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

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MOTION FOR LEAVE TO FILE BRIEF AND *AMICI CURIAE* BRIEF OF AMERICAN TORT REFORM ASSOCIATION, CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, NATIONAL ASSOCIATION OF MANUFACTURERS, NFIB SMALL BUSINESS LEGAL CENTER, AMERICAN INSURANCE ASSOCIATION, PROPERTY CASUALTY INSURERS ASSOCIATION OF AMERICA, COALITION FOR LITIGATION JUSTICE, INC., AMERICAN PETROLEUM INSTITUTE, AND AMERICAN CHEMISTRY COUNCIL IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE*

Pursuant to Rule 37, *amici curiae* request leave to file the accompanying brief in support of the above-referenced Petition for a Writ of Certiorari.[1]

As associations that represent asbestos defendants, and their insurers, *amici* have a substantial interest in ensuring that asbestos liability rules are fair, predictable, and promote sound public policy. The Tennessee appellate court's decision below violates these fundamental principles and upsets the careful balance this Court struck in *Norfolk & W.*

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[1] Respondents' counsel did not consent to the filing of *amici's* brief in this action. Counsel of record for all parties received notice of *amici*'s intention to file the accompanying brief at least ten days prior to the brief's due date.

Ry. Co., v. Ayers, 538 U.S. 135 (2003), where the Court held that, under the Federal Employers' Liability Act ("FELA"), 45 U.S.C. §§ 51-60, a plaintiff suffering from asbestosis (a potentially impairing scarring of the lungs) may "seek compensation for fear of cancer as an element of his asbestosis-related pain and suffering damages" *if* the plaintiff "prove[s] that his alleged fear is genuine and serious." 538 U.S. at 157.

The *Ayers* Court's requirement that the plaintiff's fear of developing cancer in the future must be "genuine and serious" was an "important" limitation, *id*.; it tries to prevent a "flood of less important cases," *Metro-North Commuter R.R. Co. v. Buckley*, 521 U.S. 424, 442 (1997) (rejecting medical monitoring under FELA absent a present, physical injury), that could swamp the courts, delay recoveries for claimants with serious conditions, bankrupt defendants, and jeopardize recoveries for cancer victims. The standard also helps to reduce the possibility of fraudulent claims. *Cf. Consol. Rail Corp. v. Gottshall*, 512 U.S. 532, 557 (1994).

To further minimize the risk of "unlimited and unpredictable liability" in asbestos cases, *id*. at 433, this Court in *Ayers* identified a number of "verdict control devices," including, "on a defendant's request, a charge that each plaintiff must prove any alleged fear to be genuine and serious." 538 U.S. at 159 n.19.

The decision below, which holds that a defendant has no right to a "genuine and serious fear" jury instruction, is not only inconsistent with this Court's holding in *Ayers,* but also ignores the important

policy concerns which guided this Court's decisions in *Metro-North* and *Ayers*.

Amici are well-suited to provide a broad perspective to this Court on the troubling implications of allowing the decision below to stand. The proposed brief does not seek to simply repeat the Petitioner's arguments. Rather, the brief discusses the importance of the Petition in the context of the overall asbestos litigation environment, including the recent progress that has been by courts and state legislatures to address and improve the "asbestos-litigation crisis." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 597 (1997).

Decisions such as the lower court's opinion represent an unsound return to the types of rules and practices that have already bankrupted at least eighty-five employers, *see* Martha Neil, *Backing Away from the Abyss*, ABA J., Sept. 2006, at 26, 29, and threaten the ability of the seriously ill to receive adequate or timely compensation. Although the instant case is limited to FELA actions, how this Court chooses to handle the case will impact asbestos litigation more generally. A message from this Court would provide powerful guidance to courts hearing asbestos actions under state common law and could lead others to join the growing list of jurisdictions that are acting to restore rationality and fairness to the asbestos litigation within their borders. *See* Mark A. Behrens & Phil Goldberg, *The Asbestos Litigation Crisis: The Tide Appears to Be Turning*, 12 Conn. Ins. L.J. 477 (2006).

* * *

Founded in 1986, the American Tort Reform Association ("ATRA") is a broad-based coalition of more than 300 businesses, corporations, municipalities, associations, and professional firms that have pooled their resources to promote reform of the civil justice system with the goal of ensuring fairness, balance, and predictability in civil litigation. For more than a decade, ATRA has filed *amicus curiae* briefs in cases before federal and state courts that have addressed important liability issues.

The Chamber of Commerce of the United States of America ("the Chamber") is the world's largest business federation, representing an underlying membership of more than three million companies and professional organizations of all sizes and in all industries. The Chamber advocates the interests of its members in matters before the courts, Congress, and the Executive Branch. To that end, the Chamber regularly files *amicus* briefs in cases that raise issues of vital concern to the nation's business community.

The National Association of Manufacturers ("NAM") is the nation's largest industrial trade association, representing small and large manufacturers in every industrial sector and in all fifty states. NAM's mission is to enhance the competitiveness of manufacturers and improve American living standards by shaping a legislative and regulatory environment conducive to U.S. economic growth and to increase understanding among policymakers, the media, and the general public about the importance of manufacturing to America's economic strength.

