous assumption-of-the-risk instructions are presumptively or automatically prejudicial.

Second, respondent insists that the Court would need to decide an *additional* question of whether the instruction was erroneous—which the court below assumed but did not decide—in the first instance. See Pet. App. 17a. Again, not so. The Court is free to rule on the question presented and then remand to the court below to address the alternative argument in the first instance.[2] See, *e.g., Perry* v. *Thomas*, 482 U.S. 483, 492 (1987) ("This issue may be resolved on remand; its status as an alternative ground … does not prevent us from reviewing the ground exclusively relied upon by the courts below."); *Roberts* v. *Galen of Va., Inc.*, 525 U.S. 249, 253-54 (1999) (per curiam)

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[2] Of course, the Court could also address the alternative argument if it wanted, and easily find that the instruction was given in error, as the court below assumed. The accident did not occur because of any condition that was "necessary for [respondent] to perform his duties," and Norfolk Southern did not argue or suggest that it did. *Taylor* v. *Burlington N. R.R.*, 787 F.2d 1309, 1316 (9th Cir. 1986) (Kennedy, J.). To the contrary, Norfolk Southern argued that respondent *did not* have to ride the rail car, but instead could have safely walked or at least have ridden on the opposite side of the lead car, away from the standing cars he had left in the foul of the track on which he was riding. *See* Pet. 8.

("Although respondent presents two alternative grounds for the affirmance of the decision below, we decline to address these claims at this stage in the litigation." (footnote omitted)). Indeed, the Court routinely adopts this approach.[3]

Finally, respondent asserts that the fact that the ruling below is from an intermediate state appellate court should insulate it from this Court's review. But there is no such rule or practice. The Court routinely grants cases in this posture—indeed, it has reviewed a number of FELA cases arising from lower state courts. See, *e.g., Norfolk S. Ry.* v. *Sorrell*, 549 U.S. 158 (2007) (involving certiorari to the Court of Appeals of Missouri); *Hiles*, 516 U.S. 400 (certiorari to the Appellate Court of Illinois); *Ayers*, 538 U.S. 135 (certiorari to West Virginia trial court). Moreover, the Illinois Supreme Court has already addressed the question presented and is unlikely to revisit its conclusion. See *Schultz* v. *Ne. Ill. Reg'l Commuter R.R.*, 201 Ill. 2d 260, 283 (2002). The fact that the decision below was rendered by an intermediate appellate court and the Illinois Supreme Court did not grant discretionary review *again* "should make no difference." *Arizona* v. *Kempton*, 501 U.S. 1212, 1212 (1991) (White, J., dissent from denial of certiorari). And far from affecting "only one district of Illinois's intermediate appellate court," Opp. 20, the

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[3] *Compare* Brief in Opposition at 35-38, *Limelight Networks, Inc.* v. *Akamai Techs., Inc.*, No. 12-786 (U.S. Apr. 3, 2013) (raising unaddressed alternative ground for affirmance in opposition to certiorari), *with Limelight Networks, Inc.* v. *Akamai Techs., Inc.*, 134 S. Ct. 2111, 2120 (2014) (reversing judgment on the question presented and declining to address respondents' argument regarding alternative ground for affirmance); *compare* Brief in Opposition at 11-22, *Fitzgerald* v. *Barnstable Sch. Comm.*, No. 07-1125 (U.S. May 5, 2008) (same), *with Fitzgerald* v. *Barnstable Sch. Comm.*, 555 U.S. 246, 260 (2009) (same).

decision below implicates a wide-ranging disagreement between federal appellate courts and state courts of last resort affecting numerous jurisdictions, see Pet. 10-14. And that is precisely why this Court's review is so critical.

CONCLUSION

For the foregoing reasons, certiorari should be granted.

Respectfully submitted,

ROGER A. PETERSEN
LAURA D. HUNT
CHRISTINE R. HARDY
LAW DEPARTMENT
NORFOLK SOUTHERN CORPORATION
3 Commercial Place
Norfolk, VA 23510
(757) 629-2892

CARTER G. PHILLIPS*
WILLIAM R. LEVI
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000
cphillips@sidley.com

Counsel for Petitioner

* Counsel of Record

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