

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

Leopoldo Mendoza-Gomez,
Applicant,

v.

*Union Pacific Railroad Company, Individually and
Successor-in-Interest to Southern Pacific Transportation Company,*
Respondent.

**APPLICATION FOR AN EXTENSION OF TIME WITHIN WHICH
TO FILE PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT**

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July 6, 2022

PARTIES TO THE PROCEEDINGS

Applicant, Leopoldo Mendoza-Gomez, was the Plaintiff in the district court and the Appellant in the court of appeals.

Respondent Union Pacific Railroad Company, Individually and Successor-in-Interest to Southern Pacific Transportation Company was the Defendant in the district court and the Appellee in the court of appeals.

/s/ Earl Landers Vickery
Earl Landers Vickery
Counsel for Applicant

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To the Honorable Samuel A. Alito, Jr., Associate Justice of the Supreme Court of the United States and Circuit Justice for the Fifth Circuit:

Pursuant to 28 U.S.C. § 2101(c) and Rules 13.5, 22, and 30.3 of the Rules of this Court, Applicant Leopoldo Mendoza-Gomez, respectfully requests a 59-day extension of time, up to and including October 6, 2022, within which to file a petition for a writ of certiorari in this case to review the judgment of the United States Court of Appeals for the Fifth Circuit. The court of appeals entered its judgment on April 14, 2022 (the court of appeals' opinion, appearing at 2022 WL 1117698, is attached hereto as Exhibit A; the denial of Applicant's motion for rehearing is attached as Exhibit B). The petition would be due on August 8, 2022. This application is made at least 10 days before that date. This Court's jurisdiction would be invoked under 28 U.S.C. § 1254(1).

1. This case involves an important issue of statutory interpretation that has given rise to a split of authority in the federal circuits. The Federal Employers' Liability Act ("FELA"), 45 U.S.C. § 51 *et seq.*, expressly provides:

Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any [common carrier](#) to exempt itself from any liability created by this chapter, shall to that extent be void:

* * *

45 U.S.C. § 55.

2. While this section prohibits a contract that limits a railroad's liability under FELA, this Court has drawn a distinction between a contract that resolves an "existing controversy" on the one hand and one that attempts to "exempt from liability" on the other. Railroad workers and railroads may settle claims "[w]here controversies exist as to whether there is liability, and if so for how much." *Callen v. Pennsylvania R. Co.*, 332 U.S. 625, 631 (1948). Absent a bona fide controversy, however, "[t]he Act expressly prohibits covered carriers from adopting any regulation, or entering into any contract, to limit their FELA liability." *Atchison, Topeka, and Santa Fe Ry. Co. v. Buell*, 480 U.S. 557, 561 (1987) (italics added).

3. Thus, a railroad can certainly settle an existing controversy and obtain a release of claims within that existing controversy without violating 45 U.S.C. § 55. But the Court has not directly addressed the proper *scope* of the statutory prohibition in the context of a release, i.e., how far an "existing controversy" extends when settling a claim under FELA. "Although the Supreme Court in *Callen* refused to void the releases executed in compromise of an employee's claims, the Court has not had occasion to explain how wide a net its ruling casts." *Wicker v. Consolidated Rail Corp.*, 142 F.3d 690, 698 (3d Cir. 1998).

4. The federal circuits have fashioned at least three different interpretations. The Third Circuit has interpreted section 55 and *Callen* to allow only the release of an existing, specific injury. "To be valid, a release must reflect a bargained-for settlement of a *known claim for a specific injury*, as contrasted with an attempt to extinguish potential future claims the employee might have arising from

injuries known or unknown by him.” *Babbitt v. Norfolk & W. Ry. Co.*, 104 F.3d 89, 93 (6th Cir. 1997) (italics added).

