

IN THE

Supreme Court of the United States

BREAYONNA AARON, INDIVIDUALLY AND ON BEHALF OF RICHIE
TERRELL AARON, JR., DECEASED AND ON BEHALF OF HER MINOR
CHILDREN M.A., R.A. AND L.A.; M.A., BY AND THROUGH NEXT
FRIEND, BREAYONNA AARON; R.A., BY AND THROUGH NEXT FRIEND
BREAYONNA AARON; L.A., BY AND THROUGH NEXT FRIEND
BREAYONNA AARON,

Petitioners,

v.

NATIONAL RAILROAD PASSENGER CORPORATION,
DOING BUSINESS AS AMTRAK,

Respondent.

*On Petition for A Writ of Certiorari to
the United States Court of Appeals for the Eighth Circuit*

**OPPOSITION OF NATIONAL RAILROAD
PASSENGER CORP. TO PETITION
FOR WRIT OF CERTIORARI**

Jerry A. Cuomo

Counsel of Record

Mark S. Landman

Gerald T. Ford

LANDMAN CORSI BALLAINE

& FORD P.C.

Attorneys for Respondent

One Gateway Center, 22nd Floor

Newark, New Jersey 07102

973-623-2700

jcuomo@lcbf.com

mlandman@lcbf.com

gford@lcbf.com

September 11, 2026

CORPORATE DISCLOSURE STATEMENT

Pursuant to S. Ct. R. 29.6, National Railroad Passenger Corporation d/b/a Amtrak states that it is a District of Columbia corporation that was authorized to be created by the Rail Passenger Service Act, 49 U.S.C. §24101 et seq.

Amtrak has no parent corporation, and no publicly held corporation owns 10% or more of Amtrak's stock.

Amtrak has three wholly owned subsidiaries: Passenger Railroad Insurance Limited (PRIL), Washington Terminal Company (WTC), and NERI PCC, Inc. (NERI).

The United States holds, through the U.S. Secretary of Transportation, 100% of Amtrak's preferred stock (109,396,994 shares at \$100 par value). Amtrak's common stock (9,385,694 shares at \$10 par value) is held by: American Premier Underwriters, Inc. (55.8%; a wholly owned, not publicly traded, subsidiary of American Financial Group, Inc., which is publicly traded); Burlington Northern and Santa Fe LLC (35.7%; a wholly-owned, not publicly traded, subsidiary of Berkshire Hathaway, which is publicly traded); Canadian Pacific Railway (6.3%); and Canadian National Railway (2.2%). None of Amtrak's stock is publicly traded.

TABLE OF CONTENTS

	<i>Page</i>
CORPORATE DISCLOSURE STATEMENT	i
TABLE OF AUTHORITIES	vi
INTRODUCTION	1
COUNTERSTATEMENT OF THE CASE	4
A. Relevant Evidence At Trial	5
1. Amtrak’s Investigation	5
2. Mr. Aaron’s Injuries	6
3. Evidence of Prior Crimes	7
4. Amtrak’s Security Practices	9
B. The Jury’s Verdict and Amtrak’s Post-Trial Motions	10
C. Appeal to the Eighth Circuit	10
REASONS FOR DENYING THE PETITION	12
I. THE COURT SHOULD NOT GRANT CERTIORARI TO ADDRESS WHETHER THE FEDERAL OR MISSOURI “SUFFICIENCY OF THE EVIDENCE” STANDARD APPLIES	12

	<i>Page</i>
A. Petitioners Failed to Preserve this Issue for Review	12
B. The Courts of Appeals are Not Divided on the Applicable “Sufficiency of the Evidence” Standard in Diversity Cases	17
C. This Court Decided in <i>Berk</i> When a Federal Rule of Civil Procedure Displaces State Law; “Percolation” in the Lower Courts is Required Before this Court Should Reexamine <i>Berk</i>	19
D. This Case is Not an Appropriate Vehicle for Review of the Applicable “Sufficiency of the Evidence” Standard in Diversity Cases	24
II. THIS COURT SHOULD NOT GRANT CERTIORARI TO REVIEW THE FEDERAL “SUFFICIENCY OF THE EVIDENCE” STANDARD	33
CONCLUSION.....	39

APPENDIX

Excerpt from the Motion by Amtrak for Judgment as a Matter of Law at the Close of Plaintiffs' Evidence and Memorandum in Support, dated January 29, 2024	1a
Excerpt from the Plaintiffs' Trial Brief on Issue of Duty as a Matter of Law, dated January 30, 2024	5a
Excerpt from Defendant National Railroad Passenger Corp.'s Written Suggestions in Support of Its Motion for Judgment as a Matter of Law, or, in the Alternative, a New Trial, dated April 23, 2024	11a
Excerpt from Plaintiffs' Suggestions in Support of Response to Defendant's Motion for Judgment as a Matter of Law or, in the Alternative, a New Trial, dated June 13, 2024	16a
Excerpt from Brief for Defendant-Appellant in Eighth Circuit, dated November 7, 2024	24a

Excerpt from Brief of the Appellees and Cross-Appellants in Eighth Circuit, dated February 6, 2025.....	30a
Petition for Rehearing En Banc, dated January 28, 2026.....	36a

TABLE OF AUTHORITIES

Page(s)

Cases

<i>Arizona v. Evans</i> , 514 U.S. 1 (1995)	24
<i>Berk v. Choy</i> , 607 U.S. 187 (2026)	2, 19-24
<i>Brown v. Texas</i> , 522 U.S. 940 (1997)	23
<i>Burlington Northern R.R. Co. v. Woods</i> , 480 U.S. 1 (1987)	23
<i>Byrd v. United States</i> , 584 U.S. 395 (2018)	13
<i>Cadle v. GEICO Gen. Ins. Co.</i> , 838 F.3d 1113 (11th Cir. 2016)	37
<i>Coomer v. Kansas City Royals Baseball Corp.</i> , 437 S.W.3d 184 (Mo. 2014).....	27
<i>Crues v. KFC Corp.</i> , 729 F.2d 1145 (8th Cir. 1984)	26, 27
<i>Cutter v. Wilkinson</i> , 544 U.S. 709 (2005)	26, 33
<i>Dick v. New York Life Ins. Co.</i> , 359 U.S. 437 (1959)	17, 25, 36, 38

	<i>Page(s)</i>
<i>Expressions Hair Design v. Schneiderman</i> , 581 U.S. 37 (2017)	30
<i>Food & Drug Admin. v. Wages & White Lion Invs., L.L.C.</i> , 604 U.S. 542 (2025)	15
<i>Foster v. Time Warner Entm't Co.</i> , 250 F.3d 1189 (8th Cir. 2001)	13
<i>Gasperini v. Center for Humanities, Inc.</i> , 518 U.S. 415 (1996)	21, 23
<i>Gonzalez v. Walgreen Co.</i> , 140 F.4th 663 (5th Cir. 2025)	37
<i>Granfinanciera, S.A. v. Nordberg</i> , 492 U.S. 33 (1989)	15
<i>Hanna v. Plumer</i> , 380 U.S. 460 (1965)	19, 22
<i>Houston Oil Co. v. Goodrich</i> , 245 U.S. 440 (1918)	35
<i>Jay v. Boyd</i> , 351 U.S. 345 (1956)	16
<i>Johnson v. United States</i> , 318 U.S. 189 (1943)	16
<i>L.A.C. v. Ward Parkway Shopping Ctr. Co., L.P.</i> , 75 S.W.3d 247 (Mo. 2002)	28

<i>Liszewski v. Target Corp.</i> , 374 F.3d 597 (8th Cir. 2004)	30
<i>Love v. Hardee's Food Sys., Inc.</i> , 16 S.W.3d 739 (Mo. Ct. App. 2000)	14
<i>Madden v. C&K Barbecue Carryout, Inc.</i> , 758 S.W.2d 59 (Mo. 1988).....	28
<i>Madeira v. Affordable Hous. Found., Inc.</i> , 469 F.3d 219 (2d Cir. 2006).....	18
<i>Magnum Imp. Co. v. Coty</i> , 262 U.S. 159 (1923)	4
<i>McKnight v. Johnson Controls, Inc.</i> , 36 F.3d 1396 (8th Cir. 1994)	26
<i>Mercer v. Theriot</i> , 377 U.S. 152 (1964)	25, 27, 36
<i>Northern Sec. Co. v. United States</i> , 191 U.S. 555 (1903)	22
<i>Reeves v. Sanderson Plumbing Prods., Inc.</i> , 530 U.S. 133 (2000)	20, 34, 35
<i>Rice v. Sioux City Mem'l Park Cemetery</i> , 349 U.S. 70 (1955)	4
<i>Richardson v. Richardson-Merrell, Inc.</i> , 857 F.2d 823 (D.C. Cir. 1988)	17
<i>Ridgway v. Ford Dealer Computer Servs., Inc.</i> , 114 F.3d 94 (6th Cir. 1997)	18

<i>Roell v. Withrow</i> , 538 U.S. 580 (2003)	23
<i>Sanders v. Ahmed</i> , 364 S.W.3d 195 (Mo. 2012).....	31
<i>Serio-US Indus., Inc. v. Plastic Recovery Techs. Corp.</i> , 459 F.3d 1311 (Fed. Cir. 2006).....	34
<i>Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.</i> , 559 U.S. 393 (2010)	20, 23
<i>Stormo v. State Nat’l Ins. Co.</i> , 116 F.4th 39 (1st Cir. 2024), <i>cert. denied</i> , 145 S. Ct. 1430 (2025)	18
<i>Sutherland v. Elpower Corp.</i> , 923 F.2d 1285 (8th Cir. 1991)	27
<i>Tharp v. St. Luke’s Surgicenter-Lee’s Summit, L.L.C.</i> , 587 S.W.3d 647 (Mo. 2019).....	28
<i>Thomas & Betts Corp. v. New Albertson’s, Inc.</i> , 915 F.3d 36 (1st Cir. 2019).....	18
<i>Toporoff Eng’rs, P.C. v. Fireman’s Fund Ins. Co.</i> , 371 F.3d 105 (2d Cir. 2004).....	18
<i>United States v. Alvarez-Sanchez</i> , 511 U.S. 350 (1994)	13

<i>United States v. Johnston</i> , 268 U.S. 220 (1925)	35
<i>United States v. Oakland Cannabis Buyers' Coop.</i> , 532 U.S. 483 (2001)	26, 33
<i>United States v. Wells</i> , 519 U.S. 482 (1997)	16
<i>Ventas, Inc. v. HCP, Inc.</i> , 647 F.3d 291 (6th Cir. 2011)	18
<i>Veritiv Operating Co. v. Phoenix Paper Wickliffe, L.L.C.</i> , No. 5:21-cv-170-BJB, 2026 WL 891251 (W.D. Ky. Mar. 31, 2026).....	21
<i>Walter v. Bruhn</i> , 40 F. App'x. 244 (7th Cir. 2002)	17
<i>Wilkerson v. McCarthy</i> , 336 U.S. 53 (1949)	36

Rules and Other Authorities

Fed. Rule of Civ. Proc. 50(a)	12, 20
Fed. Rule of Civ. Proc. 50(b)	1, 10, 12
<i>Wright & Miller's Federal Practice & Procedure</i> § 2524 (3d ed. 2026)	34

INTRODUCTION

In this wrongful death action arising under Missouri substantive law, Petitioners claim that Respondent National Railroad Passenger Corp. (“Amtrak”) is liable for the unprovoked shooting of Richie Aaron by defendant Marquise Webb (“Webb”) aboard Amtrak’s Missouri River Runner train.

Petitioners Breayonna Aaron (Mr. Aaron’s wife) and their minor children seek a writ of certiorari for this Court to review the judgment of the Eighth Circuit, which: (1) reversed the district court’s denial of Amtrak’s post-trial motion for judgment as a matter of law (“JMOL”) under Federal Rule of Civil Procedure 50(b); and (2) directed entry of judgment for Amtrak. In reaching that decision, the Eighth Circuit held that Petitioners failed to proffer sufficient evidence at trial to create a jury question on duty and causation.

Represented by new appellate counsel, Petitioners ask this Court to review arguments they never presented below. Petitioners contend that: (1) the Eighth Circuit erred in applying Rule 50’s federal JMOL standard instead of the Missouri state standard; and (2) even if the court was right to apply the federal standard, it “qualitatively assessed” and “re-weighed” the trial evidence—an approach under Rule 50 which Petitioners claim some Courts of Appeals have erroneously “embraced.”

This Court should not grant certiorari. First, Petitioners failed to preserve either issue in the district court or the Eighth Circuit. Indeed, Petitioners asked both courts to apply Rule 50’s *federal* “sufficiency of the evidence” standard. As a result, that is what both courts did, without mentioning the Missouri standard. Petitioners also moved the Eighth Circuit for a rehearing, but never argued that the court should have applied the Missouri standard or that it improperly “reweighed” the trial evidence.

Second, there is no genuine division among the Courts of Appeals on either issue. Nearly all Courts of Appeals apply Rule 50’s “sufficiency of the evidence” standard in diversity cases. Even if there was a real Circuit split, this Court’s recent decision in *Berk v. Choy*, 607 U.S. 187 (2026) confirms that a Federal Rule of Civil Procedure on point will displace a corollary state rule. Here, Rule 50 is on point, and displaces all state “sufficiency of the evidence” standards.

Similarly, the Courts of Appeals are not in “disarray” over the proper inquiry under Rule 50’s “sufficiency of the evidence” standard. Although the Courts of Appeals may express their inquiries using different verbiage, they have the same focus: if, without weighing the evidence or witness credibility, a reasonable jury could only rule in favor of the defendant, JMOL is appropriate.

Third, this case is a poor vehicle for this Court to review either issue. Rule 50’s “sufficiency of the evidence” standard and the Missouri standard are the

same. As a result, the Eighth Circuit has repeatedly held that it need not decide which one applies in a diversity action applying Missouri substantive law. Under either standard, JMOL in favor of Amtrak was appropriate.

Lastly, this Court should decline Petitioners' invitation to dive into the trial record to second-guess the Eighth Circuit's "sufficiency of the evidence" rulings. Long ago, this Court made clear that its role is not to recanvass trial evidence—that task falls exclusively to the Courts of Appeals.

In any event, the Eighth Circuit did not "qualitatively assess" and "reweigh" any trial evidence. It evaluated whether Petitioners met the elements of their wrongful death claim. This was the court's proper role in assessing a motion for JMOL under Rule 50. And, the court correctly found glaring shortcomings in Petitioners' trial evidence on the duty and causation elements of their claim.

On duty, Missouri law required Petitioners to proffer evidence of sufficiently similar and numerous prior violent crimes on the River Runner, such that Mr. Aaron's shooting was foreseeable. Petitioners fell far short, mustering evidence at trial of only a single prior crime on the River Runner, which did not even involve bodily injury.

On causation, Missouri law required Petitioners to proffer expert medical testimony that, "but for" Amtrak's alleged negligence, Mr. Aaron would have survived his wounds. Petitioners' medical expert of-

ferred no such testimony. In fact, the expert testified that, even if Mr. Aaron received immediate medical treatment, he had, at best, only a 14% chance of surviving.