The NFIB Small Business Legal Center, a nonprofit, public interest law firm established to protect

the rights of America's small-business owners, is the legal arm of the National Federation of Independent Business ("NFIB"). NFIB is the nation's oldest and largest organization dedicated to representing the interests of small-business owners throughout all fifty states. NFIB members own a wide variety of America's independent businesses from manufacturing firms to hardware stores.

The American Insurance Association ("AIA"), founded in 1866 as the National Board of Fire Underwriters, is a national trade association representing major property and casualty insurers writing business across the country and around the world. AIA promotes the economic, legislative, and public standing of its members; it provides a forum for discussion of policy problems of common concern to its members and the insurance industry; and it keeps members informed of regulatory and legislative developments. Among its other activities, AIA files *amicus* briefs in cases before state and federal courts on issues of importance to the insurance industry.

The Property Casualty Insurers Association of America ("PCI") is a trade group representing more than 1,000 property and casualty insurance companies. PCI members are domiciled in and transact business in all fifty states, plus the District of Columbia and Puerto Rico. Its member companies account for $184 billion in direct written premiums. They account for 52% of all personal auto premiums written in the United States, and 39.6% of all homeowners' premiums, with personal lines writers of commercial and miscellaneous property/casualty lines. In addition to the diversified product lines they write, PCI members include all types of insur-

ance companies, including stocks, mutuals, and companies that write on a non-admitted basis. The PCI membership is literally a cross-section of the United States property and casualty insurance industry. PCI is particularly interested in the resolution of the issue before the Court on behalf of its members and their interests.

The Coalition for Litigation Justice, Inc. ("Coalition") is a nonprofit association formed by insurers in 2000 to address and improve the mass tort litigation environment. The Coalition's mission is to encourage fair and prompt compensation to deserving current and future litigants by seeking to reduce or eliminate the abuses and inequities that exist under the current civil justice system.[2] The Coalition files *amicus curiae* briefs in important cases that may have a significant impact on the mass tort litigation environment.

The American Petroleum Institute ("API") is a nationwide, non-profit, trade association headquartered in Washington, D.C., that represents over 400 members engaged in all aspects of the petroleum and natural gas industry, including exploration, production, transportation, refining and marketing.

The American Chemistry Council ("ACC") represents the leading companies engaged in the business of chemistry. The business of chemistry is a key element of the nation's economy, accounting for ten cents out of every dollar in U.S. exports. Chemistry

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[1] The Coalition for Litigation Justice includes Century Indemnity Company; Chubb & Son, a division of Federal Insurance Company; CNA service mark companies; Fireman's Fund Insurance Company; Liberty Mutual Insurance Group; and the Great American Insurance Company.

companies invest more in research and development than any other business sector.

* * *

Accordingly, a*mici* ask the Court to grant their Motion.

Respectfully submitted,

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INTEREST OF *AMICI CURIAE*[1]

[1] In accordance with Rule 37.6, *amici* state that no counsel for a party has authored this brief in whole or in part, and that no person or entity, other than the *amici*, its members, or its counsel made a monetary contribution to the preparation or submission of the brief.

Amici curiae are associations whose members include asbestos litigation defendants and their insurers. Consequently, *amici* have a substantial interest in ensuring that asbestos liability rules are fair, predictable, and promote sound public policy.

As explained below, the Tennessee appellate court's decision violates these fundamental principles, is flatly inconsistent with this Court's holding in *Norfolk & W. Ry. Co., v. Ayers*, 538 U.S. 135 (2003), and upsets the careful balance this Court struck in *Ayers*. There, the Court held that, under the Federal Employers' Liability Act ("FELA"), 45 U.S.C. §§ 51-60, a plaintiff suffering from asbestosis (a potentially impairing scarring of the lungs) may "seek compensation for fear of cancer as an element of his asbestosis-related pain and suffering damages" *if* the plaintiff "prove[s] that his alleged fear is genuine and serious." 538 U.S. at 157. If allowed to stand, the lower court's decision could invite a flood of trivial or fraudulent claims, adversely affecting *amici*'s members.

STATEMENT OF THE CASE

Amici adopt Petitioner's statement of the case.

SUMMARY OF ARGUMENT

"For decades, the state and federal judicial systems have struggled with an avalanche of asbestos lawsuits." *In re Combustion Eng'g, Inc.*, 391 F.3d 190, 200 (3d Cir. 2005).[2] As far back as 1991, the Federal Judicial Conference Ad Hoc Committee on Asbestos Litigation found:

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[2] *See also* Paul F. Rothstein, *What Courts Can Do in the Face of the Never-Ending Asbestos Crisis*, 71 Miss. L.J. 1 (2001).

> [D]ockets in both federal and state courts continue to grow; long delays are routine; trials are too long; the same issues are litigated over and over; transaction costs exceed the victims' recovery by nearly two to one; exhaustion of assets threatens and distorts the process; and future claimants may lose altogether.

