No. 07-1152

In the Supreme Court of the United States

CHARLES ODELL WELDON, ET AL.,
PETITIONERS

v.

NORFOLK SOUTHERN RAILWAY COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

An Ohio statute requires plaintiffs seeking tort damages for some forms of asbestos-related injury to make a complaint-stage prima facie showing that they have an asbestos-related physical impairment. The question presented is whether the Supremacy Clause permits the Ohio statute to be applied to plaintiffs whose causes of action arise under the Federal Employers' Liability Act.

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This brief is filed in response to the Court's order inviting the Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be denied.

STATEMENT

1. This Court has recognized that asbestos litigation "defies customary judicial administration." *Ortiz* v. *Fibreboard Corp.*, 527 U.S. 815, 821 (1999). The challenges of asbestos litigation arise from, *inter alia*, the variable nature and long latency period of asbestos-related disease, the large population of potential claimants, and the finite and depleting resources of defendants. Asbestos exposure can cause asymptomatic physiological changes (such as thickening of the pleural tissue outside the lungs), non-malignant pulmonary disease (such as asbestosis) that may or may not cause symp-

toms, or mesothelioma, a cancer that causes "agonizing, unremitting pain in the lungs" and "almost certain" death within a short period of time. *Norfolk & W. Ry.* v. *Ayers*, 538 U.S. 135, 168 (2003) (Kennedy, J., concurring in part and dissenting in part); see Commission on Asbestos Litig., ABA, *Report to the House of Delegates* 6-7 (2003) (*ABA Report*);[1] Peter H. Schuck, *The Worst Should Go First: Deferral Registries in Asbestos Litigation*, 15 Harv. J.L. & Pub. Policy 541, 544 (1992) (*Worst Should Go First*). The latency period for asbestos-related disease spans one or more decades, and for some exposed individuals, symptoms will never develop. *ABA Report* 6, 12.

Bankruptcies among asbestos defendants limit the funds available to compensate victims. *Ayers*, 538 U.S. at 169 (Kennedy, J., concurring in part and dissenting in part) (noting that 57 companies have been driven to bankruptcy by asbestos litigation). Statute-of-limitations concerns encourage the filing of claims by plaintiffs who have been exposed to asbestos but as yet suffer no asbestos-related disease. *ABA Report* 9-11. In addition, for-profit litigation screening companies that "actively solicit asymptomatic workers," as well as lax or fraudulent pre-litigation medical examinations, have exacerbated the trends. *Id.* at 8-9.

2. a. In 2004, the Ohio General Assembly enacted a measure to address the "extraordinary volume of nonmalignant asbestos cases [that] continue to strain federal and state courts." Act of June 3, 2004 (H. 292), Am. Sub. H. Bill No. 292, § 3(A)(3), 2003-2004 Ohio Laws 3989. The statute requires certain state-court asbestos

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[1] The ABA Report is available at http://www.abanet.org/leadership/full_report.pdf.

plaintiffs to file documentation with their complaint—in the form of a written report and medical-test results—establishing prima facie evidence that the plaintiff has a physical impairment for which asbestos exposure was "a substantial contributing factor." Ohio Rev. Code Ann. § 2307.92 (LexisNexis 2005). The filing requirement applies to asbestos-related claims that are based on a nonmalignant condition (*i.e.*, a condition other than a diagnosed cancer), asbestos-related lung cancer claims brought by plaintiffs who also were smokers, and asbestos-related wrongful death claims. *Id.* § 2307.92(B), (C) and (D). The filing requirement does not apply to claims based on mesothelioma, a disease for which asbestos is the only known cause. *Id.* § 2307.92(E); see *Ayers*, 538 U.S. at 142 n.4.

A plaintiff alleging a non-malignant condition must establish that a "competent medical authority"—defined as a board-certified specialist who has treated and had a doctor-patient relationship with the plaintiff and spends no more than 25% of his or her time providing consulting or expert services in tort actions—has diagnosed the plaintiff as having an asbestos-related physical impairment. Ohio Rev. Code Ann. §§ 2307.91(Z), 2307.92(B) (LexisNexis 2005). The diagnosis must have taken account of the patient's personal and medical history, including all possible sources of asbestos exposure, and be based on a medical examination and pulmonary function testing. *Id.* § 2307.92(B). The statute specifies the minimum findings (with respect to respiratory impairment, lung capacity, and chest x-ray results) that will substantiate a diagnosis that the patient has an asbestos-related physical impairment. *Ibid.* For smokers with lung cancer, similar requirements apply, including a diagnosis by a competent medical authority that

the patient experienced substantial asbestos exposure, evidence of a minimum latency period of ten years between the patient's first exposure to asbestos and the diagnosis of lung cancer, and a finding by the specialist that exposure to asbestos was a "substantial contributing factor" to the cancer. *Id.* § 2307.92(C)(1). Plaintiffs in wrongful death actions must make a similar submission. *Id.* § 2307.92(D)(1).

