No. 08-1034

IN THE

Supreme Court of the United States

CSX TRANSPORTATION, INC.,
Petitioner,

v.

THURSTON HENSLEY,
Respondent.

On Petition for a Writ of Certiorari to the Court of Appeals of Tennessee

MOTION FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE* AND BRIEF OF THE ASSOCIATION OF AMERICAN RAILROADS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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MOTION OF THE ASSOCIATION OF AMERICAN RAILROADS FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITIONER

Pursuant to Rule 37.2(b), the Association of American Railroads (AAR) respectfully moves for permission to file the attached brief *amicus curiae*. Petitioner has consented to AAR's filing of a brief.* In accordance with Rule 37.2(a), AAR has provided notice to Respondent's counsel of AAR's intent to file a brief. Respondent has refused consent.

AAR is an incorporated, nonprofit trade association representing the nation's major freight railroads and

* The letter expressing consent has been filed with the Clerk of the Court.

Amtrak. AAR's members operate approximately 78 percent of the rail industry's line haul mileage, produce 94 percent of its freight revenues, and employ 92 percent of rail employees. On issues of significant interest to its members, AAR frequently appears before Congress, administrative agencies and the courts on behalf of the railroad industry.

This case, arising under the Federal Employers' Liability Act (FELA), presents such an issue. FELA, a federal negligence statute, takes the place of workers' compensation in the railroad industry. FELA presents unique issues and problems for railroads because, as a negligence law, it differs fundamentally from the no-fault compensation systems that cover virtually all other U.S. industries. Each year thousands of FELA claims and lawsuits, like the case below, are asserted against AAR member railroads, to which they devote substantial legal and financial resources: all told, the railroads spend close to a billion dollars annually in defending and resolving claims and suits brought under FELA. Because FELA litigation is an ongoing event for all major railroads, AAR has a strong interest in assuring that lower courts do not improperly expand railroad liability under FELA.

The issue raised in this case can arise in thousands of FELA cases and can significantly impact the damage awards in those cases. In *Norfolk & Western Ry. Co. v. Ayers*, this Court held that FELA plaintiffs with symptoms of an asbestos-related injury could recover damages for reasonable fear of cancer so long as that fear was "genuine and serious." The Court also made clear that it anticipated that lower courts would utilize verdict control devices to limit fear of cancer claims to only those supported by evidence of

genuine and serious emotional distress. In this case, the court below affirmed the trial court's improper refusal to instruct the jury that damages may be awarded for fear of cancer only if that fear is genuine and serious. If courts continue to take this kind of approach to claims for fear of cancer—and divergent approaches already are being taken by lower courts on this issue—it will open the floodgates to such claims in virtually all of the thousands of FELA asbestos cases pending against AAR member railroads, an outcome clearly not intended by this Court's decision in *Ayers*. In its brief, AAR will urge this Court to grant certiorari in order to clarify that proper instructions on fear of cancer claims must be given if requested by the defendant.

All of AAR's large members, who are facing numerous FELA claims in which fear of cancer damages likely will be sought, have a strong interest in the issue presented by this case. When AAR participates as *amicus curiae* in a FELA case like this one, it brings a broad, industry-wide perspective to the issue before the court. AAR works closely with its member railroads on a host of issues arising under FELA. AAR also maintains a close liaison with the National Association of Railroad Trial Counsel, an organization of over 900 attorneys representing railroads nationwide in personal injury litigation. Thus, AAR is thoroughly familiar with the trends and key issues that confront its members in FELA litigation.

As a trade association representing the nation's major railroads, AAR can assist this Court in understanding the impact of the lower court's ruling by bringing the perspective of an entire industry, which often is different from that of the individual

litigant, which may not be in a position fully to be aware of a case's impact on the industry as a whole. In this case, AAR has an interest not only in assisting the petitioner in obtaining relief from an erroneous decision, but also in assuring that an important federal law is not misconstrued to the detriment of railroads in the future.

Respectfully submitted,

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BRIEF OF THE ASSOCIATION OF AMERICAN RAILROADS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

STATEMENT OF INTEREST OF *AMICUS CURIAE* [1]

The interest of a*micus curiae* Association of American Railroads (AAR) is set forth in the Motion for Leave to File a Brief which is filed along with this brief.