Judicial Conference Ad Hoc Committee on Asbestos Litigation, *Report to the Chief Justice of the United States and Members of the Judicial Conference of the United States* 2-3 (Mar. 1991), *reprinted at* 6:4 Mealey's Litig. Rep.: Asbestos 2 (Mar. 15, 1991). In 1997, this Court described the asbestos litigation as a "crisis." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 597 (1997). More recently, the Court has noted the extraordinary problems created by the "elephantine mass" of asbestos cases. *Ayers*, 538 U.S. at 166 (quoting *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 821 (1999)).

Through 2002, approximately 730,000 asbestos claims had been filed. *See* Stephen J. Carroll *et al.*, *Asbestos Litigation xxiv* (RAND Inst. for Civil Justice 2005).[3] At least 322,000 asbestos claims may be pending. *See* American Academy of Actuaries, *Current Issues in Asbestos Litigation* (Feb. 2006).

Initially, lower courts, acting with the best of intentions but lacking sufficient foresight, sought to address the influx of asbestos claims by streamlining

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[3] RAND has estimated that $70 billion was spent in the litigation through 2002; future costs could reach $195 billion. *See id.* at 92, 106.

procedures and lowering barriers to recoveries. Rather than make the litigation go away, however, these practices simply invited more filings. *See* Victor E. Schwartz & Leah Lorber, *A Letter to the Nation's Trial Judges: How the Focus on Efficiency Is Hurting You and Innocent Victims in Asbestos Liability Cases*, 24 Am. J. Trial Advoc. 247 (2000).

In particular, the courts became flooded with hundreds of thousands of cases involving claimants with little or no physical impairment. *See* 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, 823 (2002) ("By all accounts, the overwhelming majority of claims filed in recent years have been on behalf of plaintiffs who . . . are completely asymptomatic.").[4] Mass filings by unimpaired claimants created judicial backlogs, contributed to scores of defendants being forced into bankruptcy, and threatened the ability of the seriously ill to receive adequate or timely compensation. *See*

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[4] *See also* Christopher J. O'Malley, Note, *Breaking Asbestos Litigation's Chokehold on the American Judiciary*, 2008 U. Ill. L. Rev. 1101, 1105 (2008) ("Most individuals with pleural plaques experience no lung impairment, no restrictions on movement, and usually do not experience any symptoms at all."); Roger Parloff, *Welcome to the New Asbestos Scandal*, Fortune, Sept. 6, 2004, at 186 ("According to estimates accepted by the most experienced federal judges in this area, two-thirds to 90% of the nonmalignants are 'unimpaireds'—that is, they have slight or no physical symptoms."); Alex Berenson, *A Surge in Asbestos Suits, Many by Healthy Plaintiffs*, N.Y. Times, Apr. 10, 2002, at A1 ("Very few new plaintiffs have serious injuries, even their lawyers acknowledge . . . . 'The overwhelming majority of these cases . . . are brought by people who have no impairment whatsoever.'").

Mark A. Behrens, *Some Proposals for Courts Interested in Helping Sick Claimants and Solving Serious Problems in Asbestos Litigation*, 54 Baylor L. Rev. 331 (2002).

This Court was one of the first to appreciate the serious problems posed by the asbestos litigation and the careful balance that must be struck to: (1) avoid subjecting defendants to "unlimited and unpredictable liability," *Metro-North Commuter R.R. Co. v. Buckley*, 521 U.S. 424, 433 (1997), (2) prevent a "flood of less important cases," *id*. at 442, from draining the pool of resources available for meritorious claims brought by plaintiffs with serious injury; and (3) reduce the possibility of fraudulent claims. *Cf. Consol. Rail Corp. v. Gottshall*, 512 U.S. 532, 557 (1994).

In *Metro-North* (1997), the Court ruled against allowing negligent infliction of emotional distress or medical monitoring claims brought by an asymptomatic pipefitter against his employer for occupational exposure to asbestos under FELA. *See id*. at 427.

The Court addressed FELA asbestos issues once again in *Ayers* (2003). There, the Court held that, under FELA, a plaintiff suffering from asbestosis may "seek compensation for fear of cancer as an element of his asbestosis-related pain and suffering damages" *if* the plaintiff "prove[s] that his alleged fear is genuine and serious." 538 U.S. at 157. By requiring the fear of cancer to be "genuine and serious," the Court was trying to prevent the policy concerns raised in *Metro-North* from occurring in FELA asbestosis/fear of cancer cases. To further minimize this risk, the Court in *Ayers* also identified

a number of "verdict control devices," including, "on a defendant's request, a charge that each plaintiff must prove any alleged fear to be genuine and serious." 538 U.S. at 159 n.19. This instruction was refused by the court below.

The "genuine and serious" fear requirement in *Ayers* must be enforced to prevent a "flood of less important cases," *Metro-North*, 521 U.S. at 442, with potentially "unlimited and unpredictable liability," *id*. at 433, in cases arising under FELA (or other FELA-like federal statutes), and the potential for fraudulent claims.