The purpose of the medical screening provisions of the Ohio statute is to prioritize asbestos-related tort claims on the state court docket. H. 292 § 3(B)(1), 2003-2004 Ohio Laws 3991. Cases in which the prima facie showing is satisfied proceed to discovery and adjudication, and cases in which the showing is not made are "administratively dismiss[ed] * * * without prejudice." Ohio Rev. Code Ann. § 2307.93(C) (LexisNexis 2005). The trial court "maintain[s] its jurisdiction" over the administratively dismissed case, the statute of limitations is tolled, and the plaintiff may move to reinstate the case at any time by presenting prima facie evidence that satisfies the statute. *Id.* §§ 2307.93(C), 2307.94(A).

b. In its statement of findings and intent, the Ohio legislature indicated that "reasonable medical criteria" were "a necessary response to the asbestos litigation crisis in this state." H. 292 § 3(A)(5), 2003-2004 Ohio Laws 3991. The legislature noted that "the vast majority of Ohio asbestos claims are filed by individuals who allege they have been exposed to asbestos and who have some physical sign of exposure to asbestos, but who do not suffer from an asbestos-related impairment." *Id.*

§ 3(A)(5), 2003-2004 Ohio Laws 3990.[2] The legislature found that reasonable medical criteria applied to claims at the outset of litigation would permit the state courts to "expedite the resolution of claims brought by * * * sick claimants and [would] ensure that resources are available for those who are currently suffering from asbestos-related illnesses and for those who may become sick in the future." *Ibid.*

3. a. Petitioners Charles Odell Weldon and Eric A. Wiles are former employees of Norfolk Southern Railway Company (Norfolk) who filed suits against Norfolk in Ohio state court under the Federal Employers' Liability Act (Railroads) (FELA), 45 U.S.C. 51 *et seq.* Pet. App. 17a-18a.[3] Petitioners claimed that Norfolk negligently exposed them to asbestos during the course of their employment and that they consequentially contracted "'occupational pneumoconiosis including but not limited to asbestosis, silicosis, and[/]or coal workers lung disease and/or lung cancer.'" Pet. 8 (quoting Compl. para. 14). Petitioners also sought damages for their fear of contracting cancer in the future. *Ibid.* (citing Compl. para. 15). Petitioners filed their complaints in 1999, before the Ohio statute was enacted, and, following its enactment, did not file the required report and medical

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[2] The legislature cited a study that found that 94% of the 52,900 asbestos claims filed in Ohio state court in 2000 "concerned claimants who are not sick." H. 292 § 3(A)(5), 2003-2004 Ohio Laws 3990.

[3] Petitioner Wiles also sued in his capacity as executor of the Estate of Larry Arnold Wiles. The FELA provides that "[e]very common carrier by railroad while engaging in [interstate] commerce * * * shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce * * * for such injury or death resulting in whole or in part from the negligence" of the carrier or its agents. 45 U.S.C. 51.

test results by the statutory deadline. Pet. App. 17a, 36a-37a.

In response, Norfolk filed a separate action for a declaratory judgment in the Cuyahoga County Court of Common Pleas seeking a determination that the Ohio statute applied to petitioners' pending FELA cases and that the statute "did not infringe on the Supremacy Clause of the United States Constitution." Pet. App. 18a. The Court of Common Pleas held that the FELA preempted the Ohio statute. *Id.* at 32a, 34a-39a. The Court of Appeals of Ohio affirmed, *id.* at 17a-31a, finding that application of the Ohio statute to FELA cases "might preclude claimants from vindicating a substantive right to bring a claim" under the FELA, *id.* at 30a-31a.