This Court does not grant certiorari “except in cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeals.” *Rice v. Sioux City Mem’l Park Cemetery*, 349 U.S. 70, 79 (1955). This case does not implicate any overarching public interest or a “real and embarrassing” conflict among the Courts of Appeals. The issues here are of importance only to the parties. At bottom, Petitioners simply disagree with the Eighth Circuit’s ruling. But certiorari jurisdiction “was not conferred upon this court merely to give the defeated party in the Circuit Court of Appeals another hearing.” *Magnum Imp. Co. v. Coty*, 262 U.S. 159, 163 (1923).

COUNTERSTATEMENT OF THE CASE

Amtrak’s Missouri River Runner train (“River Runner”) operates between St. Louis and Kansas City, Missouri. On January 14, 2022, Mr. Aaron and Webb boarded an Amtrak train in Normal, Illinois, and then switched to the River Runner in St. Louis, heading west into Kansas City. *See* Tr. 984. While the train was stopped at the station in Lee’s Summit, Missouri, Webb shot Mr. Aaron five times without provocation, and then disembarked the train. *See* Tr. 99, 675, 1309. No witnesses saw the shooting occur.

In March 2022, Mrs. Aaron filed suit in the Western District of Missouri against Amtrak and Webb. As to Amtrak, Mrs. Aaron alleged negligence and wrongful death based on Amtrak's alleged failure to: (a) protect Mr. Aaron from a foreseeable crime; (b) warn him of inadequate security; (c) adequately investigate; and (d) timely seek medical assistance for Mr. Aaron or discover his need for same. Pet. App. 6a.

A. Relevant Evidence At Trial

1. Amtrak's Investigation

Trial commenced on January 22, 2023. At Lee's Summit, several passengers told Amtrak's crew that someone set off fireworks and left the train. *See* Tr. 1113, 1198. With one exception, no passenger told the crew at Lee's Summit that they heard gunshots. Pet. App. 3a; Tr. 235. Although some passengers privately believed they had heard gunshots, they did not report that to the crew. Tr. 461; CA8 App. 410.

At Lee's Summit, Amtrak Conductor Issac Bowser did a walkthrough of the train. He found no injuries, but observed a "fireworks smell." Tr. 1197, 1305. Amtrak Conductor Marsha Lively believed she heard fireworks,¹ then walked the platform, opened several bathroom doors and inspected under the train. She found nothing suspicious. Tr. 1106-09.

¹ Petitioners misleadingly state that Lively heard "rapid fire." Pet. 7. They omit that, in using that term, Lively meant that she heard fireworks, not gunshots. Tr. 1111.

Amtrak's conductors confirmed the passengers were "saying the person who set the fireworks off got off the train." Tr. 1116, 1201. The crew concluded that any "safety issue was finished" and there was no reason to remain in Lee's Summit. Tr. 1117-19, 1300. As such, the train departed for the next station located in Independence, Missouri. *Id.*

It was undisputed that Amtrak's crew was unaware at Lee's Summit that Mr. Aaron had been shot. Tr. 974-75. Had the crew known anyone was injured, they would not have left Lee's Summit. Tr. 1164.

After the train departed, Conductor Bowser began taking formal statements from passengers five minutes after Mr. Aaron had—unknownst to anyone—been shot. Tr. 1226-28. When Bowser reached Mr. Aaron's seat, Bowser found him unresponsive, radioed Lively for assistance and immediately started CPR. Tr. 1125-26, 1210-12. Bowser continued CPR until the train arrived at Independence, where paramedics met the train at the platform at Amtrak's request. Tr. 1126-27, 1148-49, 1212-15.

2. Mr. Aaron's Injuries

The medical examiner testified that Mr. Aaron died of five gunshots which "perforated" his heart. Tr. 648-50. Petitioners' medical expert (Dr. Peter Brokish) testified that Mr. Aaron died of a "tension

pneumothorax,”² which could have been halted by an immediate “needle decompression.” Tr. 763-69. Dr. Brokish testified that paramedics needed to perform this procedure; he did not, and could not, say that Amtrak’s crew was qualified to administer it. Tr. 766. Dr. Brokish testified that, even if Mr. Aaron received immediate treatment, his chances of surviving were only “between 4 and 14 percent.” Tr. 772.

Based on Dr. Brokish’s testimony, Petitioners claim Mr. Aaron’s chances of survival “could have been ‘drastically different’” because of “favorable aspects of [his] physique.” Pet. 9; *see* Tr. 803-04. Dr. Brokish, however, never testified that Mr. Aaron would have survived, even *with* immediate medical treatment.

3. Evidence of Prior Crimes

On the issues of foreseeability and duty, Petitioners presented no evidence of a prior shooting on the River Runner. Pet. App. 8a-10a. They presented evidence of only a *single prior crime* on that train. *Id.* at 8a; Tr. 950-51. On December 4, 2020, on the Independence station platform, a passenger brandished a three-inch knife at an Amtrak conductor, but did not make physical contact with or injure him. Pet. App. 8a; CA8 App. 711-15.

² A tension pneumothorax “is a collection of air under pressure” that “leaks out of the holes in the lung,” then “forces air out into the pleural cavity” and “compresses the lung.” Tr. 702-03.

Without evidence of other prior crimes on the River Runner, Petitioners tried to establish foreseeability with crime statistics for Chicago, St. Louis and Kansas City, on the theory that Amtrak's train "passes through" those cities. Tr. 503-08. Petitioners' liability expert claimed Mr. Aaron's shooting was foreseeable because murders are a "significant problem" in those cities. Tr. 517. Notably, the River Runner does *not* run through Chicago (Amtrak's separate Lincoln Service runs from Chicago to St. Louis, where it connects to the River Runner). Pet. App. 17a.

Petitioners assert that they presented "76 violent crimes on Amtrak stations and trains in the Division." Pet. 28. The referenced "Division" is Amtrak's *22-state* Central Division, which includes Lee's Summit where Mr. Aaron was shot. That geographically sprawling Division includes Tennessee to the East, Minnesota to the North, Louisiana and Texas to the South, and New Mexico and Arizona to the West. *See* Pet. Sep. CA8 App. 489.

Petitioners' expert also testified about data Amtrak collected as to crimes throughout Illinois and Missouri. CA8 App. 716-18; Tr. 218, 885-87, 997. Those crimes did not occur on the River Runner, but rather at food courts, ticket counters, waiting areas, offices, concourses, and other Amtrak trains. They also bear no resemblance to Mr.'s Aaron shooting, and instead involved: (a) individuals fighting in a taxi line; (b) a customer at McDonald's splashing water on an employee because his french fries were not fresh; (c) a verbal altercation between Amtrak employees in

the locker room; and (d) several non-violent incidents involving intoxicated passengers. *See, e.g.*, Pet. Sep. CA8 App. 540, 569, 573, 593-95, 619-23, 683-85 (Amtrak Police Department reports).

4. Amtrak's Security Practices

Petitioners claim Amtrak had “no security officers aboard the train.” Pet. 9. It was undisputed, however, that Amtrak police did ride the River Runner periodically. Tr. 551; CA8 App. 492. It was also not disputed that Amtrak does not own many of the stations where it operates, including St. Louis, Kansas City, and Normal, Illinois (where Webb and Mr. Aaron boarded Amtrak's train). Tr. 936. At those stations, the owners provide armed security guards. Tr. 1077-78; CA8 App. 479-80. Where Amtrak owns the stations (as in Chicago), its police officers provide security. Tr. 559; CA8 App. 495.

Petitioners also claim Amtrak had no procedures “to screen for weapons on board its trains anywhere along the 500 mile trek from Chicago to St. Louis to Kansas City.” Pet. 9. Petitioners' liability expert (in his report and during deposition), however, did not cite “one surface transportation company in the [U.S.]” that screens passengers. Tr. 917-18. He was also unaware of any federal or state regulations that require such screening—because there are none. *Id.* As such, he conceded Petitioners were asking the jury to “impose a standard that does not exist anywhere in the [U.S.]” *Id.*

B. The Jury’s Verdict and Amtrak’s Post-Trial Motions

On January 31, 2024, the jury awarded compensatory damages of \$8,800,000, allocated 90% fault to Amtrak and 10% to Webb, and found Amtrak liable for \$150,000,000 in punitive damages. *See* Pet. App. 3a-4a. On April 23, 2024, under Rule 50(b), Amtrak renewed its motion for JMOL seeking dismissal of all claims and, in the alternative, moved for a new trial or remittitur of the punitive damages award. *Id.*

On July 16, 2024, the district court denied Amtrak’s motions for JMOL and a new trial, but remitted punitive damages from \$150,000,000 to \$35,200,000. Pet. App. 16a-27a.

C. Appeal to the Eighth Circuit

Amtrak appealed, asking the Eighth Circuit to reverse the district court and enter JMOL dismissing Petitioners’ claims because the trial evidence failed to satisfy the duty and causation elements of Petitioners’ wrongful death claim. On December 31, 2025, applying the federal JMOL standard and Missouri substantive law, the Eighth Circuit reversed and directed entry of JMOL for Amtrak. Pet. App. 15a.

The court found that Amtrak did not owe a duty to Mr. Aaron because the shooting was unforeseeable. *Id.* at 6a-12a. The court reasoned that Petitioners failed to “present evidence [at trial] that Amtrak experienced prior violent crime on the relevant premises, which was the River Runner” and had presented

evidence of only one “dissimilar incident” on that train. *Id.* at 8a. As such, there were “not sufficiently ‘numerous, similar, and recent [violent] crimes’ to put Amtrak on reasonable notice of the danger of unprovoked shootings on the River Runner.” *Id.*

The court also held that Petitioners’ reliance on prior crimes in Amtrak’s 22-state Central Division “seek[s] to expand the relevant premises too far” because, “[w]hile trains may change location frequently, crime in one location does not necessarily indicate crime in another.” Pet. App. 9a-10a. Similarly, as to crimes in cities such as St. Louis and Kansas City, the court held that “we cannot look to crime statistics in cities the River Runner merely passes through.” *Id.* at 10a.

The Eighth Circuit also held that simply because Amtrak implemented security measures, that did not mean it was charged with foreseeing all crimes aboard the River Runner. *Id.* at 10a-11a.

The Eighth Circuit also held that Amtrak was entitled to JMOL because there was no basis for the jury to “conclude Amtrak’s alleged negligence was the but-for cause of Aaron’s death.” *Id.* at 12a-15a. Specifically, Dr. Brokish’s testimony that Mr. Aaron’s chances of surviving were only “between 4 and 14 percent,” did not provide “the jury with a sufficient basis to conclude Aaron would not have died but for Amtrak’s negligence.” *Id.* at 13a. Instead, that inadequate expert testimony “required the jury to make an impermissible speculative inference that Aaron would

have survived had Amtrak promptly summoned care.” *Id.* at 14a.

On January 28, 2026, Petitioners applied for rehearing, which the Eighth Circuit denied. Pet. App. 28a-29a; Resp. App. 36a-52a.

REASONS FOR DENYING THE PETITION

I. THE COURT SHOULD NOT GRANT CERTIORARI TO ADDRESS WHETHER THE FEDERAL OR MISSOURI “SUFFICIENCY OF THE EVIDENCE” STANDARD APPLIES

A. Petitioners Failed to Preserve this Issue for Review

1. The district court and the Eighth Circuit both applied the federal “sufficiency of the evidence” standard, without discussing the Missouri standard. *See* Pet. App. 4a-5a, 19a-20a. They did so because Petitioners did not raise or preserve their current position that there is a conflict between the federal and Missouri standards and that the Missouri standard controls.

In the district court, Amtrak moved for JMOL under Rules 50(a) and 50(b) under the federal standard. Resp. App. 1a-4a, 11a-15a. In opposition, Petitioners never asked the district court to apply the Missouri standard. *Id.*, 5a-9a, 20a-22a. To the contrary, they cited the federal standard. *Id.* at 20a-21a. As one would expect, therefore, the district court decided Amtrak’s JMOL motion under the federal standard,

without any reference to the Missouri standard. Pet. App. 19a-20a.

Petitioners’ failure to argue that the district court should apply Missouri’s standard bars all appellate review of this issue, including review by this Court. This Court is “a court of review, not of first view” and “it is generally unwise to consider arguments in the first instance” that were not raised before the district court and Court of Appeals. *Byrd v. United States*, 584 U.S. 395, 404 (2018); *see United States v. Alvarez-Sanchez*, 511 U.S. 350, 360 (1994) (Court would not review argument not raised before district court or Court of Appeals).

2. Petitioners also failed to preserve this issue in their appellate briefs in the Eighth Circuit. In response to Amtrak’s citation of the federal JMOL standard in its appellate brief (Resp. App. 26a-28a), Petitioners claim to have “urged” the Eighth Circuit to apply “Missouri’s sufficiency-of-the-evidence standard, . . . under which courts overturn the verdict only where there is a ‘complete absence of probative fact’ supporting it” Pet. 4, 10 (citing CA8 Appellee Br. 22). They did no such thing.

Petitioners’ first recitation of any standard was that JMOL “only lies if there is ‘a complete absence of probative facts to support the conclusion reached so that no reasonable juror could have found for the nonmoving party.’” Resp. App. 33a. They *did not cite Missouri law* for that proposition. They cited *Foster v. Time Warner Entm’t Co.*, 250 F.3d 1189, 1194 (8th

Cir. 2001), in which the Eighth Circuit applied the *federal standard* for “sufficiency of the evidence.”

To the extent Petitioners referenced any formulation of Missouri’s “sufficiency of the evidence” standard, they did so in one paragraph on the next page of their appellate brief. Resp. App. 34a. And, Petitioners did *not* argue that Missouri applied a “complete absence of probative fact” standard (as they now contend in their Petition). Rather, they described Missouri law as applying a “substantial evidence” standard. *Id.* (citing *Love v. Hardee’s Food Sys., Inc.*, 16 S.W.3d 739, 742 (Mo. Ct. App. 2000) (“[s]ubstantial evidence is that which, if true, has probative force upon the issues, and from which the trier of facts can reasonably decide the case.”)).

But Petitioners never “urged” the court to apply the Missouri “sufficiency of the evidence” standard over the federal standard. In fact, they had just “urged” the court to apply the *federal* standard on the preceding page of their brief. Petitioners’ appeal brief is also devoid of any argument that: (a) there was any difference between the federal and Missouri standards; (b) the application of one standard over the other was outcome-determinative; or (c) the Missouri standard controlled over the federal standard under the *Erie* doctrine (or any other theory).

As such, the Eighth Circuit had no reason to view the applicable “sufficiency of the evidence” standard as a disputed or outcome-determinative issue controlled by the Missouri standard. Having been invited by Petitioners to apply the federal standard, the

Eighth Circuit did just that. Pet. App. 4a-5a.³ It did not discuss the Missouri state standard at all, let alone analyze whether it applied to Amtrak’s motion for JMOL instead of the federal standard. *Id.*

Petitioners’ mere recitation of one formulation of Missouri’s “sufficiency of the evidence” standard in their appellate brief—without any further discussion—did not preserve for review any alleged conflict between that standard and the federal standard. *See Food & Drug Admin. v. Wages & White Lion Invs., L.L.C.*, 604 U.S. 542, 565 (2025) (“without adequate briefing” on an issue “it would not be prudent to decide it here.”); *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 38 (1989) (“We decline to address this argument because respondent failed to raise it below and because the question it poses has not been adequately briefed and argued.”).