The lower court's decision signals a troubling return to the types of unsound asbestos rules and practices which led to the situation this Court described in 1997 as the "asbestos-litigation crisis." *Amchem Prods., Inc.*, 521 U.S. at 597. The decision sends the wrong message at a time when other jurisdictions are making strides to improve the overall asbestos litigation environment. *See* Mark A. Behrens & Phil Goldberg, *The Asbestos Litigation Crisis: The Tide Appears to Be Turning*, 12 Conn. Ins. L.J. 477 (2006).

Within this context, the instant case provides a pivotal opportunity for this Court to continue its leadership in guiding courts struggling with asbestos litigation, and to ensure that courts faithfully adhere to the standards this Court sets forth. While the case is limited to FELA actions, how this Court chooses to handle the case will impact asbestos litigation more generally. A message from this Court would provide powerful guidance to courts hearing asbestos actions under state common law and could lead others to join the growing list of jurisdictions

that are acting to restore rationality and fairness to the asbestos litigation within their borders.

For these reasons, *amici* urge this Court to grant the Petition for Writ of Certiorari in this action and reverse the judgment below.

ARGUMENT

I. THE PETITION SHOULD BE VIEWED IN THE CONTEXT OF THE BROADER ASBESTOS LITIGATION ENVIRONMENT

A. The Current Litigation Environment

When asbestos product liability lawsuits emerged almost forty years ago,[5] nobody could have predicted that courts today would still be dealing with the "longest-running mass tort" in U.S. history. Helen Freedman, *Selected Ethical Issues in Asbestos Litigation*, 37 Sw. U. L. Rev. 511, 511 (2008). The Occupational Safety and Health Administration ("OSHA") promulgated its first asbestos regulation in 1971, and followed up with increasingly stringent regulations in the years to follow.[6] By the early 1970s, "use of new asbestos essentially ceased in the United States." *In re Joint E. & S. Dists. Asbestos Litig.*,

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[5] *See Borel v. Fibreboard Paper Prods. Corp.*, 493 F.2d 1076 (5th Cir. 1973) (asbestos product manufacturers could be held strictly liable for failure to warn of asbestos exposure risks).

[6] OSHA was created in 1970 and almost immediately promulgated an initial regulation limiting exposure to asbestos. *See* 36 Fed. Reg. 10466, 10506 (table G-3) (May 29, 1971). Soon thereafter, OSHA revised its regulations to limit exposure still further and to require special handling of asbestos products. *See* 36 Fed. Reg. 23207 (Dec. 7, 1971); 37 Fed. Reg. 11318 (June 7, 1972). OSHA's asbestos regulations became progressively more restrictive until they effectively precluded the use of asbestos in most commercial applications.

129 B.R. 710, 737 (E.D.N.Y. & S.D.N.Y. 1991) (Weinstein, J.), *vacated*, 982 F.2d 721 (2d Cir. 1992), *opinion modified on reh'g*, 993 F.2d 7 (2d Cir. 1993) (reviewing history of asbestos use). Therefore, many believed that asbestos litigation would be a serious but diminishing problem.

The opposite was true. Instead of declining, asbestos filings multiplied exponentially. In 1991, approximately 100,000 asbestos cases were pending in courts around the country. By 1999, that number had doubled to roughly 200,000. *See The Fairness in Asbestos Compensation Act of 1999: Legislative Hearing on H.R. 1283, Before the House Comm. on the Judiciary*, 106th Cong. at 5 (July 1, 1999) (statement of Prof. Christopher Edley, Jr., Harvard Law School). That momentum continued into the 2000s, with approximately 730,000 asbestos claims filed through 2002 alone. *See* Carroll, *supra*, at *xxiv*.

Only in the past few years have courts and state legislatures, through a variety of methods, been able to stem the rapid proliferation of asbestos cases. *See* Deborah R. Hensler, *Has the Fat Lady Sung? The Future of Mass Toxic Torts*, 26 Rev. Litig. 883 (2007) (explaining the current status and history of mass toxic tort litigation and the changing dynamics resulting from executive, legislative, and judicial policy efforts).

1. Filings by the Non-Sick

Until recently, a substantial majority of claims were brought on behalf of unimpaired claimants diagnosed largely through plaintiff-lawyer-arranged

mass screenings.[7] It is estimated that over one million workers have undergone attorney-sponsored screenings. *See* Lester Brickman, *On the Theory Class's Theories of Asbestos Litigation: The Disconnect Between Scholarship and Reality?*, 31 Pepp. L. Rev. 33, 68 (2003); *see also* Griffin B. Bell, *Asbestos & The Sleeping Constitution*, 31 Pepp. L. Rev. 1, 5 (2003) (stating that mass screenings conducted by plaintiffs' lawyers and their agents have "driven the flow of new asbestos claims by healthy plaintiffs.").