b. The Ohio Supreme Court reversed. Pet. App. 1a-16a. The court first determined that the Ohio statutory scheme is "procedural in nature" because it "create[s] a procedure to prioritize the administration and resolution" of existing causes of action and does not "make it more difficult for a claimant to succeed on the merits of a claim." *Id.* at 7a-8a. The court also held that the statutory requirements were not preempted as "procedural provisions [that] impose an unnecessary burden on FELA claimants." *Id.* at 8a-9a. The court relied on *Minneapolis & St. Louis Railroad* v. *Bombolis*, 241 U.S. 211 (1916), *Missouri ex. rel. Southern Railway Co.* v. *Mayfield*, 340 U.S. 1 (1950), *Johnson* v. *Fankell*, 520 U.S. 911 (1997), and *American Dredging Co.* v. *Miller*, 510 U.S. 443 (1994), decisions in which this Court upheld the application of state procedural rules in cases brought under the FELA or another federal statute. Pet. App. 9a-12a. The court concluded that the Ohio statute was a "neutral" rule that "simply permits the

court to prioritize claims for trial purposes" and imposes no greater burden on plaintiffs than the pleading standard contained in Rule 11 of the Ohio Rules of Civil Procedure. *Id.* at 12a (quoting *Johnson*, 520 U.S. at 918).

The Ohio Supreme Court noted that its finding of no preemption was "fortified by the fact that the federal courts themselves have responded to the growth of asbestos litigation by initiating a similar method to prioritize asbestos-related cases." Pet. App. 14a. The court explained that, like the Ohio statute, multi-district litigation (MDL) procedural rules in federal court require asbestos tort plaintiffs to file with their complaint a "doctor-patient medical report setting forth an asbestos-related disease." *Ibid.* (quoting *In re Asbestos Prods. Liab. Litig.*, No. MDL 875, 2002 WL 32151574, at *1 (E.D. Pa. Jan. 16, 2002)). As in Ohio state court, non-compliant federal MDL complaints are administratively dismissed without prejudice, but the statute of limitations is tolled and the plaintiff may move to reinstate the case by filing the required information. *Ibid.* The court noted that the Ohio statutory provisions were "more specific than" the federal MDL order, but that "the effect and purpose [of the two procedures were] generally the same." *Id.* at 15a.[4]

DISCUSSION

This case involves only the threshold requirements under the Ohio statute concerning the claimant's medical condition, not other provisions such as those addressing the types of damages that ultimately may be recovered or the legal liability of particular employers.

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[4] Two judges dissented and found that the Ohio statute would infringe on the plaintiffs' "substantive rights to assert a cause of action under federal law in a state court." Pet. App. 16a (quoting *id.* at 29a).

See note 7, *infra*. Petitioners principally contend that the Court's intervention is warranted because the Ohio Supreme Court "upheld statutory rules that impose *stricter* threshold medical evidentiary requirements than asbestos plaintiffs would need to satisfy as a matter of substantive law to have a claim submitted to a jury or to recover under the FELA if litigated in federal court." Pet. 1. We agree with respondent (Br. in Opp. 7-10) that petitioners' contention is, at this time at least, an unproven hypothesis. The Ohio Supreme Court made no determination that the state law medical criteria would exceed the substantive standards for liability under the FELA. Petitioners' contention that the Ohio statute has the effect of raising the substantive standard for FELA liability thus finds no support in the Ohio Supreme Court's opinion, nor can it be assessed independently by this Court on the limited record in this declaratory judgment action, which does not include any evidence of petitioners' conditions. For those reasons, further review of petitioners' claim is unwarranted. This case, moreover, arises in an abstract posture, with essentially only the validity of the Ohio statute on its face before the Court. That posture would make it difficult for the Court to resolve questions concerning possible preemption issues that might arise in the interpretation of the Ohio statute and its application to particular claims or types of claims. Petitioners' further argument (Pet. 26-27) that the Court's intervention is required to resolve more general "confusion in state courts regarding FELA preemption" (Pet. 26) is without merit.

I. THE OHIO SUPREME COURT'S PREEMPTION RULING DOES NOT WARRANT THE COURT'S REVIEW

1. a. A cause of action under the FELA may be litigated either in federal or state court. *Second Employers' Liab. Cases*, 223 U.S. 1, 55-56 (1912); 45 U.S.C. 56. "As a general matter, FELA cases adjudicated in state courts are subject to state procedural rules, but the substantive law governing them is federal." *St. Louis Sw. Ry.* v. *Dickerson*, 470 U.S. 409, 411 (1985) (per curiam).[5] Even a state procedural rule may be preempted where it conflicts with, or undermines, a principle of federal law. See, *e.g.*, *Brown* v. *Western Ry.*, 338 U.S. 294, 296 (1949) (State "rules of practice and procedure" may not "dig into 'substantive rights.'").