STATEMENT OF THE CASE

AAR adopts the Statement of the Case in the Petition.

[1] No person or entity other than AAR has made monetary contributions toward this brief, and no counsel for any party authored this brief in whole or in part.

SUMMARY OF THE ARGUMENT

This Court should grant the petition because this case presents an important issue that will impact thousands of cases arising under the Federal Employers' Liability Act. 45 U.S.C. §§51-60. This Court has held that plaintiffs who have an asbestos-related injury may recover pain and suffering damages for fear of contracting cancer, but only if that fear is genuine and serious. The Court made it clear that this qualification was intended to require trial courts to utilize verdict-control devices to limit the number of cases in which plaintiff would qualify for such damages. Among other things, trial courts must instruct jurors that in order to recover for fear of cancer plaintiffs must prove that their fear is genuine and serious. In refusing to give such an instruction upon the defendant's request, the court below failed to play the gatekeeper role envisioned by this Court.

To date, lower courts have taken different approaches to fear of cancer claims in FELA cases, with two state courts failing to assure that juries are properly instructed when addressing fear of cancer claims. On a range of issues arising under FELA, this Court has made it clear that juries must be properly instructed on the applicable substantive law, and that it is error for a trial court to fail to do so. This Court should review this case to correct the trial court's erroneous refusal to instruct the jury on an important issue that will recur with great frequency under FELA.

There are thousands of FELA asbestos claims pending against railroads. In addition there are many other FELA cases pending in which the plaintiff has alleged exposure to a substance, other than

asbestos, which is claimed to cause cancer. In virtually all of these cases, damages for fear of cancer are likely to be sought. Without a clear mandate from this Court on the need for proper instructions, lower courts will continue to address this issue in a non-uniform manner. Moreover, to the extent other lower courts follow the court below and decline to give proper instructions, it will open the floodgates to fear of cancer claims, exactly the opposite of the result that this Court envisioned.

ARGUMENT

I. THIS COURT SHOULD GRANT CERTIORARI IN ORDER TO CLARIFY THAT TRIAL COURTS HAVE AN OBLIGATION TO GIVE PROPER INSTRUCTIONS WHERE FELA PLAINTIFFS SEEK DAMAGES FOR FEAR OF CANCER

This case presents the straightforward issue of whether a trial court has an obligation to instruct the jury on a relevant issue of substantive law in FELA cases. The court below did not. Certiorari should be granted because the issue raised by the lower court's refusal properly to instruct the jury will be faced by state and federal courts throughout the country in virtually every FELA asbestos case. Not only is this issue likely to recur, it will directly impact the quantum of damages for which defendants will be liable.

A. The Court Below Ignored its Obligation to Give Proper Instructions on Fear of Cancer Damages as Required by This Court in *Norfolk & Western Ry. Co. v. Ayers*

In the case below, respondent sought damages under FELA for, among other things, his fear of

cancer related to alleged exposure to asbestos while working for petitioner. Without having been instructed on the threshold showing, recently articulated by this Court, that a FELA plaintiff must make in order to qualify for fear of cancer damages, the jury awarded respondent $5 million in damages in a general verdict. In *Norfolk & Western Ry. Co. v. Ayers*, 538 U.S. 135 (2003), this Court held that FELA plaintiffs with asbestosis could recover damages for reasonable fear of cancer, as a component of pain and suffering, so long as that fear was "genuine and serious." This Court further held that upon request FELA defendants are entitled to an instruction "that each plaintiff must prove any alleged fear of cancer to be genuine and serious." *Id*. at 159, n.19.[2] Although the plaintiff presented evidence of, and sought damages for, fear of cancer, the trial court refused to instruct the jury on the condition that *Ayers* placed on recovery of such damages, a ruling affirmed by the Court of Appeals.