If Petitioners believed the federal and Missouri standards conflicted, and that the Missouri standard controlled, they were required to clearly explain that to the Eighth Circuit. By failing to brief this issue at all, much less with the required specificity, Petitioners failed to preserve it. *See Granfinanciera*, 492 U.S. at 39 (Court would not consider issue inadequately

³ Petitioners claim that the Eighth Circuit “declined” to apply Missouri’s sufficiency of evidence standard. Pet. 10. This is mischaracterization. Because Petitioners never asked the court to apply that standard in the first place, the Eighth Circuit never “declined” to apply it.

preserved below because “we lack guidance from the District Court or the Court of Appeals.”).

3. Petitioners again waived their current arguments when they petitioned the Eighth Circuit for rehearing. Resp. App. 36a-52a. They raised several grounds for rehearing, but *not* that the court failed to apply the Missouri “sufficiency of the evidence” standard. *See Jay v. Boyd*, 351 U.S. 345, 350 (1956) (where petitioner “apparently abandoned this allegation and argument in the Court of Appeals,” it was not before this Court).

4. Petitioners have also waived review of the applicable “sufficiency of the evidence” standard under the “invited error” doctrine. Under that doctrine, “a party may not complain on appeal of errors that he himself invited or provoked the district court to commit.” *United States v. Wells*, 519 U.S. 482, 488 (1997) (cleaned up);⁴ *see also Johnson v. United States*, 318 U.S. 189, 201 (1943) (party is not allowed to “pursue one course at the trial and then, when that has proved to be unprofitable, to insist on appeal that the course which he rejected at the trial be reopened to him.”).

⁴ In *Wells*, this Court held the “invited error” doctrine may not preclude review if the issue was “pressed [in] or passed on” by the Court of Appeals. 519 U.S. at 488. That exception does not apply here, as Petitioners never “pressed” this issue in the Eighth Circuit, nor did that court “pass on” it.

Petitioners invited both the district court and the Eighth Circuit to apply the federal standard. They cannot now claim that either court erred in failing to apply the Missouri standard.

In sum, Petitioners have waived review of Question Presented #1, as to whether the federal or Missouri state “sufficiency of the evidence” standard applied.

**B. The Courts of Appeals are Not Divided
on the Applicable “Sufficiency of the
Evidence” Standard in Diversity Cases**

Petitioners rely on this Court’s statement in 1959 that the “lower courts are not in agreement” on whether the federal or state “sufficiency of the evidence” standard applies in diversity actions. Pet. 12 (citing *Dick v. New York Life Ins. Co.*, 359 U.S. 437 (1959)). The lower court case law, however, has evolved in the ensuing 67 years. There is presently no “square” split among the Courts of Appeals, as Petitioners contend.

1. Petitioners admit the Third, Fourth, Fifth, Ninth, Tenth and Eleventh Circuits apply the federal standard. *See* Pet. 13-14. The District of Columbia Circuit does the same. *See, e.g., Richardson v. Richardson-Merrell, Inc.*, 857 F.2d 823, 825-27 (D.C. Cir. 1988).

2. Petitioners contend that the First and Seventh Circuits have “oscillated in applying a state or federal sufficiency test.” Pet. 15. But the Seventh Circuit now firmly applies the federal standard. *See Walter v.*

Bruhn, 40 F. App'x. 244, 246 (7th Cir. 2002) (“Although courts in this circuit formerly applied state standards . . . , we have since adopted the federal reasonable-person standard across the board”) (quotations omitted). The First Circuit has not squarely grappled with the issue, but has applied the federal standard in recent cases. See *Stormo v. State Nat’l Ins. Co.*, 116 F.4th 39, 45 (1st Cir. 2024), *cert. denied*, 145 S. Ct. 1430 (2025); *Thomas & Betts Corp. v. New Albertson’s, Inc.*, 915 F.3d 36, 60 (1st Cir. 2019).

Similarly, although the issue was unsettled in the Second Circuit, its recent cases also apply the federal standard. See *Madeira v. Affordable Hous. Found., Inc.*, 469 F.3d 219, 227 (2d Cir. 2006); *Toporoff Eng’rs, P.C. v. Fireman’s Fund Ins. Co.*, 371 F.3d 105, 108 (2d Cir. 2004).

In fact, as Petitioners concede, only the Sixth Circuit still applies the state “sufficiency of the evidence” standard in diversity cases. Pet. 12-13. Even that court, however, has repeatedly questioned the validity of its approach. See *Ventas, Inc. v. HCP, Inc.*, 647 F.3d 291, 314 n.11 (6th Cir. 2011) (“most if not all of our sister circuits disagree” and “appear to have the better view.”); *Ridgway v. Ford Dealer Computer Servs., Inc.*, 114 F.3d 94, 97 n.3 (6th Cir. 1997) (“Nearly all of our sister circuits have abandoned this dubious rule.”).

That only a single Court of Appeals still applies the state “sufficiency of the evidence” standard—and has repeatedly questioned that approach—demonstrates

that there is hardly a genuine split in the Courts of Appeals.

C. This Court Decided in *Berk* When a Federal Rule of Civil Procedure Displaces State Law; “Percolation” in the Lower Courts is Required Before this Court Should Reexamine *Berk*

This Court should not grant certiorari because its decision this year in *Berk v. Choy*, 607 U.S. 187 (2026), resolves this issue in favor of Rule 50’s “sufficiency of the evidence” standard.

1. In *Berk*, this Court confirmed that “a valid [Federal] Rule of Civil Procedure displaces contrary state law even if the state law would qualify as substantive under *Erie’s* test.” 607 U.S. at 192. In fact, when a Federal Rule “is on point, a federal court bypasses *Erie’s* inquiry altogether.” *Id.*; see *Hanna v. Plumer*, 380 U.S. 460, 469-70 (1965) (it is an “incorrect assumption that [*Erie*] constitutes the appropriate test of the validity and therefore the applicability of a Federal Rule of Civil Procedure. The *Erie* rule has never been invoked to void a Federal Rule.”).

This Court in *Berk* held that Delaware’s affidavit of merit statute did not apply in a diversity action because it conflicted with Federal Rule of Civil Procedure 8’s mandate that a plaintiff need only provide “a short and plain statement of the claim showing that [he] is entitled to relief.” 607 U.S. at 193 (alterations in original). To decide if a Federal Rule displaces a state rule, the question is whether both rules “at-

tempt to answer the same question.” *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 399 (2010). This Court has characterized that inquiry as “straightforward.” *Berk*, 607 U.S. at 192.

As Rule 8 did in *Berk*, Rule 50(a) provides a governing standard. JMOL is appropriate if, after a party is “fully heard,” the court “finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue.” *See Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 149 (2000) (articulating the standard for JMOL under Rule 50). This “answers the question” of when a claim should *not* be submitted to the jury in federal court: that is, if a plaintiff has failed to proffer a “legally sufficient evidentiary basis,” JMOL for the defendant is appropriate.

Petitioners contend that Rule 50 does not “answer the question” because it does not specifically define what constitutes a “legally sufficient evidentiary basis.” Pet. 19. Of course, this is a tacit admission that Rule 50 *does*, in fact, have a “sufficiency of the evidence” standard. Petitioners’ quarrel is not with the *existence* of a standard in Rule 50, but rather with the *specificity* of how that standard is described.

Simply because Petitioners believe the drafters of Rule 50(a) could have better defined the standard, does not mean it should be cast aside in favor of Missouri’s standard. Rule 50(a)’s “legally sufficient evidentiary basis” standard provides just as much specificity as Rule 8’s “short and plain statement” pleading standard. Rule 8 does not define what a

“short and plain statement” is either, but this Court in *Berk* still found it precise enough to displace Delaware state law.

Under this Court’s reasoning in *Berk*, Rule 50 neatly displaces state corollary rules “attempting to answer” when a defendant is entitled to JMOL and a claim should not be submitted to the jury. Indeed, based on *Berk*, at least one district court has already concluded that Rule 50’s federal standard for JMOL controls in diversity cases, not the state standard. *See Veritiv Operating Co. v. Phoenix Paper Wickliffe, L.L.C.*, No. 5:21-cv-170-BJB, 2026 WL 891251, at *1 n.1 (W.D. Ky. Mar. 31, 2026).

2. *Gasparini v. Center for Humanities, Inc.*, 518 U.S. 415 (1996), does not present the “same situation” as this case, as Petitioners suggest. Pet. 21-22. *Gasparini* held that New York’s state standard for determining when a jury verdict was excessive applied in federal diversity cases. As Petitioner concedes (Pet. 21-22), however, the relevant Federal Rule of Civil Procedure there (Rule 59, pertaining to motions for new trial) is *silent* on the excessiveness of jury verdicts. *See Gasparini*, 518 U.S. at 441 (Stevens, J., dissenting) (“there is no conceivable conflict between [Rule 59] and the application of the New York damages limit . . .”).

Applying the state rule in *Gasparini* made sense because Rule 59 did not “answer the question” of when a jury verdict is excessive. In contrast, Rule 50 is *not* silent on the federal standard for “sufficiency of the evidence” for purposes of JMOL motions. Rule

50's "legally sufficient evidentiary basis" standard is the federal standard, and it displaces all corollary state standards under *Berk*.

3. Amicus curiae Professor Paul Schiff Berman⁵ filed a brief that effectively moves the Court to reconsider *Berk*—a decision he criticizes as “troubling” and “the most mechanical possible formulation” of the Court’s *Erie* precedents. Amicus Br. 18. He portends that *Berk* “could be read to ignore state interests entirely” and that “the future of the *Erie* doctrine will . . . turn on whether *Berk* is properly limited to exceptional circumstances.” *Id.* at 20-21.

Berk does not mark a seismic shift in this Court’s *Erie* jurisprudence toward “ignoring” state interests. State interests may compel application of state law if there is no Federal Rule on point, as in *Gasparini*. But where a Federal Rule applies, it has long been this Court’s mandate—even before *Berk*—that it controls over a conflicting state law. See *Hanna*, 380 U.S. at 469-70 (“To hold that a Federal Rule of Civil Procedure must cease to function whenever it alters the mode of enforcing state-created rights would be to disembowel either the Constitution’s grant of power

⁵ Professor Berman asserts only an academic interest. He lacks any cognizable interest in the outcome of this case (including, for example, that its resolution may affect another matter in which he is interested). His amicus brief should be disregarded. See *Northern Sec. Co. v. United States*, 191 U.S. 555, 556 (1903) (denying request to submit amicus brief where “[i]t does not appear that applicant is interested in any other case which will be affected by the decision of this case.”).

over federal procedure or Congress' attempt to exercise that power in the Enabling Act."); *see also Burlington Northern R.R. Co. v. Woods*, 480 U.S. 1 (1987) (Fed. R. App. Proc. 38 applied in diversity action over corollary Alabama statute). *Berk* followed those precedents and confirmed this Court's approach in such cases.

The current state of this Court's *Erie* jurisprudence, as confirmed in *Berk*, offers an ease of application when a Federal Rule conflicts with a state rule in a diversity action. If the Federal Rule "answers the question"—as Rule 8 did in *Berk*—the Federal Rule controls. *See also Shady Grove*, 559 U.S. at 398-406 (Fed. Rule Civ. Proc. 23's "one-size-fits-all formula" for determining when a class action is appropriate displaced New York law prohibiting class actions seeking penalties); *Burlington Northern*, 480 U.S. at 7-8. Where the Federal Rule does not "answer the question"—as Rule 59 did not in *Gasperini*—the state rule will apply. This framework presents a "bright-line" rule offering "clarity and predictability," which "values should not be discounted." *Roell v. Withrow*, 538 U.S. 580, 596 (2003) (Thomas, J., dissenting).

4. Given this Court's decision only this year in *Berk*, the applicable "sufficiency of the evidence" standard in diversity cases requires further "percolation" in the lower courts before this Court should re-examine this issue. *See Brown v. Texas*, 522 U.S. 940, 943 (1997) (Stevens, J., respecting the denial of certiorari) ("the likelihood that the issue will be resolved correctly may increase if this Court allows other tri-

bunals to serve as laboratories in which the issue receives further study before it is addressed by this Court.”); *Arizona v. Evans*, 514 U.S. 1, 24 (1995) (Ginsburg, J., dissenting) (“when frontier legal problems are presented, periods of ‘percolation’ in, and diverse opinions from, state and federal appellate courts may yield a better informed and more enduring final pronouncement by this Court.”).

Until there has been at least some “percolation” through the lower courts of the *Berk* decision, this Court should not grant certiorari on this issue. And it should do so only if that “percolation” reveals a scenario warranting this Court’s review, such as a split in the Courts of Appeals on the interpretation of *Berk* or a divergence from this Court’s *Erie* jurisprudence. This Court certainly should not jump the gun to grant certiorari in this case now simply because Professor Berman finds *Berk* “troubling.”

D. This Case is Not an Appropriate Vehicle for Review of the Applicable “Sufficiency of the Evidence” Standard in Diversity Cases

This Court should also deny certiorari because: (1) there is no difference between the federal and Missouri standards; and (2) even if the standards were different, Petitioners’ wrongful death claim fails under either standard.

1. Whether the federal or state “sufficiency of the evidence” standard applies in diversity cases was before this Court on prior two occasions.

In *Dick v. New York Life Ins. Co.*, 359 U.S. 437 (1959), this Court held that whether the federal or state standard applied was “not properly here for decision” because “both parties assumed that the North Dakota standard applied” and “although the Court of Appeals appears to have applied the state standard, that court did not discuss the issue.” *Id.*, at 445. The Court further held that the North Dakota and federal standards were “substantially the same” and, therefore, the issue should be “left to another case where the question is briefed and argued.” *Id.*

In *Mercer v. Theriot*, 377 U.S. 152 (1964), the Court did not decide the applicable standard because “the evidence was sufficient under any standard which might be appropriate—state or federal.” *Id.* at 156 (citing *Dick*, 359 U.S. at 444-45).

2. *Dick* and *Mercer* confirm that this case is a poor vehicle for this Court to review whether the federal or state standard applies.

a. As discussed, Petitioners never asked the district court or the Eighth Circuit to apply the Missouri standard. As a result, both courts applied Rule 50’s federal standard without discussing the Missouri standard (much less any conflict between the two standards). *See* Pet. App. 4a-5a, 19a-20a. As in *Dick*, the courts below “did not discuss the issue” and it should be “left to another case where the question is briefed and argued.” 359 U.S. at 445.