b. This Court explained the fundamentals of preemption in the context of the FELA in *Dice* v. *Akron, Canton & Youngstown Railroad*, 342 U.S. 359 (1952). In *Dice*, the Court held that the validity of a release of FELA liability signed by a railroad fireman was governed by federal law. This Court noted that in the FELA, Congress granted railroad employees "a right to recover against [their] employer for damages negligently inflicted" and that state laws could not be "controlling in determining what the incidents of this federal right shall be," including "what defenses could and could not be properly interposed to suits under the Act." *Id.* at 361. *Dice* also emphasized that "only if federal law controls can the federal Act be given that uniform application throughout the country essential to effectuate its purposes." *Ibid.*; see *Brown*, 338 U.S. at 299 (holding

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[5] This Court, however, long ago acknowledged "the impossibility of laying down a precise rule to distinguish 'substance' from 'procedure'" in this context. *Brown* v. *Western Ry.*, 338 U.S. 294, 296 (1949).

that Georgia state court's restrictive construction of a FELA complaint was not binding on review because, *inter alia*, "over-exacting local requirements for meticulous pleadings" would prevent achievement of a "desirable uniformity in adjudication of federally created rights").

In two non-FELA cases, this Court has more recently addressed the circumstances in which state procedures must yield when a federal cause of action is brought in state court. *Felder* v. *Casey*, 487 U.S. 131 (1988), involved a civil-rights action brought against Milwaukee police officers under 42 U.S.C. 1983 in state court. A Wisconsin statute required a plaintiff suing a state or local officer to notify the government of the substance and amount of the contemplated claim within 120 days of the alleged injury and permit the government the opportunity to settle the claim before it was filed. *Felder*, 487 U.S. at 136-137. The Court concluded that the notice-of-claim statute "conflict[ed] in both its purpose and effects with the remedial objectives of § 1983," and therefore was preempted. *Id.* at 138. The purpose of the state statute was to "minimize governmental liability," a goal that was "manifestly inconsistent with the purpose[] of the federal statute," *i.e.*, to "provide compensatory relief to those deprived of their federal rights by state actors." *Id.* at 141. The Court also found that the Wisconsin statute would "frequently and predictably produce different outcomes in federal civil rights litigation based solely on whether that litigation takes place in state or federal court." *Ibid.* In addition, the Court found "no reason to suppose that Congress * * * contemplated that those who sought to vindicate their federal rights in state courts could be required to seek redress in the first instance from the very state officials

whose hostility to those rights precipitated their injuries." *Id.* at 147.

Johnson v. *Fankell*, 520 U.S. 911 (1997), also involved an action brought in state court under 42 U.S.C. 1983. Distinguishing *Felder*, the Court held that the Supremacy Clause did not require preemption of an Idaho rule that barred interlocutory appeal of the trial court's denial of a motion to dismiss the complaint on qualified immunity grounds. *Johnson*, 520 U.S. at 913. Even though interlocutory appeal would be available in federal court, the "normal presumption against preemption [was] buttressed by" the fact that Idaho's interlocutory-appeal rule was a "neutral state Rule regarding the administration of the state courts." *Id.* at 918. And, unlike the notice-of-claim statute in *Felder* that required dismissal of the underlying action for noncompliance with its provisions, application of the Idaho rule was not "outcome determinative," *i.e.*, it would not affect "the ultimate disposition of the case" to the detriment of federal interests because the defendants' qualified immunity arguments could be addressed on appeal from a final judgment. *Id.* at 920-921.

2. Under the foregoing principles, petitioners have not demonstrated that the Supremacy Clause necessarily precludes application of Ohio's general medical screening provisions for asbestos claims to causes of action under the FELA. There is no inherent inconsistency between those provisions and the FELA, and petitioners' argument that the provisions impose evidentiary standards that exceed substantive liability standards under the FELA is not established on the present record.

a. In *Metro-North Commuter Railroad* v. *Buckley*, 521 U.S. 424, 427 (1997), this Court held that a railroad

worker who alleges that he was negligently exposed to asbestos cannot recover damages under the FELA "unless, and until, he manifests symptoms of a disease." Applying the "physical impact" standard for FELA "injury" announced in *Consolidated Rail Corp.* v. *Gottshall*, 512 U.S. 532 (1994), the Court explained that "the words 'physical impact' * * * do not include a contact that amounts to no more than an exposure * * * to a substance that poses some future risk of disease." *Buckley*, 521 U.S. at 429-432. The Court recognized that compensating those who feared asbestos-related illness, but who might never become sick, could divert resources from plaintiffs who had developed or would develop symptomatic asbestos-related disease: "In a world of limited resources," the Court asked, "would a rule permitting immediate large-scale recoveries for widespread emotional distress caused by fear of future disease diminish the likelihood of recovery by those who later suffer from the disease?" *Id.* at 435-436 (citing, *inter alia*, *Worst Should Go First, supra*).