In permitting FELA plaintiffs who suffer from an asbestos-related injury to recover for fear of cancer, as a component of pain and suffering damages, this Court went to great lengths to point out that it was doing so with "an important reservation." *Id*. at 157. Following on concerns expressed in *Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532 (1994) and *Metro*

[2] Although the Court "resisted" providing any elaboration on the nature of the evidence required to sustain a claim for genuine and serious fear of cancer, *id*. at 158, n. 17, Justice Breyer did not resist, proposing that fear of cancer damages be limited to situations where the plaintiffs fear "is unusually severe-where it significantly and detrimentally affects the plaintiff's ability to carry on with everyday life and work." 538 U.S. at 187 (Breyer, J., concurring and dissenting in part).

North Commuter R.R. v. Buckley, 521 U.S. 424 (1997), the *Ayers* Court made it clear that such claims are to be "cabined" by the requirement that fear of cancer damages are available only to those plaintiffs who can demonstrate a "genuine and serious" fear, with the expectation that such awards would be made in a limited number of cases. 538 U.S. at 158-59. Responding to Justice Kennedy's dissenting opinion, which suggested the Court was ignoring the concerns expressed in *Gottshall* and *Buckley* over the "unlimited and unpredictable" liability that would follow a failure to limit the availability of damages for fear of cancer, the majority explained that verdict control devices available to trial courts, including, but not limited to, a proper charge to the jury, would assuredly avoid that result. *Id*. at 159, n.19.[3] It has already become apparent, however, that this message has gone unheeded in some courts.

The Court of Appeals acknowledged that "it is incumbent upon [a FELA plaintiff seeking fear of cancer damages] to prove that his alleged fear is genuine and serious." *Hensley v. CSX Transp., Inc*., 2008 WL 683755 at *16 (Tenn. App. 2008). However, the Court went on to find that a trial court has no obligation to instruct the jury on the very facts that it acknowledged the plaintiff must prove to sustain his claim.[4] Following *Hedgecorth v. Union Pac. R.R*., 210 S.W.3d 220 (Mo. App. 2006), the Court of Appeals took the position that *Ayers* did not address jury

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[3] In both *Gottshall* and *Buckley*, this Court enunciated limiting rules on recovery for emotional distress out of concern over unlimited and unpredictable liability.

[4] Incredibly, the Court of Appeals justified this refusal, in part, on the grounds that members of the jury might not follow the instructions. 2008 WL 683755 at *16.

instructions, but merely "ruled on substantive law." This conclusion is incorrect, see Petition at 15; even if it were correct, it would not justify the trial court's refusal to give a proper instruction.

It is well established that a trial court hearing a FELA case has an obligation to give an instruction that properly informs the jury on the relevant substantive law.[5] For example, in *Norfolk & Western Ry. Co. v. Liepelt*, 444 U.S. 490, 498 (1980), this Court held that it was error to fail to instruct the jury that damages awarded to the plaintiff are not subject to federal income taxes. This Court held that, in order to avoid an inflated damages award, it was essential to assure that members of the jury did not hold the mistaken belief that the award it made would be subject to income taxes. *See also St. Louis SW Ry. v Dickerson*, 470 U.S. 409, 411 (1985)(A FELA defendant has the right to an instruction that damages must be reduced to present value.) Moreover, juries must not only be instructed on the substantive law, those instructions must be accurate. In *Seaboard Air Line Ry. v. Tilghman*, 237 U.S. 499 (1915), this Court reversed a verdict for the plaintiff because the trial court failed properly to instruct the jury on the law of comparative negligence under FELA.[6] The trial court's instruction that the jury was to reduce any award to account for the plaintiff's contributory negligence by "whatever you think would be proper" was deemed error by this Court

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[5] The Court of Appeals seemed to recognize this, explaining that "trial courts must give substantially accurate instructions concerning the law applicable to the matter at issue," 2008 WL 683755 at *2, only to ignore this axiom when addressing the issue of fear of cancer.