The problem, as policy-makers, judges, and lawyers for the truly sick recognized, was that mass filings by unimpaired claimants were creating judicial backlogs and exhausting defendants' resources. *See* Susan Warren, *Competing Claims: As Asbestos Mess Spreads, Sickest See Payouts Shrink*, Wall St. J., Apr. 25, 2002, at A1 (discussing the wave of corporate bankruptcies resulting from asbestos litigation).

These dynamics were not lost on this Court. *See Amchem Prods., Inc.*, 521 U.S. at 598 ("exhaustion of assets threatens and distorts the process; and future claimants may lose altogether); *Ayers*, 538 U.S. at 169 ("It is only a matter of time before inability to pay for real illness comes to pass.") (Kennedy, J., dissenting in relevant part).

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[7] *See Owens Corning v. Credit Suisse First Boston*, 322 B.R. 719, 723 (D. Del. 2005) ("Labor unions, attorneys, and other persons with suspect motives [have] caused large numbers of people to undergo X-ray examinations (at no cost), thus triggering thousands of claims by persons who had never experienced adverse symptoms."); *Eagle-Picher Indus., Inc. v. Am. Employers' Ins. Co.*, 718 F. Supp. 1053, 1057 (D. Mass. 1989) ("[M]any of these cases result from mass X-ray screenings at occupational locations conducted by unions and/or plaintiffs' attorneys, and many claimants are functionally asymptomatic when suit is filed.").

As explained further below, a number of reforms recently adopted by state legislatures and courts have had a major impact on filings by the non-sick. *See*, *e.g*., Freedman, *supra*, at 513 ("Perhaps the most dramatic change since the dawn of the new century has been the restriction of the litigation to the functionally impaired."); *see also* Philip Zimmerly, Comment, *The Answer is Blowing in Procedure: States Turn to Medical Criteria and Inactive Dockets to Better Facilitate Asbestos Litigation*, 59 Ala. L. Rev. 771 (2008).

2. Bankruptcies and the Economic Impact of the Litigation

"For some time now, mounting asbestos liabilities have pushed otherwise viable companies into bankruptcy," *In re Combustion Eng'g, Inc*., 391 F.3d 190, 201 (3d Cir. 2005), including an estimated eighty-five employers. *See* Martha Neil, *Backing Away from the Abyss*, ABA J., Sept. 2006, at 26, 29; *see also* Christopher Edley, Jr. & Paul C. Weiler, *Asbestos: A Multi-Billion-Dollar Crisis*, 30 Harv. J. on Legis. 383, 392 (1993) (each time a defendant declares bankruptcy, "mounting and cumulative" financial pressure is placed on the "remaining defendants, whose resources are limited"); *In re Joint E. & S. Dists. Asbestos Litig.*, 129 B.R. at 751 ("Overhanging this massive failure of the present system is the reality that there is not enough money available from traditional defendants to pay for current and future claims.").

This combination of bankruptcies and incredible litigation expenditures has depleted the pool of resources from which the truly sick may recover. For example, the Manville trustees reported that a "dis-

proportionate amount of Trust settlement dollars have gone to the least injured claimants—many with no discernible asbestos-related physical impairment whatsoever." Quenna Sook Kim, *Asbestos Trust Says Assets Are Reduced as the Medically Unimpaired File Claims*, Wall St. J., Dec. 14, 2001, at B6. The Trust is now paying out *five cents on the dollar* to asbestos claimants. *See id.* Many other trusts have been forced to cut or delay payments to claimants. *See* James L. Stengel, *The Asbestos End-Game*, 62 N.Y.U. Ann. Surv. Am. L. 223, 262 (2006).

3. Peripheral Defendants Are Being Dragged into the Litigation

As a result of these bankruptcies and depleted resources, "the net has spread from the asbestos makers to companies far removed from the scene of any putative wrongdoing." Editorial, *Lawyers Torch the Economy*, Wall St. J., Apr. 6, 2001, at A14. The Congressional Budget Office observed that asbestos suits have expanded "from the original manufacturers of asbestos-related products to include customers who may have used those products in their facilities." Congress of the United States, Congressional Budget Office, *The Economics of U.S. Tort Liability: A Primer* 8 (Oct. 2003); *see also* Steven B. Hantler *et al.*, *Is the Crisis in the Civil Justice System Real or Imagined?*, 38 Loy. L.A. L. Rev. 1121, 1151-52 (2005) (discussing spread of asbestos litigation to "peripheral defendants"). One well-known plaintiffs' attorney has described the litigation as an "endless search for a solvent bystander." *'Medical Monitoring and Asbestos Litigation'–A Discussion with Richard Scruggs and Victor Schwartz*, 17:3 Mealey's Litig.

Rep.: Asbestos 5 (Mar. 1, 2002) (quoting Mr. Scruggs).

More than 8,500 defendants have now become "ensnarled in the litigation." *In re Joint E. & S. Dists. Asbestos Litig.*, 129 B.R. at 747-48; Deborah R. Hensler, *California Asbestos Litigation – The Big Picture*, HarrisMartin's Columns – Raising The Bar In Asbestos Litig., Aug. 2004, at 5. Nontraditional defendants now account for more than half of asbestos expenditures. *See* Carroll, *supra*, at 94.