In *Norfolk & Western Railway* v. *Ayers*, 538 U.S. 135 (2003), the Court reaffirmed that asbestos-related "injury" cognizable under the FELA must rise to the level of an asbestos-related disease. The *Ayers* plaintiffs suffered from asbestosis. *Id.* at 140. Noting that, "of those exposed to asbestos, only a fraction will develop asbestosis," *id.* at 157 (citation omitted), the Court held that the plaintiffs' asbestos-related disease also allowed them to recover "parasitic" damages under the FELA for the emotional distress attributable to the fear of developing another disease—cancer—in the future, *id.* at 148. The Court reasoned that asbestosis, a "chronic, painful and concrete reminder" of the plaintiffs' injurious asbestos exposure, was a "bodily harm" that made the asbestos

defendants liable under the FELA for related pain-and-suffering damages, including compensation for a heightened risk of contracting cancer. *Id.* at 155 (quoting *Eagle Picher Indus., Inc.* v. *Cox*, 481 So. 2d 517, 529 (Fla. Dist. Ct. App. 1986)); *id.* at 154 (quoting Restatement (Second) of Torts, § 456, at 494 (1965)). The Court also reiterated, however, that the FELA provides no right to relief for disease-free "asymptomatic plaintiffs," including those who experience asbestos-related physiological changes (such as pleural plaque or pleural thickening) that do not constitute asbestos-related disease. *Id.* at 156 (citing James A. Henderson, Jr., & Aaron D. Twerski, *Asbestos Litigation Gone Mad: Exposure-Based Recovery for Increased Risk, Mental Distress, and Medical Monitoring*, 53 S.C. L. Rev. 815, 830 (2002)).

b. Symptomatic asbestos-related disease thus is an essential element of a cause of action under the FELA, which the plaintiff must establish by the common law preponderance of the evidence standard. See *Norfolk S. Ry.* v. *Sorrell*, 549 U.S. 158, 165-166 (2007) ("Absent express language to the contrary, the elements of a FELA claim are determined by reference to the common law."). There is no inherent inconsistency between the FELA and the provisions of the Ohio statute at issue here, because the Ohio statute serves to identify—and expedite—those cases in which the plaintiff has obtained the basic medical evidence required to establish asbestos-related injury, a prerequisite to asbestos-related FELA liability. The evidentiary submissions that petitioners claim are unfairly required of them (Pet. 7) merely reflect the fact that, unlike some "injuries" that are observable and easily diagnosed, the standard medi-

cal protocol for identifying asbestos-related disease is more complex.

"[T]he diagnosis of asbestos-related pleural disease, and particularly asbestosis, requires assessment of a number of factors including the review of chest x-rays, pulmonary function tests, latency, and the taking of a complete occupational, exposure, medical and smoking history." *ABA Report* 12. These tests and patient histories are necessary "to enable a physician to exclude other more probable causes," because "many symptoms and findings are not specific to asbestos-related disease" and may result from smoking or other non-asbestos-related environmental factors. *Ibid*. The diagnostic tests specified in the Ohio statute are standard measures for distinguishing asbestos-related diseases from other ailments. For instance, pulmonary function tests, see Ohio Rev. Code Ann. § 2307.92(B)(3)(a) and (b) (LexisNexis 2005), distinguish "*restrictive* lung disease, which can be caused by asbestos, from *obstructive* lung disease, which is normally associated with smoking and is not associated with asbestos exposure." *ABA Report* 15. In addition, a positive chest x-ray reading by a certified reader, see Ohio Rev. Code Ann. § 2307.92(B)(3)(b)(i)(III) and (ii) (LexisNexis 2005), "is almost always viewed as a necessary component of the diagnosis of asbestosis." *ABA Report* 13.