[6] *See* 45 U.S.C. §53.

because it failed to inform the jury that such a deduction must be in the proportion that the employee's negligence bears to the total causal negligence. *Id*. at 501. *See also Harris v. Illinois Cent. R.R*., 58 F.3d 1140, 1144 (6th Cir. 1995); *Wise v. Union Pac. R.R*., 815 F.2d 55, 57 (8th Cir. 1987) (FELA defendant is entitled to a proper instruction on contributory negligence if there is any evidence to support that theory.) In *Norfolk Southern Ry. Co. v. Sorrell,* 549 U.S. 158 (2007), this Court again underscored the importance of proper instructions, reversing the lower court because the Missouri Court of Appeals approved instructions given at trial incorrectly informed the jury that the standard of causation applicable to employer negligence differed from the standard applicable to employee contributory negligence.

Nonetheless, doubting the efficacy of a proper instruction, the Court of Appeals found the trial court's review of the sufficiency of the evidence to be an adequate substitute for a proper instruction. In performing that review, the Court found it sufficient that the plaintiff had testified that he experiences "anxiety" (as opposed to only "worry") about contracting cancer, for which he was taking the prescription medication Xanax. The court also found that even though the plaintiff testified that he began taking the medication before he learned he had asbestosis, the jury could have concluded that his fear of cancer was "at least *part* of the reason [the plaintiff] has *continued* to take Xanax." 2008 WL 683755 at *17 (emphasis in the original).

The Court of Appeals concluded that if the jury believed respondent's evidence it could have found that a genuine and serious fear of cancer existed.

This analysis only underscores the need for proper jury instructions. Rather than speculate on what the jury could have found, it would have been far more meaningful, and consistent with the law, had the jury actually been advised of what it was required to find in order to award damages for fear of cancer. See Petition at 17-19.

B. Guidance is Needed From This Court on a Trial Court's Obligation to Give Proper Instructions Where FELA Plaintiffs Seek Fear of Cancer Damages Because This Issue Will Both Pervade and Greatly Impact FELA Litigation

Not only was it error for the trial court to refuse properly to instruct the jury, it was an error that has the potential to be repeated in numerous cases and to have a marked impact on the outcome of those cases. Currently, thousands of FELA claims alleging asbestos-related disease are pending against the nation's railroads. In addition, there are many pending claims that allege an injury resulting from other exposures that plaintiffs typically have attempted to link to cancer, such as diesel exhaust and solvents. Indeed, AAR member railroads report that so-called occupational exposure cases have come to represent a significant portion of the FELA actions brought against them. Many of these cases raise the potential for including "fear of cancer" as an element of the plaintiff's damages. Additionally, this issue will impact cases that arise under the Jones Act, a compensation statute governing seamen which incorporates the substantive law of FELA. 46 U.S.C. §30104(a); *see Hagerty v. L&L Marine Services, Inc.*, 788 F.2d 315 (5th Cir.), *modified on denial of reh'g en*

banc, 797 F.2d 256 (1986) (permitting Jones Act plaintiff to recover for fear of cancer).

Asbestos litigation in the railroad industry has followed the general pattern seen in the civil justice system as a whole.[7] FELA suits alleging asbestos exposure were first seen in significant numbers in the early 1980s. While at various points it appeared that FELA asbestos claims were in decline, the number of filings invariably picked up again. Despite the fact that significant use of asbestos in the rail industry ended in the 1950s with the phase-out of steam locomotives, FELA claims for asbestos-related injures continue to be filed in large numbers. This phenomenon is no doubt driven in part by the active efforts of plaintiffs' counsel to mine for new claims. *See Adams v. Herron*, 191 F.3d 447, 1999 WL 710326 (4th Cir. 1999)(Plaintiffs' counsel offered free x-rays, which were reviewed and interpreted by a non-treating physician hired by the firm.) *See also In re: Asbestos Product Liability Litigation*, (No. VII), MDL Docket No. 875, slip op. at 3, n.4 (E.D. Pa. Feb. 24, 2009)(describing the use of screening companies that use mobile x-ray machines set up in public places to identify potential asbestos plaintiffs). "Asbestos litigation over time has been shaped by . . . the rise of a sophisticated and well-capitalized plaintiff bar." RAND INSTITUTE FOR CIVIL JUSTICE, ASBESTOS LITIGATION 21 (2005).