If the Court of Appeals has not addressed an issue (even one that was preserved), this Court will not re-

view it. *See Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005) (“Because these defensive pleas were not addressed by the Court of Appeals . . . we do not consider them here.”); *United States v. Oakland Cannabis Buyers’ Coop.*, 532 U.S. 483, 494 (2001) (“Because the Court of Appeals did not address these claims, we decline to do so in the first instance.”).

b. Next, the Rule 50 federal and Missouri standards for “sufficiency of the evidence” are “substantially the same,” if not identical. Indeed, Petitioners have described those standards using the exact same words. In their Eighth Circuit brief, Petitioners argued that JMOL under Rule 50 “only lies if there is ‘*a complete absence of probative facts*’ to support the jury’s conclusion.” Resp. App. 33a (emphasis added). In their Petition, they describe Missouri’s sufficiency of the evidence standard the same way. *See* Pet. 24 (“Under Missouri law, a court may overturn a verdict ‘only where there is *a complete absence of probative fact* to support the jury’s conclusion.’”) (citation omitted, emphasis added).

It is not surprising, therefore, that the Eighth Circuit has repeatedly found that there is no difference between the federal and Missouri “sufficiency of the evidence” standards. *See, e.g., McKnight v. Johnson Controls, Inc.*, 36 F.3d 1396, 1400 (8th Cir. 1994) (“the federal standard and the Missouri standard are virtually identical”); *Cruess v. KFC Corp.*, 729 F.2d 1145, 1148 (8th Cir. 1984) (“The standards for . . . judgment notwithstanding the verdict are the same under both federal and Missouri law.”).

In diversity cases applying Missouri substantive law, therefore, “[t]his eliminates the need for [the court] to address the issue of whether to use a federal or state standard of review” when a defendant moves for JMOL. *Sutherland v. Elpower Corp.*, 923 F.2d 1285, 1288 n.6 (8th Cir. 1991); see *Crues*, 729 F.2d at 1148 (same). Contrary to Petitioners’ assertion, therefore, application of the federal or Missouri standard will not “lead to a substantially different result” in this case. Pet. 20.

c. Finally, as in *Mercer*, application of the Rule 50 federal or Missouri standard—even if they are different—would have made no difference in this case. Even under the state “complete absence of probative fact” test urged by Petitioners, Amtrak was entitled to JMOL because Petitioners failed to proffer evidence at trial meeting the duty and causation elements of their claim under Missouri’s substantive law. See Pet. App. 5a (enumerating elements of negligence claim under Missouri law).

On the duty element of their claim, under any JMOL standard, Petitioners failed to proffer evidence that Webb’s unprovoked assassination of Mr. Aaron was foreseeable, triggering a duty on Amtrak’s part.

As a threshold issue, whether Amtrak owed a duty to Mr. Aaron was not for the jury to decide under *any* circumstance. Under Missouri law, both the existence of a duty and the scope of that duty is *always* a question of law for the court. See *Coomer v. Kansas City Royals Baseball Corp.*, 437 S.W.3d 184, 199 (Mo. 2014) (“[W]hether and to what extent the defendant

owes a duty . . . is always a question for the court, not the jury.”); *Tharp v. St. Luke’s Surgicenter-Lee’s Summit, L.L.C.*, 587 S.W.3d 647, 654 (Mo. 2019) (“The scope of a defendant’s duty is a question of law for the court to resolve.”). This includes cases where the question is whether a defendant has a duty to protect business invitees against criminal acts on their premises. See *L.A.C. v. Ward Parkway Shopping Ctr. Co., L.P.*, 75 S.W.3d 247, 257 (Mo. 2002).

Even if the existence of a duty on Amtrak’s part was conceivably one for the jury, the Eighth Circuit correctly held that under Missouri law, “[v]iolent crimes are foreseeable if the premises have been the site of other prior violent crimes, including robbery, assault, burglary, stealing, arson, abduction, murder, sexual assault and rape.” Pet. App. 8a (citations omitted). At trial, there was evidence of only a single prior crime on the River Runner. There was not—as Petitioners misrepresent—a “pattern of violent crime on the River Runner” Pet. 24.

The Eighth Circuit, therefore, correctly held that “[t]his case is distinguishable from those in which the Missouri Supreme Court has held such a duty existed” because prior crime aboard the River Runner was “significantly less frequent and is dissimilar to the random shooting that occurred here.” Pet. App. 9a (citing *Madden v. C&K Barbecue Carryout, Inc.*, 758 S.W.2d 59, 62-63 (Mo. 1988) (duty existed where the premises had been the site of “six armed robberies, six strong arm robberies, one assault, and one purse snatching” in the preceding three years) and *L.A.C.*,

75 S.W.3d at 258 (duty existed where “seventy-five violent crimes” occurred on the premises in the three years preceding the attack)).

The Eighth Circuit did not “simply dismiss” the lone prior crime on the River Runner, as Petitioners complain. Pet. 27. To the contrary, the court considered whether that single crime rendered Mr. Aaron’s shooting foreseeable and, indeed, gave Petitioners every favorable inference with respect to it. For example, the Eighth Circuit *rejected* Amtrak’s contention that—because that crime did not involve bodily injury—it was an irrelevant “non-violent” crime. Instead, the court *accepted*, as *Petitioners argued*, that it was a “violent” crime. *See* Pet. App. 8a (“The jury was only presented evidence of one incident of prior violent crime on the River Runner.”). Under any “sufficiency of the evidence” standard, however, one prior crime on the River Runner did not make Webb’s unprovoked shooting foreseeable to Amtrak.

All of Petitioners’ other evidence concerned crimes in other cities and elsewhere within Amtrak’s 22-state Central Division. Petitioners claim the Eighth Circuit “simply waved that direct foreseeability evidence away” Pet. 28. But as to the foreseeability of crimes by unknown assailants under Missouri law, there was nothing “direct” about that evidence. The Eighth Circuit correctly held that Petitioners sought “to expand the relevant premises too far” under Missouri law. Pet. App. 9a.

For example, the court held that, under Missouri law, “crime in one location does not necessarily indi-

cate crime in another” and that Petitioners could not establish the foreseeability of a shooting aboard the River Runner by proffering crime statistics: (i) “in other locations simply because those locations are owned and operated by Amtrak”; or (ii) “in cities the River Runner merely passes through.” Pet. App. 10a (collecting cases).

This Court should not second-guess the Eighth Circuit’s interpretation of what prior crime evidence is required to establish foreseeability under Missouri law. To the contrary, this Court gives “great deference to the interpretation and application of state law by the courts of appeals” because “lower federal courts are better schooled in and more able to interpret the laws of their respective States.” *Expressions Hair Design v. Schneiderman*, 581 U.S. 37, 45 (2017) (cleaned up, citations omitted). Under any “sufficiency of the evidence” standard, these other crimes were irrelevant to whether Mr. Aaron’s shooting aboard the River Runner was foreseeable under Missouri substantive law.

Petitioners also assert that the Eighth Circuit “dismissed Amtrak’s security measures” and claim that they “can constitute affirmative evidence of foreseeability.” Pet. 28. But, the Eighth Circuit flatly rejected that argument based on its own prior holding that: “Missouri law makes clear that the provision of a security program does not give rise to a general duty to protect [business invitees].” Pet. App. 10a-11a (citing *Liszewski v. Target Corp.*, 374 F.3d 597, 600 (8th Cir. 2004)). Under any standard, Amtrak’s

maintenance of security measures did not give rise to a duty under Missouri law, much less a duty to protect against unforeseeable criminal acts.

Similarly, under any “sufficiency of the evidence” standard, Petitioners failed to proffer sufficient evidence on causation. Petitioners do not quarrel with the Eighth Circuit’s interpretation of Missouri law as requiring expert testimony that, but for Amtrak’s actions, Mr. Aaron “would not have died.” Pet. App. 12a-13a (citing *Sanders v. Ahmed*, 364 S.W.3d 195, 209 (Mo. 2012) (“[i]n wrongful death actions, a plaintiff must establish that ‘but for’ the defendant’s actions or inactions, the patient would not have died.”)). Thus, expert testimony that Amtrak “might” or “could have” caused Mr. Aaron’s death is insufficient. Pet. App. 13a. At trial, Petitioners’ medical expert (Dr. Brokish) never provided the required causation testimony.

Petitioners attempt the same misdirection they unsuccessfully employed before the Eighth Circuit. They claim Dr. Brokish testified that “things would have been drastically different” if Amtrak had called 911 in Lee’s Summit, and that Mr. Aaron’s “age and size” somehow “extend[ed] the survivability window.” Pet. 26-27. Nowhere, however, did Dr. Brokish ever testify—as is required to maintain a wrongful death claim under Missouri law—that Mr. Aaron would have survived had Amtrak acted differently.

To the contrary, he unequivocally testified under cross-examination that, had “everything been done right” by Amtrak, Mr. Aaron had “[a]bout [a] 1 in 7

chance” of surviving his wounds, “which is 14 percent.” Tr. 845. And, on redirect examination by Petitioners’ own counsel, Dr. Brokish doubled-down, confirming: “*I’ve not changed my opinion. Still the same. 4 to 14 percent.*” Tr. 856-57 (emphasis added).⁶

In fact, Petitioners’ theory at trial was *never* that Mr. Aaron would have survived the shooting. Rather, they argued Amtrak deprived Mr. Aaron of his 14% “best-case-scenario” chance of survival. As the Eighth Circuit observed, however, Petitioners brought a claim for wrongful death, not a claim for “lost chance of survival.” Pet. App. 14a.

Under the Rule 50 federal or the Missouri state standard, there is simply no expert medical testimony to sustain Petitioners’ wrongful death claim. In fact, Dr. Brokish’s expert testimony is precisely the kind that *fails* to create a jury question on causation under Missouri law.

⁶ Petitioners point to Dr. Brokish’s testimony that, if Mr. Aaron had been shot in his “waiting room,” he had an “80-to-90 percent survivability.” Pet. 27. But, because Mr. Aaron was not shot in Dr. Brokish’s waiting room, the Eighth Circuit correctly rejected this non-sequitur. Pet. App. 13a-14a n.5.

II. THIS COURT SHOULD NOT GRANT CERTIORARI TO REVIEW THE FEDERAL “SUFFICIENCY OF THE EVIDENCE” STANDARD

In Petitioners’ Question Presented #2, they assert that—even if the Eighth Circuit was right to apply Rule 50’s federal standard—the court engaged in an improper “qualitative assessment” and “reweighing” of the trial evidence to determine if it was “sufficient.” According to Petitioners, some Courts of Appeals have erroneously “embraced” that approach. Pet. 29. As such, Petitioners ask this Court to grant certiorari to resolve the purported “disarray” in the Courts of Appeals over the proper inquiry under Rule 50. Pet. 15-18. This Court should not grant certiorari on this issue.

1. Petitioners never raised this issue in the Eighth Circuit. They do not even suggest that they asked the Eighth Circuit to apply one specific formulation of Rule 50’s federal standard, and that the court mistakenly applied a different one. Petitioners also did not raise this as a point of error in their rehearing petition. Resp. App. 36a-52a. This Court should not grant certiorari to be the first court in this case to grapple with this issue. *See Cutter*, 544 U.S. at 718; *Oakland Cannabis Buyers’ Coop.*, 532 U.S. at 494.

2. There is no genuine split among the Courts of Appeals concerning the scope of the proper inquiry under Rule 50’s JMOL standard. Simply put by the Federal Circuit: “[a]lthough the courts have adopted numerous formulations for the standard of review

regarding a JMOL, the test is essentially whether, without weighing the evidence or considering the credibility of the witnesses, ‘there can be but one conclusion as to the verdict that reasonable jurors could have reached.’” *Serio-US Indus., Inc. v. Plastic Recovery Techs. Corp.*, 459 F.3d 1311, 1320 (Fed. Cir. 2006) (citations and quotations omitted). This is precisely the standard the Eighth Circuit applied in this case. Pet. App. 4a-5a.

Indeed, the treatise Petitioners cite for the proposition that there exists a “variety of verbal formulations” of the test under Rule 50 *agrees* that “[a] great many other federal cases . . . phrase the Rule 50 test in terms of what reasonable persons serving as jurors permissibly could conclude given the state of the evidence” 9B *Wright & Miller’s Federal Practice & Procedure* § 2524 (3d ed. 2026). In fact, that treatise explains that “the reasonable person test is indelibly inscribed on federal post-trial motion jurisprudence” and, to the extent courts use different words in their expressions of the standard, “it is unlikely that their use produces any real difference in result.” *Id.*

3. To the extent there were ever questions as to the proper inquiry under Rule 50, this Court answered them in *Reeves*. There, this Court held:

Under Rule 50, a court should render judgment as a matter of law when a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that

issue [T]he court must draw all reasonable inferences in favor of the nonmoving party, and it may not make credibility determinations or weigh the evidence.

530 U.S. at 149. This is also nearly verbatim how the Eighth Circuit articulated the Rule 50 standard in this case. Pet. App. 4a-5a.

4. Petitioners’ assertion that the Eighth Circuit “ignored key evidence” and “reweighed evidence” (Pet. 25) invites this Court to take precisely the kind of deep dive into the trial evidence that it has repeatedly said it will not undertake.

This Court “do[es] not grant a certiorari to review evidence and discuss specific facts.” *United States v. Johnston*, 268 U.S. 220, 227 (1925); see *Houston Oil Co. v. Goodrich*, 245 U.S. 440, 441 (1918) (holding that certiorari was improvidently granted where “[t]he propriety of submitting these matters depended essentially upon an appreciation of the evidence,” which had already been reviewed by the district court and the Court of Appeals).

As Justice Frankfurter has reasoned:

I do not think we should take cases merely to review facts already canvassed by two and sometimes three courts even though those facts may have been erroneously appraised For this Court to take a case which turns merely on such an appraisal of evidence . . . is to deny due regard to the considerations which

led the Court to ask and Congress to give the power to control the Court's docket. . . .

Wilkerson v. McCarthy, 336 U.S. 53, 66–67 (1949) (Frankfurter, J., concurring).

Similarly, in his dissent in *Dick*, Justice Frankfurter observed that a review of the trial evidence is uniquely the job of the Courts of Appeals:

This is not the place to review a conflict of evidence nor to reverse a Court of Appeals because were we in its place we would find the record tilting one way rather than the other, though fair-minded judges could find it tilting either way.

It is the staple business of Courts of Appeals to examine records for the sufficiency of evidence. To undertake an independent review of the review by the Court of Appeals of evidence is neither our function nor within our special aptitude through constant practice.

359 U.S. at 461 (Frankfurter, J., dissenting); *see also Mercer*, 377 U.S. at 157 (Harlan, J., dissenting) (“it is not the business of this Court to substitute its judgment for that of the Court of Appeals . . . on the sufficiency of the evidence . . .”).