The Ohio statute also appears to set low minimum requirements for showing physical impairment, which reinforces the conclusion that the statute seeks to defer adjudication of only those claims that were brought prematurely—*i.e.*, before asbestos-related injury is evident. For example, lung irregularities revealed by x-ray that are graded at a borderline 1/0 on the "ILO scale" can satisfy Ohio's prima facie standard. Ohio Rev. Code

Ann. § 2307.92(B)(3)(b)(ii) (LexisNexis 2005).[6] And the statute specifies a latency period of only ten years as a diagnostic marker for asbestos-related lung cancer in smokers. *Id.* § 2307.92(C)(1)(b). By comparison, the ABA Commission on Asbestos Litigation—which worked with "a group of ten of the nation's most prominent physicians in the area of pulmonary function" to design a set of standards for asbestos-related impairments that would not "unfairly exclude any significant number of deserving claims," *ABA Report* 11, 13—recommended that a minimum 15-year latency period between exposure and the onset of non-malignant disease be required. *Id.* at 12.

c. Petitioners also assert that preemption of the Ohio statute is required because the statute "imposes a different, stricter causation standard" than the FELA itself imposes. Pet. 15. Petitioners focus on the requirement in the Ohio statute that a plaintiff make a prima facie showing that "'exposure to asbestos' is 'a *substantial contributing factor* to the medical condition'" alleged in the lawsuit. *Ibid.* (quoting Ohio Rev. Code Ann. § 2307.92(B) (LexisNexis 2005)). Petitioners claim that the "substantial contributing factor" standard is in tension with the "relaxed standard of causation" that applies under the FELA. Pet. 14 (quoting *Gottshall*, 512 U.S. at 543). For several reasons, that contention does not warrant the Court's review.

First, the Ohio Supreme Court did not interpret the phrase in the Ohio statute on which petitioners rely,

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[6] The ILO scale was created by the International Labour Organization as a means for standardizing the classification of dust-related changes on chest x-rays. *ABA Report* 13. A grade of 1/0 "indicates that the reader found evidence of lung irregularities—the '1'—but also considered whether the x-ray should be read as normal, or '0.'" *Ibid.*

"substantial contributing factor." The Ohio court thus did not attempt to compare the nexus between past asbestos exposure and a current injury required under the "substantial contributing factor" standard to any equivalent nexus that would be required to establish asbestos-related injury under the FELA in federal court. To the extent that the court *suggested* how it would interpret the Ohio statute in future cases, the clear implication of the court's opinion is that the Ohio statute would not be interpreted to impose evidentiary burdens that exceed FELA standards: the court wrote that in FELA cases the Ohio statute does *not* "make it more difficult for a claimant to succeed on the merits of a claim." Pet. App. 8a.

This Court has previously declined review of a state court judgment where "significant ambiguities in the record" obscured the framing of the constitutional issues presented for review. See *Minnick* v. *California Dep't of Corr.*, 452 U.S. 105, 127 (1981). The same result is appropriate here. Any review of the preemption implications of Ohio's "substantial contributing factor" standard should await a future case in which there is a record of medical evidence proffered by a FELA plaintiff and an application of the "substantial contributing factor" standard in evaluating that evidence. This case, which arises in an abstract declaratory judgment posture, provides neither component essential to meaningful review by this Court.

Second, petitioners' arguments for further review fail to focus on the distinct nature of the injury in asbestos tort suits—the requirement, announced by this Court in *Buckley* and confirmed in *Ayers*, that a plaintiff must suffer from a symptomatic asbestos-related disease in order to recover on an asbestos claim under the

FELA. As petitioners note (Pet. 15 n.6), the standard for legal causation under the FELA is unsettled. See *Sorrell*, 549 U.S. at 163-164 (declining to address whether *Rogers* v. *Missouri Pacific Railroad*, 352 U.S. 500 (1957), altered the common-law rule of proximate causation in FELA cases); *id.* at 172-177 (Souter, J., concurring) (opining that *Rogers* did not "water down the common law requirement of proximate cause"); *id.* at 177-182 (Ginsburg, J., concurring in the judgment) (opining that "the causation standard in FELA actions is more 'relaxed' than in tort litigation generally"). Resolution of that uncertainty is not necessary in evaluating Ohio's statutory medical criteria in the posture of this case. Those statutory provisions address the medical questions whether the plaintiff has a disease *at all* and whether it was caused by asbestos, and they do not address whose asbestos caused the disease or to what extent.[7] The Ohio statute identifies an alleged injury as an asbestos-related impairment.[8]

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[7] A separate provision of the Ohio statute governing the burden of proof at trial requires asbestos plaintiffs to "prove that the conduct of [each] particular defendant was a substantial factor in causing the injury or loss on which the cause of action is based." Ohio Rev. Code Ann. § 2307.96(A) (LexisNexis 2005). That provision is not at issue here. Nor does this case implicate the Ohio provision that bars the award of damages for a plaintiff's fear or risk of developing cancer in the future. *Id*. § 2307.94(B) (discussed at Pet. 14 n. 5); see *Ayers*, 538 U.S. at 157-159 (permitting FELA plaintiffs who suffer from asbestosis to recover damages for fear of cancer).