B. The Courts' Contribution to the Crisis

The origins of the wave of asbestos litigation that began in the 1970s are well known. In the 1940s and 1950s, millions of American workers were exposed to asbestos, usually with few or no precautions. Resulting illnesses began to appear by the 1960s, and, because some asbestos-related diseases have latency periods of up to 40 years, injuries continued to emerge in later decades. Absent congressional action – and, despite pleas from this Court, other courts, and the Judicial Conference, none has been forthcoming[8] – it was inevitable that asbestos litigation would present a major problem for the courts.

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[8] *See Ortiz*, 527 U.S. at 821 ("[T]he elephantine mass of asbestos cases . . . defies customary judicial administration and calls for national legislation."); *id*. at 865 ("'[T]he elephantine mass of asbestos cases' cries out for a legislative solution.") (Rehnquist, C.J., joined by Scalia and Kennedy, J.J., concurring) (internal citation omitted); *Cimino v. Raymark Indus., Inc.,* 151 F.3d 297, 313 (5th Cir. 1998) ("There is no doubt that a desperate need exists for federal legislation in the field of asbestos litigation.") (internal citation omitted); Judicial Conference Report at 3 ("The Committee firmly believes that the ulti-

What is harder to understand is why a problem that should have begun to resolve itself by now has continued for so long. It is here that the courts themselves share some of the blame. With the best of intentions, many courts adopted both procedural and substantive rules intended to facilitate resolution of asbestos claims – to put money in the hands of the sick as quickly as possible, and also to clear court dockets of overwhelming numbers of cases. Those efforts have been massively counterproductive. Lowering the legal barriers to recovery may seem attractive in individual cases, but in the aggregate, it only fuels the fire, inviting more and more claims with little regard for merit.

One "near-heroic effort[] . . . to make the best of a bad situation," *Ortiz*, 527 U.S. at 865 (Rehnquist, C.J., concurring), involved mass settlements of hundreds of thousands or even millions of claims aggregated under Rule 23 of the Federal Rules of Civil Procedure. But that route was invalidated by the Court in *Amchem* and *Ortiz*: even the most pressing efficiency interests, the Court held, cannot justify the lumping together of disparate and fact specific claims for settlement purposes. *See Amchem*, 521 U.S. at 620-29; *Ortiz*, 527 U.S. at 841-61.

Other courts turned to mass joinders and "jumbo" consolidations, aggregating thousands of claims against dozens or hundreds of defendants in an effort to produce quick settlements with low transaction costs. *See The Fairness in Asbestos Compensation Act of 1999: Legislative Hearing on H.R. 1283 Before the H. Comm. on the Judiciary*, 106th Cong. At 13

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mate solution should be legislation . . . creating a national asbestos dispute resolution scheme . . . .").

(July 1, 1999) (statement of Prof. William Eskridge, Yale Law School) (describing pressure on defendants to settle on terms favorable to plaintiffs).

As it turns out, bending procedural and substantive rules to put pressure on defendants to settle brings no lasting efficiency gains. This effect should not be surprising:

> Judges who move large numbers of highly elastic mass torts through their litigation process at low transaction costs create the opportunity for new filings. They increase demand for new cases by their high resolution rates and low transaction costs. If you build a superhighway, there will be a traffic jam.

Francis E. McGovern, *The Defensive Use of Federal Class Actions in Mass Torts*, 39 Ariz. L. Rev. 595, 606 (1997).

C. State Efforts to Manage the Litigation

Recently, and in the wake of this Court's decisions in *Metro-North* and *Ayers*, *see infra*, a number of courts and state legislatures have acted to address these serious problems and improve the asbestos litigation environment in their jurisdictions. *See* James A. Henderson, Jr., *Asbestos Litigation Madness: Have the States Turned a Corner?*, 3:6 Mealey's Tort Reform Update 12 (Jan. 18, 2006) ("A movement is afoot among state courts and legislatures that may prove to be the beginnings of a reversal in the disheartening trends of recent years, perhaps the turning of a corner in this hugely important and highly controversial area of tort litigation.").

Beginning in 2004, state legislatures in some key jurisdictions began to enact "medical criteria" laws requiring asbestos claimants to present credible and objective medical evidence of physical impairment in order to bring or proceed with a claim.[9] These laws "set forth rigid criteria for the claimant diagnoses." Matthew Mall, Note, *Derailing the Gravy Train: A Three-Pronged Approach to End Fraud in Mass Tort Litigation*, 48 Wm. & Mary L. Rev. 2043, 2060 (2007); *see also* Joseph Sanders, *Medical Criteria Acts: State Statutory Attempts to Control the Asbestos Litigation*, 37 Sw. U. L. Rev. 671, 689 (2008) (concluding that "medical criteria acts are a step in the right direction").