5. A year after *Babbitt*, the Sixth Circuit considered the enforceability of a general release in the face of section 55, acknowledging that “[s]ome courts . . . have held that general releases do not contravene the purposes of FELA and may bar a subsequent claim,” while “[o]thers [including *Babbitt*] have refused to allow a defendant to use a previously executed general release to block a subsequent FELA claim.” *Wicker*, 142 F.3d at 699. While acknowledging the predictability provided by the bright-line test in *Babbitt*, *id.* at 700, the Sixth Circuit rejected the Third Circuit’s approach, focusing not on “known injuries,” but on “known risks.” The court held that parties may permissibly release any claims related to the known *risks* involved in the existing controversy, whether or not those risks had manifested in a present injury. *Id.* at 701. Courts have continued to struggle with the differing tests under *Babbitt* and *Wicker* in the almost 25 years since these opinions were issued. *E.g.*, *Ribbing v. Union Pac. R.R. Co.*, 484 F. Supp. 3d 676, 680 (D. Neb. 2020) (“There is a split in authority as to the validity of a release of future claims under the FELA.”).

6. To complicate matters further, in the case at bar, the Fifth Circuit has taken its own road. It cites neither *Babbitt* nor *Wicker*, but reads *Callen* to hold that section 55 does not preclude general releases at all. *Mendoza-Gomez v. Union Pac. R.R. Co.*, No. 21-20397, 2022 WL 1117698, at *3 (5th Cir. Apr. 14, 2022) (holding that this Court has rejected the “precise argument” that 45 U.S.C. § 55 “prohibits common carriers from exempting themselves from liability through contractual agreements.”).

7. The case at bar presents an opportunity for the Court to resolve the circuit split and to address the permissible scope of a release of future claims under 45 U.S.C. § 55. Significantly, in the asbestos context, this Court has recognized the “separate disease rule,” which establishes that non-malignant claims for asbestos exposure and claims for malignancies, i.e., cancer, that subsequently develop from that exposure, are legally distinct claims. *Norfolk & W. Ry. Co. v. Ayers*, 538 U.S. 135, 152 (2003). This rule has developed because of the “special problem posed by latent-disease cases,” such as the case at bar. *Id.* at 152 n. 12. The acknowledged legal distinction with respect to such issues as limitations and res judicata makes this case an ideal vehicle in which to address the release of claims for existing injuries as compared to claims for existing risks that an injury will subsequently develop.

8. Applicant settled a non-malignant claim for occupational exposure and signed a release in 2012. Union Pacific required that he sign a release that facially included the exposure claim, as well as “fear of cancer,” which the Court recognized as an element of an exposure claim in *Ayers*. *Ayers*, 538 U.S. at 157. This was permissible. But the release also included a release of claims of the actual development of cancer. Applicant did not have cancer in 2012, and was not diagnosed with lung cancer until 2017. This case therefore presents an important question as to whether a release of a legally distinct claim based on cancer that had not developed and had not been diagnosed at the time of the release violates 45 U.S.C. § 55.

9. Applicant seeks a 59-day extension to file a certiorari petition, for reasons personal to Applicant’s Counsel of Record. Counsel’s 14-year old son’s water

polo team has qualified for the Junior Olympics in San Jose, California, and Counsel's family has planned for months to drive to California, transporting both his son and another member of the team. Other family members will fly over to meet them, hoping to enjoy an extended family vacation after Junior Olympics ends. Counsel plans to leave by July 13, and expects to return home on August 15, meaning that the petition for certiorari is currently due as he is driving home. Complicating matters further, Counsel had symptoms of COVID on July 1, and tested positive on July 3. This has affected the work that he will reasonably be able to accomplish prior to leaving.

10. Counsel for Applicant has conferred with Counsel for Union Pacific. While Union Pacific does not endorse the legal discussions in this Application, it does not oppose the request for extension itself.

Accordingly, applicant respectfully requests a 59-day extension of time, up to and including October 6, 2022, within which to file a certiorari petition in this case.

Respectfully submitted,

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