5. Although certiorari should be denied for the reasons above, Petitioners are also incorrect that the Eighth Circuit “qualitatively assessed” or “reweighed” the trial evidence. Rather, the court’s decision turned

on gaps in Petitioner’s trial evidence on foreseeability/duty and causation. This is precisely the purpose of a motion for JMOL. *See Cadle v. GEICO Gen. Ins. Co.*, 838 F.3d 1113, 1121 (11th Cir. 2016) (JMOL “for a defendant is appropriate ‘when there is insufficient evidence to prove an element of the claim’”). Conversely, to survive a JMOL motion, “the non-movant must at least establish a conflict in substantial evidence on each essential element of their claim.” *Gonzalez v. Walgreen Co.*, 140 F.4th 663, 668 (5th Cir. 2025) (citations and quotations omitted).

a. On duty, the Eighth Circuit correctly focused on one evidentiary matter—the absence of sufficient prior violent crimes aboard the River Runner. It was undisputed that there was but a single prior crime on that train. The court did not discount, reweigh, or qualitatively assess that evidence. It simply concluded that, as a matter of Missouri law, one lone crime on the premises did not establish that Amtrak should have foreseen Webb’s random shooting of Mr. Aaron.

The same is true of the evidence of other crimes throughout Amtrak’s 22-state Central Division. The Eighth Circuit did not “reweigh” that evidence. It simply found the evidence too remote to establish foreseeability as a matter of Missouri law because none of those crimes occurred on the River Runner. The same is true of Amtrak’s security measures—as a matter of Missouri law, that does not establish foreseeability of every subsequent crime.

b. Similarly, the Eighth Circuit did not “reweigh” Dr. Brokish’s testimony on causation. Again, the court appropriately focused on a gaping hole in Petitioners’ trial evidence—the absence of expert testimony that Mr. Aaron would have survived absent Amtrak’s alleged negligence. For all of Dr. Brokish’s testimony that Mr. Aaron’s “age and size” would “extend the survivability window,” one aspect of his testimony was undisputed—Mr. Aaron had, at best, a 14% chance of surviving. The Eighth Circuit’s conclusion was not the result of “reweighing” the evidence.⁷ It was the result of an application of Missouri’s substantive requirements on causation in wrongful death cases.

Petitioners plainly want this Court to sift through the trial record and to reach a different conclusion than the Eighth Circuit. But reviewing the trial evidence to determine if it was sufficient is the “staple business” of the Eighth Circuit, not this Court. *See Dick*, 359 U.S. at 461 (Frankfurter, J., dissenting).

⁷ Again, the Eighth Circuit gave Petitioners every favorable inference on this issue. For example, the Eighth Circuit gave no weight to the testimony of Amtrak’s medical expert that Mr. Aaron’s wounds had a “100-percent mortality rate” which “no further medical treatment could have altered.” Tr. 677-81.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Dated: September 11, 2026

Respectfully submitted,

Jerry A. Cuomo

Counsel of Record

Mark S. Landman

Gerald T. Ford

LANDMAN CORSI BALLAINE

& FORD PC

One Gateway Center, 22nd Floor

Newark, New Jersey 07102

973-632-2700

jcuomo@lcbf.com

Counsel for Respondent

National Railroad Passenger

Corp.

APPENDIX

1a

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION**

Case No.: 4:22-CV-00189-SRB

BREAYONNA AARON, Individually and on behalf
of RICHIE TERRELL AARON, JR., deceased,

and

BREAYONNA AARON, on behalf of her minor children
M.A., R.A., and L.A., individually and on behalf of
RICHIE TERRELL AARON, JR., deceased,

Plaintiffs

v.

NATIONAL RAILROAD PASSENGER CORPORATION
d/b/a AMTRAK, and MARQUISE L. WEBB,

Defendants.

**DEFENDANT AMTRAK'S MOTION FOR
JUDGMENT AS A MATTER OF LAW AT
THE CLOSE OF PLAINTIFFS' EVIDENCE
AND MEMORANDUM IN SUPPORT**

Defendant National Railroad Passenger Corpora-
tion ("Amtrak") is entitled to judgment as a matter
of law, pursuant to Federal Rule of Civil Procedure
50(a), against Plaintiffs' claims in their Petition for

Damages. This is a wrongful death case against Amtrak. Plaintiffs have alleged Amtrak was negligent by failing to protect decedent Richie Aaron Jr. (“Aaron”) from foreseeable criminal acts by third parties, failing to adequately warn Aaron of the absence of adequate security measures, failed to promptly and adequately investigate the noises as Aaron was being shot, failing to seek medical assistance on the train, and failing to timely discover the need for medical attention, which resulted in the death of Aaron. This Motion seeks judgment as a matter of law on each of Plaintiffs’ claims against Amtrak. Plaintiffs’ retained expert witnesses have now testified, and Plaintiffs have failed to produce sufficient evidence to allow the jury to conclude Amtrak caused or contributed to cause Aaron’s death. Judgement as a matter of law is required on this basis.

I. LEGAL STANDARD

Pursuant to Rule 50(a) of the Federal Rules of Civil Procedure, a motion for judgment as a matter of law may be made at any time before the case is submitted to the jury. Judgment as a matter of law should be granted when a plaintiff has been fully heard on an issue during a jury trial, and the court finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the plaintiff on that issue. *Id.* at (a)(1)(A)-(B). In a negligence action, judgment as a matter of law is appropriate where the evidence is insufficient to establish the essential duty and causation elements. *See generally,*

Crossfield v. Quality Control Equip. Co., Inc., 1 F.3d 701, 701, 707 (8th Cir. 1993) (reversing trial court's denial of supplier's motion for judgment as a matter of law in a product liability action where supplier had no duty to warn plaintiff of the hazards of using a machine); *Williams v. Birkeness*, Case No. 92-1041-CV-W-1, 1993 WL 741998, *1 (W.D.Mo. Oct. 15, 1993) (granting judgment as a matter of law in defendants' favor where the plaintiff failed to adduce a legally sufficient evidentiary basis for a reasonable jury to find that any negligence of a defendant *caused* the plaintiff's alleged damages).

* * *

[Page 10]

III. CONCLUSION

For all the foregoing reasons, Defendant Amtrak requests that this Court enter judgment as a matter of law in favor of Amtrak under Fed. R. Civ. P. 50. Alternatively, Amtrak is entitled to judgement as a matter of law on punitive/aggravating damages.

Respectfully submitted,

/s/ Rachel M. Smith

Rachel M. Smith MO #71597

Sean P. Hamer MO #48153

SCHARNHORST AST KENNARD GRIFFIN, P.C.

1100 Walnut, Suite 1950

Kansas City, Missouri 64106

T: (816) 268-9400; F: (816) 268-9409

4a

Email: *rsmith@sakg.com*
shamer@sakg.com

Mark S. Landman (Admitted *Pro Hac Vice*)
LANDMAN CORSI BALLAINE & FORD, P.C.
120 Broadway, 13th Floor
New York, New York 10271
T: (212) 238-4800/F: (212) 238-4848
Email: *mlandman@lcbf.com*

*Attorneys for Defendant National Rail-
road Passenger Corporation d/b/a
Amtrak*

5a

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION**

Case No: 4:22-CV-00189-SRB

BREAYONNA AARON, Individually and on behalf
of RICHIE TERRELL AARON, JR., deceased, and on
behalf of her minor children M.A., R.A., and L.A.,
Plaintiffs,

v.

NATIONAL RAILROAD PASSENGER CORPORATION
d/b/a AMTRAK, and MARQUISE L. WEBB,
Defendants.

**PLAINTIFFS' TRIAL BRIEF ON ISSUE
OF DUTY AS A MATTER OF LAW**

BREAYONNA AARON, Individually and on behalf of
RICHIE TERRELL AARON, JR., and of her minor chil-
dren M.A., R.A., and L.A. ("Plaintiffs") file this
their Trail Brief on the issue of duty and ask the
Court to instruct the jury that Defendant National
Railroad Passenger Corporation d/b/a AMTRAK's
("Amtrak") owed a legal duty to invitees and show
the Court as follows:

In *Madden v. C & K Barbecue Carryout, Inc.*, 758
S.W.2d 59, 61 (Mo. banc 1988), in the context of

third-party crimes, the court held, “a duty to exercise care may be imposed by common law under the facts and circumstances of a given case.” *Id.* (emphasis added). Finding that the touchstone for the creation of a duty is foreseeability, the court expressly found that a duty of care arises out of circumstances in which there is a foreseeable likelihood that particular acts or omissions will cause harm or injury. *Id.* at 62 (emphasis added). In *Richardson v. Quicktrip Corp.*, 81 S.W.3d 54 (W.D. Mo. 2002), the court noted that foreseeability of a violent crime being perpetrated on a patron is not absolutely dependent upon notice of prior crimes of a similar nature occurring on or near the premises and may also be determined from all of the circumstances present. *Id.* at 63. Thus, in the context of premises, Missouri jurisprudence has established a clear framework to recognize the instances where a business owner has a duty to protect a plaintiff from a third party’s criminal acts. This well-established jurisprudence has been codified. See Section 537.787, RSMo (Cum. Supp. 2018)(duty exists where business knows or has reason to know that such acts are being committed or are reasonably likely to be committed in a particular area of the premises. . .); see also Restatement (Second) of Torts § 344 cmt. f (1965) (“If the place or character of [a] business ... is such that [the business owner] should reasonably anticipate careless or criminal conduct on the part of third persons, either generally or at some particular time, [the business owner] may be under a duty to take precautions against it”) (emphasis added).

Outside of the landowner framework, Missouri courts have relied on other, more general provisions of the Restatement of Torts. These cases essentially turn on the extent to which the defendant can foresee a third party might commit a criminal or wrongful act, and demonstrate that foreseeability can exist if the defendant has knowledge of facts that provide notice of such risk—regardless of the relationship between the parties and regardless of where the injuries occur. See *Rardon v. Falcon Safety Prod., Inc.*, 2021 WL 2008923, at * 13 (W.D. Mo. May 4, 2021).

“A legal duty arises where: (1) imposed by the legislative branch; (2) imposed by the law based on a relationship between the parties or because the defendant must exercise due care to avoid a foreseeable injury because of a particular set of circumstances; or (3) a party assumed a duty.” *Lockhart v. Carlyle*, 585 S.W.3d 310, 316 n.10 (Mo. App. 2019). Assumption of a duty is separate from a pre-established legal theory which recognizes a duty, such as premises liability, because a duty that otherwise does not exist is assumed by contract or by conduct. *K.L.S. v. Union Pacific Railroad*, 575 S.W.3d 259, 268 (Mo. App. 2019). “If a defendant assumes a duty, by contract or by conduct, he can be held liable for injuries caused by the unsafe performance of that assumed duty.” *Kraus v. Hy-Yee, Inc.*, 147 S.W.3d 907, 919-920 (Mo. App. 2004) (internal quotation marks and citation omitted).

Here, there is no dispute that Amtrak owes a duty to Plaintiffs under statutory and common law, as well as assumption by contract or conduct. *First*,

there is overwhelming evidence, under the totality of circumstances and prior crimes tests, that Amtrak owed a duty to protect invitees such as Mr. Aaron from foreseeable criminal acts. Plaintiffs' Exhibits 20a, 20b, 22a, 22b, 23, 38, 47a, 47b, 93a, 122, 149a, 149b, and 149c lists hundreds of instances of violent crimes that occurred on Amtrak trains, on Amtrak platforms and in the close vicinity of the locations in St. Louis, Chicago, and Kansas City where the Amtrak trains traverse. This establishes the requisite duty and foreseeability. Second, there is evidence that Amtrak assumed a duty to keep its passengers safe. Plaintiffs' Exhibits 11, 12, 20a, 33, 34, and 35, *inter alia*, show that Amtrak assumed the responsibility to provide reasonably safe travel, free of fireworks and firearms, yet failed to enforce or apply its policies, e.g. to prohibit firearms and fireworks, provide reasonably safe travel, and request medical assistance for medical personnel aboard the train. Accordingly, Amtrak voluntarily assumed a duty as a matter of law. See, *Keenan v. Miriam Foundation*, 784 S.W.2d 298, 303 (Mo.App. E.D.1990).

The Court Rules On The Issue of The Duty; The Jury Determines If Duty Was Breached

The law is clear, "[d]uty is entirely a question of law, to be determined by reference to the body of statutes, rules, principles and precedents which make up the law; and it must be determined only by the court." *Kopoian v. George W. Miller & Co., Inc.*, 901 S.W.2d 63, 68 (Mo.App.W.D.1995) (quota-

tions omitted); *Lopez v. Three Rivers Electric Cooperative, Inc.*, 26 S.W.3d 151, 155 (Mo. banc 2000)(same); see also, *L.A.C. ex rel. D.C. v. Ward Parkway Shopping Ctr. Co., L.P.*, 75 S.W.3d 247, 257 (Mo. banc 2002); *Madden v. C & K Barbecue Carryout, Inc.*, 758 S.W.2d 59, 62 (Mo. banc 1988)); See also Section 537.787, RSMo (Cum. Supp. 2018). The Court has all of the evidence before it, from which it can make this determination.

CONCLUSION

For the above-stated reasons and on the evidence presented, the Court should (i) find and/or confirm that Defendant owed a duty to invitees such as Richie Aaron as a matter of law; (ii) instruct the Jury that Defendant owed a duty to Plaintiffs; and (iii) grant Plaintiffs such other and further relief that the court deems appropriate.

Respectfully submitted,

/s/ Nuru Witherspoon
 NURU WITHERSPOON
 Missouri Bar Number
 66812
 KAMARIA HARPER
 WILLIAMS
Admitted Pro Hac Vice
 LINJE' RIVERS
Admitted Pro Hac Vice

/s/ Aubrey "Nick" Pittman
 AUBREY "NICK" PITTMAN
Admitted Pro Hac Vice
 Texas State Bar No.
 16049750
 Oklahoma Bar No. 35519

10a

**THE WITHERSPOON
LAW GROUP**

5565 Deer Creek Dr.
Dallas, Texas 75228

314-899-2977 – Telephone

972-696-9982 – Fax

witherspoon@

twlglawyers.com

**THE PITTMAN
LAW FIRM, P.C.**

901 Main Street,
Suite 3670

Dallas, Texas 75202

214-459-3454 - Telephone

214-853-5912 - Fax

11a

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION**

Case No.: 4:22-CV-00189-SRB

ORAL ARGUMENT REQUESTED

BREAYONNA AARON, Individually and on behalf
of RICHIE TERRELL AARON, JR., deceased,

and

BREAYONNA AARON, on behalf of her minor children
M.A., R.A., and L.A., individually and on behalf
of RICHIE TERRELL AARON, JR., deceased,

Plaintiffs

v.

NATIONAL RAILROAD PASSENGER CORPORATION
d/b/a AMTRAK, and MARQUISE L. WEBB,

Defendants.