State legislatures have also acted to require individualized trials, removing an economic incentive for plaintiffs to file claims that may have little or no value unless they are joined with other more serious cases. From 2005 through 2007, Texas, Kansas, and Georgia enacted laws that generally preclude the joinder of asbestos cases at trial.[10]

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[9] Medical criteria laws for asbestos cases were enacted in Ohio in 2004, Texas and Florida in 2005, Kansas and South Carolina in 2006, and Georgia in 2007. *See* FLA. STAT. §§ 774.201–.209; GA. CODE ANN. §§ 51-14-1–13 (2000 & Supp. 2008); KAN. STAT. ANN. §§ 60-4901–-4911 (2005 & Supp. 2007); OHIO REV. CODE ANN. §§ 2307.91–.96 (West 2004 & Supp. 2008); S.C. CODE ANN. §§ 44-135-30–110 (2002 & Supp. 2007); TEX. CIV. PRAC. & REM. CODE ANN. §§ 90.001–.012 (Vernon 2005 & Supp. 2008).

[10] *See* GA. CODE ANN. § 51-14-11 (Supp. 2008); KAN. STAT. ANN. § 60-4902(j) (Supp. 2007); TEX. CIV. PRAC. & REM. CODE ANN. § 90.009 (Vernon Supp. 2008).

Courts also have helped to curb filings by the non-sick. For instance, a growing number of courts have implemented inactive asbestos dockets (also called deferred dockets or pleural registries) to give trial priority to the sick. *See* Susan Warren, *Swamped Courts Practice Plaintiff Triage*, Wall St. J., Jan. 27, 2003, at B1.[11] Under these docket management plans, the claims of the non-sick are suspended and preserved; they also are exempt from discovery. Claimants may petition for removal to the trial docket when credible medical evidence of impairment is shown. *See* Peter H. Schuck, *The Worst Should Go First: Deferral Registries in Asbestos Litigation*, 15 Harv. J.L. & Pub. Pol'y 541 (1992).

The result of the above-described developments has been a dramatic reduction in the number of filings by unimpaired claimants. For example, Richard

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[11] Since 2002, the list of jurisdictions with inactive asbestos dockets has grown to include: Cleveland, Ohio (Mar. 2006); Minnesota (June 2005) (coordinated litigation); St. Clair County, Illinois (Feb. 2005); Portsmouth, Virginia (Aug. 2004) (applicable to cases filed by the Law Offices of Peter T. Nicholl); Madison County, Illinois (Jan. 2004); Syracuse, New York (Jan. 2003); New York City, New York (Dec. 2002); and Seattle, Washington (Dec. 2002). Earlier courts that had adopted inactive dockets include Baltimore City, Maryland (Dec. 1992); Cook County (Chicago), Illinois (Mar. 1991); and Massachusetts (coordinated litigation) (Sept. 1986). In 2005, the RAND Institute for Civil Justice called the "reemergence" of inactive dockets one of "the most significant developments" in asbestos litigation. *See* Carrroll, *supra*, at xx (2005); *see also In re USG Corp.*, 290 B.R. 223, 226 n.3 (Bankr. D. Del. 2003) ("The practical benefits of dealing with the sickest claimants . . . have led to the adoption of deferred claims registries in many jurisdictions."); Mark A. Behrens & Manuel López, *Unimpaired Asbestos Dockets: They Are Constitutional*, 24 Rev. Litig. 253, 264 (2005).

Schuster, chairman of the Columbus-based Vorys, Sater, Seymour and Pease's national toxic tort defense litigation practice, has said that Ohio's medical criteria law "dramatically cut the number of new case filings by more than 90%." Peter Geier, *States Taking Up Medical Criteria: Move Is to Control Asbestos Caseload*, Nat'l L.J., May 22, 2006, at 1. Bryan Blevins of Provost & Umphrey, a national plaintiffs' practice based in Beaumont, Texas, has said that since Texas enacted its asbestos medical criteria law, "[t]he only cases getting filed now are cancer cases." *Id.* John Cooney, an asbestos plaintiffs' lawyer based in Chicago, has said, "I know whole firms that just don't do asbestos anymore." Patti Waldmeir, *Asbestos Litigation Declines in Face of US Legal Reforms*, Fin. Times (London), July 24, 2006, at 2 New York Appellate Division Justice Helen Freedman, who adopted a Deferred Docket when she managed the New York City asbestos litigation as a trial court judge, has said that "[a] preliminary estimate indicates that the Deferred Docket reduced the number of cases actually pending in my court by 80 percent." Freedman, *supra*, at 514.

"A lot of companies that were seeing 40,000 cases in 2002 and 2003 have dropped to the 15,000 level," according to Jennifer Biggs, who chairs the mass torts subcommittee of the American Academy of Actuaries. Alison Frankel, *Asbestos Removal*, Am. Law., July 2006, at 15. Frederick Dunbar, a senior vice president of NERA Economic Consulting, recently studied the Securities and Exchange Commission filings of eighteen large asbestos defendants and found that, "for all of them, 2004 asbestos claims had dropped from peak levels of the previous three years.