As of the beginning of this year, the eight largest U.S. freight railroads and Amtrak have advised AAR that they are facing over 9,000 pending asbestos

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[7] See Edward J. McCambridge, *Asbestos Litigation: Where We Have Been, Where We Are Now, Where We Are Going*, 57 FED'N DEF. & CORP. COUN. Q. 409 (2007).

cases. Since *Buckley* has ruled out claims based solely on exposure, in all of these cases the plaintiffs presumably alleges that they are suffering from an asbestos-related injury, the very kind of claim which *Ayers* holds potentially qualifies for fear of cancer damages.[8] Moreover, fear of cancer claims will not necessarily be limited to asbestos litigation. *See Ayers*, 538 U.S. at 150, n.10. (citing to cases alleging fear of cancer due to exposures to substances other than asbestos).[9] The large railroads have advised AAR that over 600 FELA claims are pending in which the plaintiff claims exposure to substances other than asbestos that allegedly also can result in contracting cancer. Specifically, rail employees and former employees have brought and continue to bring claims alleging they have been injured due to workplace exposure to alleged carcinogenic substances, such as diesel exhaust, chemical solvents, silica and other toxic or deleterious substances. *E.g., Baker v. Norfolk Southern Ry. Co*., 514 S.E.2d 448, (Ga. App.), *cert. denied*, 528 U.S. 1021 (1999) (alleging locomotive engineer's cancer was caused by prolonged exposure to exhaust from railroad's diesel locomotives).[10]

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[8] *Buckley* held that individuals who are exposed to asbestos, but who are without symptoms of a disease, cannot recover for emotional distress. 521 U.S. at 427. Though some of the pending FELA claims allege that the plaintiff has cancer, the railroads report that these constitute less than 5% of the total. Thus, the vast majority of the pending FELA asbestos claims allege a non-malignant asbestos-related injury and are likely to include a fear of cancer allegation.

[9] Claims for fear of diseases other than cancer have been recognized under FELA. *E.g., Marchica v. Long Island R.R.*, 31 F.3d 1197 (2d Cir. 1994) (fear of contracting AIDS).

[10] In 2006, class action lawsuits were filed against Norfolk Southern and CSX Transportation, and their predecessor rail-

Fear of cancer claims can lead to substantial awards. Even if much of the $5 million awarded here was for other elements of the plaintiff's damages, it is likely that a significant amount was awarded for his fear of cancer claim. Given the substantial number of pending FELA actions that will present similar claims, the consequence of failing properly to instruct a jury will be significant. For example, in *Ayers*, the verdicts for the six plaintiffs ranged from $700,000 to $1.2 million. 538 U.S. at 144. Considering that the plaintiffs were not seriously ill, and were retired (precluding damages for lost wages), it is likely that the jury made substantial awards for fear of cancer damages. Because awards on such claims are inherently unpredictable, and because allegations of fear of cancer introduce a high emotional issue (as the Court of Appeals readily acknowledged), it is essential that juries hearing such claims be properly instructed.

The magnitude of this issue is further heightened for railroads because they can potentially be liable for all damages suffered by plaintiffs with asbestos-related, or other types of, injuries, even when railroad employment caused a minimal amount of the harm suffered. In *Ayers*, this Court held that FELA's joint and several liability scheme prohibited apportionment of damages among joint tortfeasors. As a result, if any exposure to a harmful substance occurred during the plaintiff's railroad employment, the railroad can be held liable for the full extent of

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roads, by and on behalf of locomotive engineers and conductors alleging injury due to exposure to diesel exhaust. Among other things, the complaints allege that the plaintiffs suffer from fear of cancer. *See Taylor v. CSX Transp., Inc.*, 2007 WL 2891085 (N.D. Ohio 2007)(denying class certification).

the damages even if the majority of the harmful exposure can be attributed to other employment.[11] The effect of this rule is underscored by the fact that one of the *Ayers* plaintiffs was "exposed to asbestos [at the railroad] for only three months" and "worked with asbestos elsewhere as a pipefitter for 33 years." 538 U.S. at 143. Two of the other *Ayers* plaintiffs "had significant exposure to asbestos while working for other [non-railroad] employers." *Id*. Thus, railroads can be fully liable for all asbestos-related damages, including fear of cancer, not just to long-term employees, but also to former employees whose rail employment was fleeting.