[8] The record in this case likewise does not establish that the provisions of the Ohio statute requiring *reliable* evidence of asbestos-related injury (for instance, a diagnosis by a "competent medical authority") interfere with substantive federal rights. Indeed, federal law also dictates meaningful criteria of reliability for claims involving medical questions. See, *e.g.*, *Daubert* v. *Merrell Dow Pharm.*, *Inc.*, 509

Third, petitioners are mistaken in contending (Pet. 12-14), that the Ohio Supreme Court's decision conflicts with *Felder*. In *Felder*, the Court found a "manifest[] inconsisten[cy]" between the purpose of the Wisconsin notice-of-claim statute (*i.e.*, to minimize governmental liability in civil rights actions by giving government defendants the advantages of early investigation and the opportunity for early settlement) and the purpose of the federal civil rights statute (*i.e.*, to provide compensatory relief to those deprived of civil rights by state actors). *Felder*, 487 U.S. at 141-153. Petitioners assert that this case presents a policy clash akin to that in *Felder* because the aim of Ohio's statute, "like the statute in *Felder*, is to reduce the number of successful claims, thereby reducing total liability." Pet. 13; see Pet. 6. Petitioner's premise, however, runs counter to the determination by Ohio's highest court that the statute's purpose is *not* to reduce overall liability, but instead is to "place those already ill at the head of the line for compensation." *Sinnott* v. *Aqua-Chem, Inc.*, 876 N.E.2d 1217, 1221 (Ohio 2007). Moreover, petitioners' view that the FELA's singular goal is "to afford broad recovery to FELA claimants" (Reply Br. 6) also is oversimplified. As this Court has recognized, although the FELA "was indeed enacted to benefit railroad employees, * * * [i]t does not follow * * * that this remedial purpose requires" that the statute invariably be interpreted "in favor of employees." *Sorrell*, 549 U.S. at 171. See *Gottshall*, 512 U.S. at 543 ("That FELA is to be liberally construed * * * does not mean that it is a workers' compensation statute."). This Court has made clear

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U.S. 579, 589 (1993) (Federal Rules of Evidence require "any and all scientific testimony or evidence" to be "not only relevant, but reliable.").

that, in the context of allegedly negligent workplace exposure to asbestos, the FELA offers no relief to railroad workers in the absence of "injury" in the form of a current asbestos-related disease. *Buckley*, 521 U.S. at 433. As discussed above, so far as the Ohio statute on its face and the current record reveal, the purpose and effect of the Ohio statute is consistent with those of the FELA, in that it *identifies* and *expedites* cases in which asbestos-related disease is present. *Felder* therefore does not call for preemption here.

3. The Ohio statutory scheme attempts to tackle widely-recognized core problems in asbestos litigation—that suits by plaintiffs who have been exposed to asbestos but who manifest no asbestos-related disease outnumber suits by symptomatic plaintiffs, and that the funds to pay all asbestos claimants are finite and dwindling. A case prioritization system based on specified medical criteria, such as the one enacted in Ohio, has been recommended as a sensible approach by some commentators. See, *e.g.*, *Worst Should Go First, supra.* And, as the Ohio Supreme Court noted (Pet. App. 14a), the federal district court handling multi-district litigation of asbestos-related cases has instituted a similar method for prioritizing the cases on its docket so as to "protect the rights of all of the parties, yet preserve and maintain any funds available for compensation to victims." *In re Asbestos Prods. Liab. Litig.*, No. MDL 875, 2002 WL 32151574, at *1 (E.D. Pa. Jan. 16, 2002).

Regardless of whether this Court's review of case-prioritization schemes such as Ohio's could be warranted in the future (for example, if it turned out that such schemes were being applied to preclude or unduly limit FELA recovery for asbestos-related claims in state courts), review of such questions would be unfruitful in

the posture of this case, where the Ohio courts have had no opportunity to interpret and apply their statute in the context of concrete facts.