Ten companies saw claims fall by more than half between 2003 and 2004." *Id.*

II. THIS COURT SHOULD GRANT CERTIORARI TO HELP ENSURE MORE TIMELY AND ADEQUATE RECOVERIES FOR PERSONS WITH SERIOUS INJURIES AND TO PROTECT DEFENDANTS FROM TRIVIAL OR FRAUDULENT CLAIMS

A. The Safeguards Articulated by This Court Should be Enforced

The significant progress made in curtailing filings by the unimpaired and prioritizing resources for the truly sick is, in part, a result of this Court's past asbestos case guidance. This case represents an important opportunity to reaffirm the Court's commitment to the sound public policy protecting resources for seriously injured claimants, and to ensure that the standards the Court sets forth in this regard are not diluted or eviscerated by inconsistent lower court interpretations.

Over a decade ago, this Court in *Metro-North* refused to authorize an asbestos-related medical monitoring claim under FELA, recognizing that such a claim would extend to "tens of millions of individuals," expose defendants to unlimited liability, and thus drain the pool of resources available for meritorious claims by plaintiffs with serious present harm. 521 U.S. at 442; *see also Gottshall*, 512 U.S. at 546 (cautioning against the "very real possibility of nearly infinite and unpredictable liability for defendants" in FELA case deciding whether to allow claims for negligently inflicted emotional distress).

The Court applied this same public policy rationale in *Ayers*. The case was a 5-4 decision, with two dissenting opinions, both of which expressed serious concern for "unlimited and unpredictable liability" by allowing asbestosis plaintiffs to be compensated for fear of cancer as part of their damages for pain and suffering. 538 U.S. at 181 (Kennedy, J., dissenting in relevant part) (quoting *Metro-North*, 521 U.S. at 433); *id.* at 185 (Breyer, J., dissenting in relevant part) (same). The dissents pointed to the depleted pool of assets occasioned by asbestos bankruptcies, warning that permitting such broad liability for fear of cancer would more quickly exhaust the funds available to those who actually have or will develop cancer. *Id.* at 167-170 (Kennedy, J., dissenting); *id.* at 185-187 (Breyer, J. dissenting).

To safeguard recovery for the truly sick while permitting recovery for *certain* fears of cancer, *Ayers* struck a careful balance. The Court, responding to the arguments of the four dissenting justices, stated an important limitation that the fear of cancer must be "genuine and serious" to allow recovery. *Id.* at 159 n.19. The Court explained that this was a "verdict control device" meant to preserve resources from "bankrupt defendants." *Id.* At the same time, the limitation ensured that determinations of liability were not "entirely outside the jury's ken." *Id.*

The decision below fundamentally distorts the balance struck in *Ayers*[12] and the clear public policy

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[12] Also incorporated within this balance is recognition that asbestosis is a distinct disease from cancer, and that the generally-accepted medical view is that asbestosis is not causally related to cancer and does not itself develop into cancer. *See, e.g.,* A. Churg & F. Green, *Pathology of Occupational Lung Disease*

objectives underlying both *Ayers* and *Metro-North*. In refusing to instruct the jury on the "genuine and serious" limitation and allowing the claim for fear of cancer based on the respondent's own testimony that he had a "concern" or "anxiety" about the possibility of contracting disease in the future, the substance of such a protection is rendered meaningless.

This Court should grant certiorari not only to send a clear message that other courts may not nullify the careful standards articulated by this Court, but also to continue to guide courts in advancing the public policy protecting and prioritizing the claims of the persons with serious injury.

B. Permitting the Decision Below to Stand Would Result in a Step Backwards With Respect to Controlling Asbestos Lawsuits

In the wake of this Court's rulings in *Metro-North* and *Ayers*, and the meaningful reforms that have taken shape as a result of the work of both courts and legislatures, the lower court's decision here is particularly troubling. Allowing the decision to stand would undermine the significant progress that has been made in the litigation and re-open some of the floodgates.

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312 (2d ed. 1998) (describing asbestos-related diseases as a "disparate set of diseases with different epidemiological, pathogenic, pathologic, and prognostic features"); R. Doll & J. Peto, *Effects on Health of Exposure to Asbestos* 2 (1985); *see also Kilpatrick v. Dept. of Labor,* 883 P.2d 1370, 1375 (1994), *amended*, 915 P.2d 519 (Wash. 1995); *Eagle-Picher Indus., Inc. v. Cox,* 481 So.2d 517, 522 n.7 (Fla. Dist. Ct. App. 1985) ("asbestosis and cancer can be. . . . considered distinct sibling diseases parented by the same cause").

As a light at the end of the tunnel begins to take shape, the decision below functions to allow pain and suffering damages for fear of cancer based on weak and easily contrived evidence of such fear. It permits exactly the type of unwarranted claims this Court has acted against.

If the evolution of asbestos litigation provides any guide, plaintiffs' attorneys will exploit this opening and fear of cancer recoveries will become far more readily available than *Ayers* either contemplates or permits. This will likely also lead to great confusion and division among courts in applying *Ayers*.

CONCLUSION

For these reasons, *amici* urge this Court to grant the Petition for Writ of Certiorari in this action and reverse the judgment below.

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Dated: March 16, 2009