C. Guidance From This Court Will Assure That Lower Courts Undertake Their Proper Gatekeeping Function and Avoid Non-Uniform Application of FELA

If this Court demurs from providing guidance on this issue, confusion and lack of uniformity will continue whenever courts are confronted with fear of cancer claims in FELA cases. As petitioner points out, lower courts have already begun to take divergent approaches with respect to fear of cancer claims. Petition at 24-26. This divergence of approaches likely will lead to a lack of uniformity in the interpretation of FELA and, inevitably, forum

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[11] The Court recognized that railroads could pursue contribution and indemnity claims, as permitted under state law. 538 U.S. at 162. Often, however, this remedy is illusory, as many joint tortfeasors who are responsible for a plaintiff's harmful exposure to asbestos are out of business. By mid-2004, over 70 asbestos defendants have dissolved or filed for bankruptcy protection. RAND at 109.

shopping, a practice facilitated by FELA's broad venue provisions.

FELA plaintiffs are provided with many options when choosing where to bring and maintain their lawsuit. A FELA suit may be brought in either state or federal court in any district in which the railroad does business, 45 U.S.C. §56; and, if a case is brought in state court, it may not be removed to federal court. 28 U.S.C. §1445(a). The four largest railroads in the United States each operate in over than 20 states, and as a result will face asbestos suits over a wide geographical area. Moreover, historically, courts have permitted plaintiffs wide latitude over selection of venue: naturally, plaintiffs often select a venue based on their perception of where courts are likely to interpret the law to their advantage. The FELA's venue provision gives plaintiffs "the right to select the court in which he considers it would be most advantageous for him to bring his action." *Petersen v. Ogden Union Ry. & Depot Co.*, 175 P.2d 744, 747 (Utah 1946). For example, the Montana Supreme Court does not recognize the doctrine of *forum non conveniens* in FELA cases, in part, in reliance on FELA's "policy favoring the injured worker's choice of forum [citations omitted] even if that choice of forum involves forum shopping." *State ex rel. Burlington Northern R.R. Co. v. District* Court, 891 P.2d 493, 499 (Mont. 1995).[12] Though FELA is to be interpreted uniformly, *South Buffalo Ry. Co. v. Ahern*, 344 U.S. 367, 371 (1953); *New York Cent. R.R. v. Winfield*, 244

[12] The Court held that "a district court in this state may not dismiss a FELA action because it deems itself to be an inconvenient forum" and "that a district court in this state is not empowered to change the place of trial of a FELA action based on the doctrine of *forum non conveniens*." *Id*.

U.S. 147, 150 (1917), plaintiffs who intend to allege fear of cancer no doubt will select a forum in which they can count on the court to decline to instruct the jury on a plaintiff's evidentiary obligation in such cases[13]

Trial courts have an obligation to fulfill and take seriously their gatekeeping role in fear of cancer cases as required by *Ayers*, and to do so in a consistent and uniform manner. Though this Court held that "it is incumbent upon [a plaintiff seeking fear of cancer damages] to prove that his alleged fear is genuine and serious," *Ayers*, 538 U.S. at 157, without further guidance lower courts are likely to continue to address the issue presented here in a disparate manner. Moreover, plaintiffs in FELA asbestos and other exposure cases are likely to seek out courts which, like the court below, will eschew their responsibility to remain faithful to the *Ayers* requirement that only plaintiffs with genuine and serious fear may qualify for fear of cancer damages. The outcome will be "uncabined" liability for fear of cancer damages—a clear departure from the holdings of *Gottshall*, *Buckley* and *Ayers*. This result will be avoided if this Court grants the petition and confirms that in FELA cases where the plaintiff seeks damages for fear of cancer the trial court is required to instruct the jury that the plaintiff must prove that his fear is "genuine and serious."

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[13] Asbestos litigation has long been characterized by efforts of plaintiffs to seek favorable jurisdictions. RAND at 61-63.

CONCLUSION

For the reasons set forth herein, this Court should grant the petition.

Respectfully submitted,

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