II. PETITIONERS IDENTIFY NO CONFUSION AMONG STATE COURTS REGARDING FELA PREEMPTION THAT WARRANTS THE COURT'S INTERVENTION

Petitioners' further contention that the Court should grant review to address general "confusion in state courts regarding FELA preemption" (Pet. 26-33) also is without merit. Even if such "confusion" existed, this case would be a poor vehicle for addressing it. As already discussed, the record here is inadequate to meaningfully evaluate FELA preemption in the particular context of the Ohio statute's medical screening provisions.

Moreover, petitioners' suggestion that a "line of state courts" has erroneously held that "a conclusion that a rule is procedural is the beginning *and* the end of the inquiry as to whether a rule may be applied to FELA claims" (Pet. 27) does not withstand scrutiny. The court in *Allen* v. *National Railroad Passenger Corp.*, 934 So. 2d 1006, 1013-1016 (Miss. 2006), expressly declined to rule upon questions regarding the FELA, because the only question before it was whether dismissal of plaintiff's action as a sanction for willful discovery violations was an abuse of discretion. The Montana Supreme Court in *Rule* v. *Burlington Northern & Santa Fe Railway*, 106 P.3d 533 (2005), relied upon direct authority from this Court when it observed that its state venue statute was procedural and not preempted by the FELA. *Id.* at 536 (citing *Miles* v. *Illinois Cent. R.R.*, 315 U.S. 698, 703 (1942)). And the Alabama Supreme Court in *Alabama Great Southern Railroad* v. *Jackson*,

587 So. 2d 959 (1991), cert. dismissed, 502 U.S. 1083 (1992), simply applied state law after correctly stating that "[a]s a general matter, FELA cases adjudicated in a state court are subject to the state's procedural rules" while "the substantive law governing such cases is federal." *Id.* at 962.

Nor is there a basis for petitioners' contention that FELA preemption decisions out of Kansas and Illinois lack "reasoned or meaningful analysis." Pet. 28. In *Gaulden* v. *Burlington Northern, Inc.*, 654 P.2d 383 (1982), after noting that the FELA "does not provide a vehicle for the determination of the fault of a third party," the Kansas Supreme Court reasoned that the FELA's objectives would not be undermined by state rules authorizing suits by FELA defendants for contribution from third parties, "so long as [contribution] is not utilized to reduce the recovery of damages to which the employee is entitled under FELA." *Id.* at 389. Similarly, the Illinois Supreme Court found no impairment of the FELA right to trial by jury in *Castro* v. *Chicago, Rock Island & Pacific Railroad*, 415 N.E.2d 365 (1980), cert. denied, 452 U.S. 941 (1981), where the state procedural rule in question did not apply if a timely jury demand was filed, and the rule thus "protect[ed] [FELA plaintiffs'] right to trial by jury." *Id.* at 367. Both state supreme courts articulated reasons for their holdings, and petitioners demonstrate no error in that reasoning.

Petitioners also contend that there is a "substantial[] conflict[]" (Pet. 30) between the Ohio Supreme Court's opinion and the Georgia Supreme Court's decision in *DaimlerChrysler Corp.* v. *Ferrante,* 637 S.E.2d 659 (2006). That is incorrect. The court in *Ferrante* evaluated whether a Georgia statute—which required a prima facie showing in asbestos cases similar to that required

by the Ohio statute—could be applied retrospectively to pending cases under Georgia law. The court ruled that the new statute could not be applied retrospectively because the standard it contained ("prima facie evidence that asbestos was a *substantial* contributing factor to [the plaintiff's] medical condition") exceeded the standard that previously applied under Georgia law ("a plaintiff was required to show only that exposure to asbestos was a *contributing* factor in his or her medical condition"). *Id.* at 661. The court held that the new statute "impose[d] upon appellees a greater evidentiary burden than was required under the law in effect at the time their actions were filed," "affect[ed] appellees' substantive rights," and could not, as a matter of Georgia law, be applied retroactively. *Ibid.*

Ferrante has little relevance to this case. First, *Ferrante* did not involve the FELA or preemption principles. The Georgia Supreme Court instead considered whether its statute was "substantive" under the standards generally used to establish the liability of joint tortfeasors. Moreover, unlike the Georgia court, the Ohio Supreme Court has not opined on the meaning of its "substantial contributing factor" standard, other than to suggest that it is no more demanding than the good faith pleading standard contained in Ohio Rule of Civil Procedure 11. Finally, the Georgia statute does not contain protections (such as the tolling of the statute of limitations) that apply in Ohio and serve to protect the right to recovery under the FELA. Thus, nothing about *Ferrante* warrants review in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 2008