**DEFENDANT NATIONAL RAILROAD
PASSENGER CORP'S WRITTEN
SUGGESTIONS IN SUPPORT OF ITS
MOTION FOR JUDGMENT AS A MATTER
OF LAW OR, IN THE ALTERNATIVE,
A NEW TRIAL**

On the Brief:

Sean P. Hamer MO #48153
Rachel M. Smith MO #71597
Mark S. Landman (*Pro Hac Vice*)

SCHARNHORST AST KENNARD GRIFFIN, P.C.
1100 Walnut, Suite 1950
Kansas City, Missouri 64106

LANDMAN CORSI BALLAINE & FORD P.C.
120 Broadway, 13th Floor
New York, New York 10271

*Attorneys for Defendant National Rail-
road Passenger Corporation d/b/a Amtrak*

* * *

[Page 11]

PRELIMINARY STATEMENT

On January 14, 2022, Richie Aaron was shot and killed by Defendant Marquise Webb (“Webb”) aboard Defendant National Railroad Passenger Corp.’s (“Amtrak”) Missouri River Runner train. On January 31, 2024, a jury rendered a verdict against Amtrak in favor Plaintiff Breayonna Aaron (on behalf of Mr. Aaron and her minor children) (“Plaintiffs”) for \$8.8 million in compensatory damages and \$150 million in punitive damages. Amtrak now moves pursuant to Fed. R. Civ. P. 50(b) and 59 for judgment as a matter of law

(“JMOL”) or, in the alternative, a new trial or remittitur as follows:

* * *

[Page 6]

APPLICABLE STANDARDS

Under Fed. R. Civ. P. 50(b), if the court denies a party’s motion for judgment under Rule 50(a),¹ “the movant may file a renewed motion for judgment as a matter of law and may include an alternative or joint request for a new trial under Rule 59.” A Rule 50(b) motion for JMOL “presents a legal question of whether there is sufficient evidence to support a jury verdict.” *Gray v. Bicknell*, 86 F.3d 1472, 1478 (8th Cir. 1996). Although the court must afford the non-movant “the benefit of all reasonable inferences, [it] may not accord a party the benefit of unreasonable inferences or those at war with the undisputed facts.” *Sip-Top, Inc. v. Ekco Grp., Inc.*, 86 F.3d 827, 830 (8th Cir. 1996) (quotations and citations omitted). A reasonable inference is one “drawn from the evidence without resort to speculation.” *Id.* (citations omitted).

* * *

¹ On January 29, 2024, Amtrak moved for JMOL under Rule 50(a). (Tr. 1068:13-1071:25; Doc. # 251). The court reserved decision (Tr. 1073:24-25), and then denied the motion on February 14, 2024. (Doc. # 262).

[Page 90]

CONCLUSION

For the reasons set forth herein, Amtrak requests that the Court:

1. Grant its motion for judgment as a matter of law pursuant to Fed. R. Civ. P. 50(b), dismissing all claims against it asserted by Plaintiffs; or
2. In the alternative, grant its motion for a new trial pursuant to Fed. R. Civ. P. 59; or
3. In the alternative, grant its motion for remittitur of the punitive damages award.

Respectfully submitted,

/s/ Sean P. Hamer

Sean P. Hamer MO #48153

Rachel M. Smith MO #71597

SCHARNHORST AST KENNARD GRIFFIN, P.C.

1100 Walnut, Suite 1950

Kansas City, Missouri 64106

T: (816) 268-9400; F: (816) 268-9409

Email: shamer@sakg.com

rsmith@sakg.com

and

Mark S. Landman (Admitted *Pro Hac Vice*)

LANDMAN CORSI BLAINE & FORD, P.C.

120 Broadway, 13th Floor

New York, New York 10271

15a

T: (212) 238-4800/F: (212) 238-4848

Email: *mlandman@lcbf.com*

*Attorneys for Defendant National Rail-
road Passenger Corporation d/b/a
Amtrak*

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION**

Case No: 4:22-CV-00189-SRB

BREAYONNA AARON, Individually and on behalf
of RICHIE TERRELL AARON, JR., deceased, and on
behalf of her minor children M.A., R.A., and L.A.,
Plaintiffs,

v.

NATIONAL RAILROAD PASSENGER CORPORATION
d/b/a AMTRAK, and MARQUISE L. WEBB,
Defendants.

**PLAINTIFFS' SUGGESTIONS IN SUPPORT
OF RESPONSE TO DEFENDANT'S MOTION
FOR JUDGMENT AS A MATTER OF LAW OR,
IN THE ALTERNATIVE, A NEW TRIAL**

AUBREY "NICK" PITTMAN
Admitted Pro Hac Vice
Texas State Bar No.
16049750

**THE PITTMAN
LAW FIRM, P.C.**
901 Main Street,
Suite 3670
Dallas, Texas 75202

JAMES R. LAYTON,
Missouri Bar No. 45631
**TUETH KEENEY COOPER
MOHAN & JACKSTADT,
P.C.**
34 N. Meramec, Suite 600
St. Louis, MO 63105

NURU WITHERSPOON
Missouri Bar No. 66812
KAMARIA HARPER WILLIAMS
Admitted Pro Hac Vice

THE WITHERSPOON LAW GROUP
5565 Deer Creek, Unit A
Dallas, Texas 75228

BREAYONNA AARON, Individually and on behalf of
RICHIE TERRELL AARON, JR., and of her minor chil-
dren M.A., R.A., and L.A. (“Plaintiffs”) file this
their suggestions in response to Defendant Nation-
al Railroad Passenger Corporation d/b/a AMTRAK’s
(“Amtrak”) Motion For Judgment As A Matter of
Law or, in the Alternative, A New Trial (the
“Motion”) and show the Court as follows:

INTRODUCTION

Amtrack tracked violent crimes against persons
in Missouri and Illinois for years 2019, 2020, and
2022, recording multiple altercations involving
firearms. These internal documents reflect evi-
dence of enough criminal activity that would have
placed Amtrak on notice that security personnel
should have been reallocated to provide security for
train routes like the one Mr. Aaron was on when he
was killed. The evidence also revealed that Amtrak
has specific internal policies geared towards ban-
ning persons from riding trains who have been
caught carrying firearms onto its trains or engag-
ing in other forms of violence, but does not enforce

these policies. More attention should have been paid to Amtrak's internal policies regarding potential criminal activity on its trains.

The undisputed proof at trial was that Amtrak had no procedures or protocol in place to screen for weapons on board its trains anywhere along the 500 mile trek from Chicago to St. Louis to Kansas City. Nor were there any Amtrak personnel (police or other employees) on the trains whose job it was to provide safety or security to the passengers or to serve as a crime deterrent. This despite the fact that Amtrak kept track of crimes that were occurring throughout the Central Region, which is where Mr. Aaron was shot. This despite the fact that Amtrak police and personnel had uniformly requested that Amtrak provide "more security" as well as officers "to ride on the trains." Thus, the jury heard more than sufficient evidence upon which it could easily conclude that Amtrak's intentional activities and omissions showed complete indifference to or a conscious disregard for the safety of others. Further, considering that Amtrak repeatedly failed and refused to provide security for any of the trains or train stations in Missouri, it is not surprising that the jury ruled unanimously that it had to award a large amount of punitive damages in order to have a deterrent effect on a multi-billion-dollar corporation. Clearly, the jury also found that Missouri has a legitimate interest in deterring companies from placing passengers in situations where no safety provisions are maintained.

BACKGROUND

Plaintiffs' Complaint alleged that Amtrak failed to take any precautions or exercise proper vigilance for the safety and security of their passengers. Plaintiffs further averred that the shooter boarded Amtrak's train without detection by employees, rode the train for hours, committed the shooting, and escaped without being detained, because of Amtrak's nonexistent security and safety precautions and the negligence of Amtrak's employees in failing to exercise reasonable efforts to monitor and protect passengers against such dangers. The Complaint averred further that once Richie Aaron was shot on Amtrak's train, Amtrak failed timely to discover Mr. Aaron's need for medical assistance and to either render or seek trained assistance in providing medical care. As a result, Mr. Aaron died on the train.

On January 23, 2024, this matter came before the Court for jury trial. After hearing all of the evidence introduced, the instructions of the Court, and the arguments of counsel, the Jury retired to consider its verdict, and, after deliberating thereon, returned its verdict, which was filed of record on January 31, 2024. (See ECF No. 261). On March 27, 2024, and in accordance with the Jury's verdict, the Court entered Judgment for Plaintiffs and against Defendant in the amount of \$8,800,000 and punitive damages in the amount of \$150,000,000. (ECF No. 275).

ARGUMENT**A. Federal Rule Of Civil Procedure 50(b) Motions.**

The Supreme Court has stated that when considering a trial record on a Federal Rule of Civil Procedure 50(b) motion, “[a] court must draw all reasonable inferences in favor of the nonmoving party, and it may not make credibility determinations or weigh the evidence.” *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150 (2000). “Thus, although the court should review the record as a whole, it must disregard all evidence favorable to the moving party that the jury is not required to believe.” *Id.* at 151. The Eighth Circuit also makes clear that, in ruling on a motion under Rule 50, a court must draw all reasonable inferences in favor of the nonmoving party. *Roberson v. AFC Enters., Inc.*, 602 F.3d 931, 933 (8th Cir. 2010); *Canny v. Dr. Pepper/Seven-Up Bottling Grp., Inc.*, 439 F.3d 894, 900 (8th Cir. 2006). In other words, this Court must:

- (1) resolve direct factual conflicts in favor of the nonmovant, (2) assume as true all facts supporting the nonmovant which the evidence tended to prove, (3) give the nonmovant the benefit of all reasonable inferences, and (4) deny the motion if the evidence so viewed would allow reasonable jurors to differ as to the conclusions that could be drawn.

Stults v. Am. Pop Corn Co., 815 F.3d 409, 418 (8th Cir. 2016) (quoting *Jones v. Edwards*, 770 F.2d 739, 740 (8th Cir. 1985)). As the verdict winner, Plaintiffs are entitled to “the benefit of all logical inferences that could be drawn from the evidence presented, [resolution of] all conflicts in the evidence in [its] favor, and in general, view [of] the record in the light most favorable to [Plaintiffs].” And in doing so, this Court must “not make credibility determinations or weigh the evidence.” *Meyers v. Starke*, 420 F.3d 738, 741 (8th Cir. 2005). Here, there was more than sufficient evidence from which a jury could reasonably find liability. Thus, the Motion must be denied.

* * *

[Page 6]

I. AMTRAK IS NOT ENTITLED TO JUDGMENT AS A MATTER OF LAW OR A NEW TRIAL ON PLAINTIFFS’ CLAIM THAT AMTRAK FAILED TO RENDER, AND/OR DISCOVER THE NEED FOR, MEDICAL ASSISTANCE.

A. Amtrak Is Not Entitled To Judgment On Plaintiffs’ Claims For Amtrak’s Failure To Timely Discover The Need For Medical Attention And Render Aid.

A defendant cannot justify a motion for judgment as a matter of law unless there is “a complete

absence of probative facts to support the conclusion reached so that no reasonable juror could have found for the nonmoving party.” *Foster*, 250 F.3d at 1194, quoting *Blackmon v. Pinkerton Sec. & Investigative Servs.*, 182 F.3d 629, 635 (8th Cir.1999). A submissible case is simply one in which the plaintiff has presented substantial evidence for every fact essential to liability. *Love v. Hardee’s Food Sys., Inc.*, 16 S.W.3d 739, 742 (Mo.App.E.D. 2000). “Substantial evidence is that which, if true, has probative force upon the issues, and from which the trier of facts can reasonably decide the case.” *Id.* (quoting *Hurlock v. Park Lane Med. Ctr.*, 709 S.W.2d 872, 880 (Mo.App.1985)). “Substantial” does not necessarily mean quantity or even quality, it simply means that the evidence relied on must be probative of the issues it was offered to prove. *McCrackin v. Plumber*, 103 S.W.3d 178, 181 (Mo.App. W.D.2003). To make a submissible case in a wrongful death suit, a plaintiff must show only that the negligence of the defendant “directly caused” or “directly contributed to cause” the decedent’s death. *Kivland v. Columbia Orthopaedic Group, LLP*, 331 S.W.3d 299, 306 (Mo. banc 2011).

* * *

[Page 93]

CONCLUSION

For the reasons stated above, the defendant’s motion for judgment as a matter of law or in the alternative for new trial should be denied.

23a

Respectfully submitted,

AUBREY “NICK” PITTMAN
Admitted Pro Hac Vice
Texas State Bar No.
16049750

THE PITTMAN
LAW FIRM, P.C.
901 Main Street,
Suite 3670
Dallas, Texas 75202

NURU WITHERSPOON
Missouri Bar No. 66812
KAMARIA HARPER WILLIAMS
Admitted Pro Hac Vice

THE WITHERSPOON
LAW GROUP
5565 Deer Creek, Unit A
Dallas, Texas 75228

JAMES R. LAYTON,
Missouri Bar No. 45631

TUETH KEENEY COOPER
MOHAN & JACKSTADT,
P.C.
34 N. Meramec, Suite 600
St. Louis, MO 63105

Counsel for Plaintiffs

24a

No. 24-2654

IN THE
United States Court of Appeals
FOR THE EIGHTH CIRCUIT

BREAYONNA AARON, INDIVIDUALLY AND ON BEHALF OF
RICHIE TERRELL AARON, JR., DECEASED AND ON
BEHALF OF HER MINOR CHILDREN M.A., R.A. AND L.A.;
M.A., BY AND THROUGH NEXT FRIEND, BREAYONNA
AARON; R.A., BY AND THROUGH NEXT FRIEND BREAY-
ONNA AARON; L.A., BY AND THROUGH NEXT FRIEND
BREAYONNA AARON,

Plaintiffs-Appellees,

v.

NATIONAL RAILROAD PASSENGER CORPORATION,
DOING BUSINESS AS AMTRAK,

Defendant-Appellant,

MARQUISE L. WEBB,

Defendant.

*On Appeal from the United States District Court
for the Western District of Missouri
Stephen R. Bough, U.S. District Judge
Case No.: 4:22-cv-00189-SRB*

BRIEF FOR DEFENDANT-APPELLANT

Sean P. Hamer	Mark S. Landman
Rachel M. Smith	Jerry A. Cuomo
SCHARNHORST AST	Gerald T. Ford
KENNARD GRIFFIN, PC.	LANDMAN & CORSI
1100 Walnut Street,	BALLAINE & FORD P.C.
Suite 1950	120 Broadway, 13th Floor
Kansas City, Missouri	New York, New York
64106	10271
816-268-9400	212-238-4800

Attorneys for Defendant-Appellant

* * *

[Page 7]

SUMMARY OF THE ARGUMENT

First, Amtrak was entitled to JMOL because Plaintiffs did not present a submissible case that Amtrak owed a duty:

- Amtrak had a duty to protect Aaron from Webb's criminal act only if prior violent crimes on the River Runner made the shooting foreseeable. There was no evidence of *any* prior violent crimes on the River Runner and, as a result, Webb's random shooting of Aaron was unforeseeable. (Argument, *infra*, Point I).

- Amtrak did not have a duty to screen passengers for weapons. No state or federal regulation requires that and there was no admissible evidence that any surface transportation provider does so.

To the contrary, the standard in the industry is to ***not*** screen passengers. (Point II(A)).

Second, Amtrak was entitled to JMOL because Plaintiffs did not present a submissible case on causation:

- Amtrak’s alleged lack of police presence did not cause Aaron’s shooting. In fact, Webb testified that no degree of police presence would have deterred him from shooting Aaron. (Point II(B)).

- Nothing Amtrak did or failed to do after Aaron was shot caused his death. Plaintiffs’ expert testified that, even if Amtrak immediately procured aid for Aaron, he had only a 4% to 14% chance of surviving. (Point III).

Third, Amtrak is entitled to a new trial because:

* * *

[Page 10]

ARGUMENT

POINT I

AMTRAK IS ENTITLED TO JMOL BECAUSE THERE WAS NO EVIDENCE AT TRIAL THAT AARON’S MURDER WAS FORESEEABLE

A motion for JMOL “presents a legal question of whether there is sufficient evidence to support a jury verdict”, which this Court reviews *de novo*. *Gray v. Bicknell*, 86 F.3d 1472, 1478 (8th Cir. 1996). The District Court erred in denying

Amtrak's JMOL motion because there was no evidence of prior violent crimes on the River Runner that made Aaron's shooting foreseeable.

* * *

[Page 19]

POINT II

AMTRAK IS ENTITLED TO JMOL BECAUSE THERE WAS NO EVIDENCE THAT IT HAD A DUTY TO SCREEN PASSENGERS FOR WEAPONS AND ANY LACK OF AMTRAK POLICE PRESENCE DID NOT CAUSE AARON'S MURDER

Amtrak is alternatively entitled to JMOL because there was no evidence that: (1) Amtrak breached a duty to screen passengers for weapons; and (2) an alleged lack of an Amtrak police presence caused (or failed to prevent) the shooting. This Court reviews this issue *de novo*. *Gray*, 86 F.3d at 1478.

* * *

[Page 23]

POINT III

**AMTRAK IS ENTITLED TO JMOL BECAUSE
THERE WAS NO EVIDENCE THAT
AMTRAK'S ALLEGED FAILURE TO
TIMELY RENDER MEDICAL ASSISTANCE
OR DISCOVER THE NEED FOR SAME
CAUSED AARON'S DEATH**

Plaintiffs argued that Amtrak caused Aaron's death because it did not adequately investigate at Lee's Summit and discover his need for medical attention sooner. (App.358; R. Doc. 259, at 23). Even if this were true, Webb fatally wounded Aaron and there was no evidence he would have survived had Amtrak acted more expediently. This Court reviews this issue *de novo*. *Gray*, 86 F.3d at 1478.

* * *

[Page 65]

CONCLUSION

Amtrak requests that this Court reverse the District Court and: (1) grant Amtrak JMOL dismissing Plaintiffs' claims; or, in the alternative, (2) grant Amtrak a new trial; or, in the alternative, (3) reduce the punitive damages award to a ratio of no more than 1:1.

29a

Respectfully submitted,

/s/ Jerry A. Cuomo _____

Jerry A. Cuomo
Mark S. Landman
Gerald T. Ford
LANDMAN CORSI BALLAINE &
FORD, P.C.
120 Broadway, 13th Floor
New York, New York 10271
T: (212) 238-4800

and

Sean P. Hamer
Rachel M. Smith
SCHARNHORST AST KENNARD
GRIFFIN, P.C.
1100 Walnut
Suite 1950
Kansas City, Missouri 64106
T: (816) 268-9400

*Attorneys for Defendant/Appel-
lant/Cross-Appellee National
Railroad Passenger Corpora-
tion d/b/a Amtrak*

30a

Case Nos. 24-2654 and 24-2693

**IN THE UNITED STATES COURT
OF APPEALS
FOR THE EIGHTH CIRCUIT**

**BREAYONNA AARON, individually and on behalf
of RICHIE TERRELL AARON, JR., deceased, and
on behalf of her minor children M.A., R.A.
and L.A.; M.A., by and through next friend,
BREAYONNA AARON; R.A., by and through next
friend BREAYONNA AARON; L.A., by and
through next friend BREAYONNA AARON,**

**Plaintiffs – Appellees and
Cross-Appellants**

vs.

**NATIONAL PASSENGER RAIL CORPORATION
d/b/a AMTRAK,**

**Defendant – Appellant and
Cross-Appellee,**

and

MARQUISE L. WEBB,

Defendant.

**Appeal from U.S. District Court,
Western District of Missouri
Honorable Stephen R. Bough,
U.S. District Judge
Case No. 4:22-cv-00189-SRB**

**BRIEF OF THE APPELLEES
AND CROSS-APPELLANTS**

Jonathan Sternberg, Mo. #59533
Jonathan Sternberg, Attorney, P.C.
2323 Grand Boulevard #1100
Kansas City, Missouri 64108
(816) 292-7020
jonathan@sternberg-law.com

James R. Layton, Mo. #45631
*Tueth Keeney Cooper Mohan
& Jackstadt, P.C.*
34 N. Meramec, Suite 600
St. Louis, Missouri 63105
(314) 880-3600
jlayton@tuethkeeney.com

Aubrey “Nick” Pittman, Tex. #16049750
The Pittman Law Firm, P.C.
901 Main Street, Suite 3670
Dallas, Texas 75202
(214) 377-9815
pittman@thepittmanlawfirm.com

COUNSEL FOR APPELLEES AND CROSS-APPELLANTS

ORAL ARGUMENT REQUESTED

* * *

[Page 20]

Summary of the Argument

The district court properly denied Amtrak judgment as a matter of law on liability. It correctly held the plaintiffs made a submissible case that: (1) Mr. Aaron's shooting was foreseeable to Amtrak, (2) Amtrak owed a duty to prevent the shooting by reasonable means, which Amtrak breached, and which caused Mr. Aaron's death, and (3) Amtrak's failure to render medical assistance caused Mr. Aaron's death.

The district court also properly denied Amtrak a new trial. Amtrak waived its only instructional challenge, which instruction was proper in any case. The court properly admitted evidence of prior crimes. Col. Mills' expert testimony was proper. Amtrak opened the door to references to airport security and commuter railroad security. And Missouri law does not allow for an appellate re-determination of whether the jury's verdict fit the weight of the evidence, which it did in any case.

The district court also properly denied Amtrak judgment as a matter of law on the plaintiffs' punitive-damage claim. Substantial evidence supported the claim under Missouri law, and Amtrak had legally sufficient notice of the claim.

But the district court did err in remitting the punitive-damage award down to a ratio of 4:1. A ratio of 9:1 would have sufficed to meet due process concerns while still recognizing the reprehensibili-

ty of Amtrak’s conduct the jury found. Amtrak’s 1:1 suggestion is meritless.

Argument

I. The district court properly held the plaintiffs made a submissible case that the shooting of Mr. Aaron was foreseeable to Amtrak.

Standard of Review

This Court reviews the denial of a post-trial motion for judgment as a matter of law under Fed. R. Civ. P. 50(b) de novo, using the same standards the district court had to use. *Am. Bank of St. Paul v. TD Bank, N.A.*, 713 F.3d 455, 462 (8th Cir. 2013).

Judgment as a matter of law only lies if there is “a complete absence of probative facts to support the conclusion reached so that no reasonable juror could have found for the nonmoving party.” *Foster v. Time Warner Entm’t Co.*, 250 F.3d 1189, 1194 (8th Cir. 2001) (citation omitted). This means “[t]his court will reverse . . . only when the record contains ‘no proof beyond speculation to support the verdict.’” *Am. Bank*, 713 F.3d at 462 (citations omitted).

In determining this, the Court “must draw all reasonable inferences in favor of the nonmoving party, and it may not make credibility determinations or weigh the evidence.” *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150 (2000). Instead, “it must disregard all evidence favorable to the moving party that the jury is not required to

believe.” *Id.* at 151.

Therefore, as the district court did, in reviewing the denial of a motion for judgment as a matter of law, this Court must:

(1) resolve direct factual conflicts in favor of the nonmovant, (2) assume as true all facts supporting the nonmovant which the evidence tended to prove, (3) give the nonmovant the benefit of all reasonable inferences, and (4) deny the motion if the evidence so viewed would allow reasonable jurors to differ as to the conclusions that could be drawn.

Stults v. Am. Pop Corn Co., 815 F.3d 409, 418 (8th Cir. 2016) (citation omitted).

The point is to determine whether the plaintiff made a submissible case, which state law governs when a plaintiff’s cause of action is under state law. *Allstate Indem. Co. v. Dixon*, 932 F.3d 696, 702 (8th Cir. 2019).

In Missouri, a submissible case is one in which the plaintiff has presented substantial evidence for every fact essential to liability. *Love v. Hardee’s Food Sys., Inc.*, 16 S.W.3d 739, 742 (Mo. Ct. App. 2000). “Substantial evidence is that which, if true, has probative force upon the issues, and from which the trier of facts can reasonably decide the case.” *Id.* (citation omitted). “Substantial” does not mean quantity or even quality, just that the evidence must be probative of the issues it was offered to prove. *McCrackin v. Plummer*, 103 S.W.3d 178, 181 (Mo. Ct. App. 2003).

[Page 70]

Conclusion

This Court should affirm the district court's judgment on liability and compensatory damages. It should modify the punitive-damage award to undo the remission of the jury's award amount and instead order a 9:1 multiplier award.

Respectfully submitted,

<i>Jonathan Sternberg,</i>	<i>James R. Layton,</i>
<i>Attorney, P.C.</i>	<i>Mo. #45631</i>
by <u>/s/ Jonathan Sternberg</u>	<i>Tueth Keeney Cooper</i>
<i>Jonathan Sternberg,</i>	<i>Mohan & Jackstadt,</i>
<i>Mo. #59533</i>	<i>P.C.</i>
2323 Grand Boulevard	34 N. Meramec, Suite 600
#1100	St. Louis, Missouri 63105
Kansas City, Missouri	(314) 880-3600
64108	<i>jlayton@tuethkeeney.com</i>
(816) 292-7020	
<i>jonathan@</i>	
<i>sternberg-law.com</i>	

Aubrey "Nick" Pittman,
 Tex. #16049750
The Pittman Law Firm, P.C.
 901 Main Street, Suite 3670
 Dallas, Texas 75202
 (214) 377-9815
pittman@thepittmanlawfirm.com

COUNSEL FOR APPELLEES AND CROSS-APPELLANTS

36a

**IN THE UNITED STATES COURT
OF APPEALS
FOR THE EIGHTH CIRCUIT**

Case Nos. 24-2654
and 24-2693

BREAYONNA AARON, *et alia*,

Plaintiffs-Appellees and
Cross-Appellants,

vs.

NATIONAL PASSENGER RAILROAD CORPORATION,

Defendant-Appellant and
Cross-Appellees.

On Appeal from the United States District Court
Western District of Missouri
Case No. 4:22-cv-00189-SRB

PETITION FOR REHEARING EN BANC

Appellees and Cross-Appellants Breayonna Aaron, individually and on behalf of Richie Terrell Aaron, Jr., deceased, and on behalf of her minor children M.A., R.A. and L.A., request the Court under Fed. R. App. P. 40(b) and 8th Cir. R. 35A to rehear this case en banc.¹

¹ Panel rehearing also automatically is requested. 8th Cir. R. 40A(b).

Grounds for Rehearing En Banc

Under Fed. R. App. P. 40(b)(2)(D), rehearing en banc is warranted because the panel's decision reversing the district court's \$44 million judgment entered on a jury verdict raises questions of exceptional importance: (1) whether a national common carrier operating a mobile premises owes a heightened duty to protect its passengers from third-party violent acts, or instead may be insulated from duty absent a history of sufficiently numerous, similar, and recent violent crimes on the same conveyance itself; (2) whether a carrier's assumption of safety obligations, through its policies, representations, and training, may be disregarded entirely in determining its duty to its passengers; and (3) whether foreseeability for third-party criminal acts aboard a mobile conveyance may be reduced to a categorical rule that excludes regional and route-specific crime patterns and the carrier's own internal crime tracking, warnings, and admissions as legally irrelevant.

Under Fed. R. App. P. 40(b)(2)(A), rehearing en banc also is warranted because the panel's decision conflicts with this Court's precedent governing foreseeability and the permissible scope of evidence bearing on duty. The panel effectively adopts a bright-line rule that foreseeability of third-party criminal acts aboard a mobile conveyance may be found only from sufficiently numerous, similar, and recent prior violent crimes on that same conveyance, and it categorically excludes regional and route-specific crime evidence and related internal

safety knowledge from consideration. That approach conflicts with *Liszewski v. Target Corp.*, 374 F.3d 597, 600 (8th Cir. 2004), which rejected bright-line exclusions, declined to wholesale refuse to consider off-premises crimes, and instead treated foreseeability as a context-dependent inquiry in which that evidence may be given “less weight,” rather than none at all.

A. Summary

This case arises from the murder of a passenger aboard Amtrak’s Lincoln Service Missouri River Runner train in Missouri. After an eight-day trial, the jury returned a verdict finding Amtrak liable for negligence and wrongful death and awarded \$8.8 million in compensatory damages and \$150 million in punitive damages. The district court remitted punitive damages to \$35.2 million, entering a final judgment of \$44 million.

The panel reversed in full and directed entry of judgment for Amtrak. It held that none of the appellees’ theories of negligence could be submitted to the jury because Amtrak owed no duty to protect the decedent from the shooting and because, as to post-shooting conduct, the evidence was insufficient to establish but-for causation.

On duty and foreseeability, the panel did not address Missouri’s common-carrier doctrine or the appellees’ separate assumption-of-duty theory, notwithstanding that Amtrak’s status as a common carrier was undisputed and those doctrines were extensively briefed.

Instead, the panel decided the issue of duty exclusively through general premises-liability principles governing third-party criminal acts. Applying that framework, the panel held that as a matter of Missouri law, a third-party criminal act aboard a passenger train is unforeseeable unless there have been sufficiently numerous, recent, and similar violent crimes on that same train itself. It held that violent crime elsewhere along the route, in the surrounding metropolitan areas, or elsewhere within Amtrak's Central Division was legally irrelevant. It also held Amtrak's own internal crime tracking, admissions by its police officials that shootings on trains were foreseeable, internal requests for increased security, and Amtrak's safety policies could not be considered in determining foreseeability or duty, reasoning that this evidence merely reflected prudence beyond what the law requires.

The panel's decision adopts a restrictive framework that, applied to a mobile premises operated by a national common carrier, effectively insulates the carrier from liability unless sufficiently numerous, similar, and recent violent crimes already have occurred on the same vehicle. That rule has significant consequences for passenger safety and for the operation of mass-transit systems nationwide. It also narrows foreseeability by categorically excluding regional context and internal safety knowledge from consideration, and it does so without engaging the role of common carrier obligations in the analysis of duty.

These issues are not specific to this case. They will recur in cases involving railroads, buses, ferries, and other forms of mass transit, and they implicate how negligence law treats mobile premises, internal risk assessment, and duties of common carriers. Because the panel's published decision resolves these questions categorically and in tension with this Court's prior decision in *Liszewski v. Target Corp.*, 374 F.3d 597, 600 (8th Cir. 2004), rehearing en banc is warranted.

B. The panel's failure to address Missouri's common-carrier-duty and assumption-of-duty doctrines warrants en banc review.

The panel's decision resolves the existence of duty without addressing two threshold duty doctrines that the appellees raised and preserved, which if correct would warrant affirmance: (1) Missouri's common-carrier doctrine and (2) Missouri's assumption-of-duty doctrine.

Although Amtrak's status as a national common carrier was undisputed, and the appellees separately argued that Amtrak affirmatively assumed passenger-safety obligations through its policies, representations, and training, the panel resolved duty exclusively through general third-party-crime premises-liability decisions and their foreseeability doctrine. By failing to engage either the heightened relationship-based duty of common carriers to protect their passengers or the conduct-based doctrine that an actor can assume a duty it ordinarily might not have, the panel's opinion leaves unresolved

whether those doctrines retain independent force in cases involving third-party violence aboard a conveyance operated by a national carrier. That omission has significant implications for passenger-safety litigation involving rail, bus, and other mass-transit systems and warrants the full Court's attention.

1. Missouri's common-carrier duty

The law of Missouri recognizes that a legal duty may arise in multiple ways, including one the law imposes based on the relationship between the parties. *Lockhart v. Carlyle*, 585 S.W.3d 310, 316 n.10 (Mo. Ct. App. 2019). In the appellees' briefing, that relationship-based duty was the starting point of their analysis (Brief of the Appellees ["Aple.Br."] 32-33).

Like many states, *see* Restatement (Second) of Torts § 314A, "It is well established under Missouri law that a special relationship exists between a common carrier . . . and its passengers." *Spencer v. Am. Airlines, Inc.*, 553 S.W.3d 861, 867 (Mo. Ct. App. 2018). The common carrier's duty is

to exercise the highest degree of care to protect its passengers from all dangers that are known or by the exercise of the highest degree of care ought to be known[,] . . . includ[ing] the actions of third parties over whom the carrier has no control[,] when injury reasonably could have been anticipated by the carrier or its employees.

Id. (citation omitted). Courts including this Court have held common carriers liable for assaults on passengers on the conveyance in light of that heightened duty. *See, e.g., Gilstrap v. Amtrak*, 998 F.2d 559, 560-62 (8th Cir. 1993) (sexual assault by Amtrak employee); *McCoy v. Chi. Transit Auth.*, 371 N.E.2d 625, 627-29 (Ill. 1977) (assault by another passenger); *Gordon v. Chi. Transit Auth.*, 470 N.E.2d 1163, 1168-69 (Ill. App. 1st Dist. 1984) (assault/rape by passenger); *Hernandez v. New Orleans Pub. Serv., Inc.*, 346 So.2d 304, 305 (La. Ct. App. 1977) (assault by bus driver).

The appellees relied on this to argue that because Amtrak is a common carrier, it owed Mr. Aaron and the other passengers the highest degree of care to protect them from actions of third parties it reasonably could anticipate (Aple.Br. 32-33).

2. Missouri's assumption-of-duty doctrine

They appellees also argued to the panel Amtrak assumed a duty to protect Mr. Aaron and the other passengers from shootings by third parties on the train when it promised it would provide its passengers safety, including from criminal firearms issues, had a policy prohibiting passengers carrying firearms on its trains, and trained employees to deal with active shooters on trains and hired a third-party company to advise it on safety strategy for violent crimes (Aple.Br. 32-34). *See Bowan v. Express Med. Transp., Inc.*, 135 S.W.3d 452, 457 (Mo. Ct. App. 2004) (“If a defendant assumes a

duty, by contract or by conduct, he can be held liable for injuries caused by the unsafe performance of that assumed duty,” “even when there was no duty to act originally”).

3. The panel’s decision does not address either doctrine, warranting rehearing en banc.

Despite the appellee’s arguments, the panel’s duty analysis does not engage either Missouri’s common carrier framework or assumption doctrine at all. Instead, the panel framed the case as an ordinary premises liability third-party-crime dispute and held Amtrak owed no duty to protect Mr. Aaron from the criminal acts of third parties because the shooting was not foreseeable under the panel’s restrictive on-train-only foreseeability approach. It held that violent crimes were not foreseeable on the River Runner because the evidence showed only one prior incident aboard the River Runner and it was dissimilar, so there were not sufficiently numerous, similar, and recent crimes to place Amtrak on notice of unprovoked shootings. (Opinion 8). It then held that the appellees’ attempt to use evidence of crime in Amtrak’s Central Division, the metropolitan areas the route served, and Amtrak’s internal crime data expanded the premises too far and did not comport with Missouri law (Opinion 8-9). It rejected the use of Amtrak’s own security measures and its recognition that crime was possible as a basis for duty. (Opinion 9). That is only a premises liability duty

analysis, not a common-carrier or assumption duty analysis.

That matters because the common-carrier and assumption doctrines do not treat the duty question as turning solely on whether sufficiently numerous, similar, and recent prior violent crimes occurred on the same physical premises. The common carrier duty is framed in terms of the carrier's heightened obligation to protect passengers from dangers that are known or ought to be known and from third-party actions when injury reasonably could have been anticipated by the carrier or its employees. *Spencer*, 553 S.W.3d at 867.

The panel's failure to engage with these doctrines has two consequences relevant to en banc review:

- it effectively dissolves the duty of common carriers or assumed duties into general premises liability doctrine in third-party-crime cases, because the panel resolved the existence of duty without acknowledging that common carrier status or assumption of a duty could alter either the foreseeability analysis or the scope of the duty once foreseeability is shown; and
- because this is a published decision reversing a substantial jury verdict and directing entry of judgment as a matter of law, its analysis will be cited as the governing duty framework in future cases against transportation carriers.

If the Court intends that result, it should say so expressly and reconcile it with Missouri's common carrier and assumption doctrines. If it does not, the panel's opinion leaves an important area of law in a state of confusion.

This question is also intertwined with the panel's treatment of Amtrak's internal safety knowledge. The appellees briefed that Amtrak did not merely operate trains, it held itself out as responsible for passenger safety, had a firearms prohibition policy, trained employees for active shooters, and engaged in safety strategy for violent crime (Aple.Br. 33-34). The appellees argued that those facts supported both the reasonable anticipation component of the common carrier duty and an independent assumed duty (Aple.Br. 33-34).

Despite this, the panel treated internal awareness and security measures as legally irrelevant to duty and foreseeability, stating that prudence beyond what the law requires cannot be used to infer duty (Opinion 9). That approach may be defensible in ordinary premises cases, but it is difficult to square with the common-carrier doctrine, which is built around the carrier's special relationship to passengers and the heightened degree of care that relationship imposes, or with Amtrak's assumption of the duty to protect its passengers from violent acts by third parties using firearms.

To be sure, this is not an academic dispute about labels. The panel's holding about Amtrak's duty operates as a safe harbor for a mobile common carrier absent a history of sufficiently numerous, similar, and recent violent crimes on the same

conveyance itself (Opinion 8). Whether Missouri's common-carrier doctrine or assumption-of-duty doctrine permit that result is precisely the sort of statewide tort law question that federal courts should approach with caution, and it is the sort of recurrent, system-wide question that warrants en banc attention in this Court. The panel's opinion resolves duty without addressing the doctrines the appellees invoked and without clarifying whether common-carrier or assumption-of-duty principles have any independent force in third party crime cases aboard a conveyance. That unresolved question is of exceptional importance and warrants rehearing en banc.

C. The panel's framework for foreseeability of third-parties' injury to passengers on mobile premises raises issues of exceptional importance.

The panel's decision also warrants en banc review because it adopts a restrictive foreseeability framework that, as applied to a mobile premises operated by a national carrier, materially alters how Missouri negligence law treats third-party criminal acts. While the panel characterized its analysis as an application of Missouri precedent, its approach effectively converts foreseeability into a categorical threshold rule that excludes entire classes of evidence as a matter of law and has consequences well beyond the facts of this case.

As the panel notes (Opinion 6), the law of Missouri long has treated foreseeability as the

touchstone for duty in third-party-crime cases. But it has never done so as a bright-line or purely numerical inquiry.

In *Madden v. C & K Barbecue Carryout, Inc.*, 758 S.W.2d 59, 62-63 (Mo. 1988), the Supreme Court of Missouri explained that a duty arises when a business owner knew or should have known of a foreseeable likelihood that third-party conduct would endanger invitees, and it emphasized that foreseeability does not require anticipation of the precise injury that occurred. The court in *Madden* identified a range of prior criminal activity as relevant to that analysis, including armed robbery, assault, and purse snatching, even though the ultimate harm was abduction and sexual assault. *Id.* at 62 n.2.

Subsequent Missouri decisions likewise describe foreseeability as a fact-intensive inquiry that considers surrounding circumstances rather than insisting on identical prior crimes on the same premises. In *Richardson v. QuikTrip Corp.*, 81 S.W.3d 54, 63 (Mo. Ct. App. 2002), the court held that foreseeability of violent crime “is not absolutely dependent upon notice of prior crimes of a similar nature occurring on or near the premises,” but may be determined from “all of the circumstances present.” (Citation omitted). And in *L.A.C. v. Ward Parkway Shopping Ctr. Co.*, 75 S.W.3d 247, 259 (Mo. 2002), the Supreme Court of Missouri stated expressly that “[f]oreseeability does not require identical crimes in identical locations” and framed the inquiry as whether prior criminal acts would

put reasonable and prudent persons on notice that precautions should be taken.

The appellees relied on that body of law to argue that foreseeability in this case could be established by evidence of violent crime along the River Runner route and at the locations where passengers boarded, as well as by Amtrak's own internal crime tracking and admissions that shootings on trains were foreseeable (Aple.Br. 23-30). They cited evidence that Amtrak tracked dozens of violent crimes in Missouri and Illinois in the years preceding the shooting, a passenger had brandished a knife on this very same train, there had been prior shootings in Amtrak's Central Division, and that Amtrak's own police officials acknowledged that a shooting on a train stopped at a station was foreseeable. (Aple.Br. 27-30).

The panel rejected that framework. It held that a violent criminal act aboard the River Runner was unforeseeable as a matter of law because there had been only one prior incident on the River Runner itself – the brandishing of the knife – and the panel deemed that incident dissimilar (Opinion 8). It then held that evidence of crime elsewhere along the route, in the metropolitan areas the train served, and within Amtrak's Central Division impermissibly expanded the relevant "premises" and therefore could not be considered (Opinion 8-9). The panel also held that Amtrak's internal crime tracking, admissions by its police officials, and recognition that shootings were possible could not establish foreseeability or duty because that

evidence reflected prudence beyond what the law requires (Opinion 9).

The panel's approach goes further than weighing evidence or assigning it less significance. It excludes entire categories of evidence as legally irrelevant in the context of a mobile conveyance. While this Court has recognized that off-premises crimes may be entitled to less weight in some circumstances, it has also rejected wholesale exclusion of that evidence. In *Liszewski v. Target Corp.*, 374 F.3d 597, 600 (8th Cir. 2004), this Court stated that it would "not rely on any bright-line rules such as a temporal cutoff or the wholesale refusal to consider crimes that occurred off premises," but instead would "simply give less weight" to temporally remote or off-premises crimes depending on the circumstances. The panel's approach here does not give that evidence less weight. Instead, it deems the evidence irrelevant as a matter of law when the premises is a moving conveyance.

As applied to a mobile premises, the panel's distinction is novel and consequential. A train boards passengers at multiple locations, travels through different environments, and serves as a single, continuous conveyance across those locations. Under the panel's rule, foreseeability can be established only by prior similar violent crimes on that same train, regardless of the carrier's knowledge of crime along the route or at boarding locations, and regardless of the carrier's own internal assessment of risk. *Cf. Neering v. Ill. Cent. R.R.*, 50 N.E.2d 497, 501-03 (Ill. 1943) (restoring verdict against railroad for passenger's assault on suburban train

platform even where no prior incidents at that station, where carrier still reasonably should have anticipated attack). The practical effect is to insulate a carrier from duty unless identical crimes have already occurred on the same vehicle.

Similarly, in *Ostrander v. Duggan*, 341 F.3d 745, 749 (8th Cir. 2003), the Court emphasized that foreseeability under Missouri law turns on whether there were “specific incidents of violent crimes on the premises” sufficient to place a defendant on notice. (Citation omitted). But the Court in *Ostrander* did not hold that evidence of surrounding circumstances or a defendant’s own internal knowledge were categorically irrelevant. Rather, it evaluated the record presented and concluded that the plaintiff’s evidence was insufficient to establish foreseeability under the applicable standard.

The panel’s decision here goes much further. It does not merely assign less weight to evidence of crime along the route, at boarding locations, or within the Amtrak operating region. Instead, it entirely excludes that evidence from the foreseeability analysis when the premises is a moving conveyance, holding that consideration of that evidence impermissibly expands the premises as a matter of law. (Opinion 8-9). Likewise, it excludes the carrier’s own internal crime tracking, admissions, and recognition of risk on the ground that this evidence reflects prudence beyond what the law requires (Opinion 9).

Because the panel’s published decision adopts this narrowed framework and will govern future cases involving passenger rail and other forms of

mass transportation, it implicates the uniformity of this Court's decisions. Whether foreseeability may be reduced to the panel's categorical rule for mobile premises, and whether this Court's prior rules for analyzing foreseeability permit the exclusion of entire categories of contextual evidence as a matter of law, are questions appropriate for the full Court's resolution.

D. Conclusion

The panel's decision resolves questions of duty and foreseeability in a manner that has significant implications beyond this case. First, it holds Amtrak had no duty to protect against the murder of Mr. Aaron but does not address Missouri's common-carrier doctrine or the distinct doctrine of assumption of duty, even though Amtrak's status as a common carrier and its affirmative safety representations were undisputed and extensively briefed. Second, it applies a restrictive foreseeability framework to a mobile premises operated by a national carrier, effectively insulating the carrier from duty to protect its passengers against third-party violent crimes absent sufficiently numerous, similar, and recent violent crimes on the same conveyance. Third, it categorically excludes regional and route-specific crime patterns and the carrier's own internal crime tracking, warnings, and admissions from consideration as a matter of law.

Those holdings narrow foreseeability analysis and duty doctrine in a way that will govern future cases involving passenger rail and other forms of

mass transportation. Whether common-carrier and assumption-of-duty principles have independent force, and whether foreseeability for third-party criminal acts aboard a mobile conveyance should be reduced to the panel's categorical rule, are questions of exceptional importance warranting the full Court's consideration.

The Court should rehear this case en banc.

Respectfully submitted,

<i>Jonathan Sternberg,</i>	<i>James R. Layton,</i>
<i>Attorney, P.C.</i>	<i>Mo. #45631</i>
by <u>/s/ Jonathan Sternberg</u>	<i>Tueth Keeney Cooper</i>
<i>Jonathan Sternberg,</i>	<i>Mohan & Jackstadt,</i>
<i>Mo. #59533</i>	<i>P.C.</i>
2323 Grand Boulevard	34 N. Meramec, Suite 600
#1100	St. Louis, Missouri 63105
Kansas City, Missouri	(314) 880-3600
64108	<i>jlayton@tuethkeeney.com</i>
(816) 292-7020	
<i>jonathan@</i>	
<i>sternberg-law.com</i>	

Aubrey "Nick" Pittman,
 Tex. #16049750
The Pittman Law Firm, P.C.
 901 Main Street, Suite 3670
 Dallas, Texas 75202
 (214) 377-9815
pittman@thepittmanlawfirm.com

COUNSEL FOR APPELLEES AND CROSS-APPELLANTS