NO.

IN THE
SUPREME COURT OF THE UNITED STATES

WILLIAM C. SKYE,

Petitioner,

vs.

MAERSK LINE, Limited Corporation
d.b.a. Maersk Line Limited

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

This case involves an important question of maritime law, which should be settled by this Court:

Whether a seaman can recover money damages under the Jones Act, 46 U.S.C. § 30104, for a *physical* injury to the heart (labile hypertension and left ventricular hypertrophy), stemming from excessive work hours, arduous working conditions and an erratic sleep schedule?

Certiorari is warranted because there is a split among the circuits (and later decisions of this Court) regarding the scope of *Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532 (1994).

William Skye, a Jones Act seafarer and a career merchant mariner, worked as the chief mate on board the *Sealand Pride*, a commercial vessel owned and operated by his employer Maersk Line Limited (hereinafter "Maersk"). During the course of his eight year employment, Maersk nearly worked Mr. Skye to death, forcing him to work for an excessive number of hours (about 16 hours a day on average) without providing him adequate rest periods. As a result, Mr. Skye developed the occupational disease labile hypertension as well as left ventricular hypertrophy, a physical injury characterized by a thickening of the heart wall which affects the pumping of blood in the ventricle and lead to congestive heart failure.

Mr. Skye filed suit in federal district court against Maersk for negligence under the Jones Act, 46 U.S.C. § 30104.[1] At trial Mr. Skye alleged and proved to the

[1] The Jones Act, 46 U.S.C. § 30104, grants seamen who suffer personal injury or death in the course of their employment, the right to seek damages in a jury trial against their employers. The remedies are the same as those available to railroad workers under the Federal Employers' Liability Act ("FELA"). Accordingly,

satisfaction of a jury, that he suffered physical damage to his heart as a result of Maersk forcing him to work for an excessive number of hours (about 16 hours a day on average) without providing him adequate rest periods.

The verdict form asked the jury whether Mr. Skye sustained a "physical injury" or an "emotional injury." The jury specifically found that Mr. Skye sustained *only* a "physical injury" due to Maersk's negligence, and characterized this injury as "left ventricular hypertrophy."

The jury awarded damages of $2,362,299.00, which the district court reduced to $590,574.75 to account for Mr. Skye's comparative negligence. Maersk moved for a judgment as a matter of law on the ground that this Court's decision in *Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532 (1994), barred Mr. Skye's Complaint. The district court denied that motion and entered judgment in Mr. Skye's favor. Maersk appealed.

In a 2-1 decision, the Eleventh Circuit vacated the jury's finding of negligence against Maersk, and rendered judgment in favor of Maersk. Relying on this Court's opinion in *Gottshall*, the Eleventh Circuit held that Mr. "Skye's complaint of an injury caused by work-related stress is not cognizable under the Jones Act, which concerns injuries caused by physical perils." Mr. Skye filed a Petition for Rehearing En Banc, which the Eleventh Circuit denied.

Certiorari is warranted for the following reasons.

First, certiorari is warranted because there is a split among the circuits (and later decisions of this Court) regarding the scope of *Consolidated Rail Corp. v. Gottshall*,

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rights and causes of action available to railroad workers under FELA, are also available to seafarers under the Jones Act.

512 U.S. 532 (1994). District and Circuit courts have struggled to determine the scope of the *Gottshall* holding. This has resulted in non-uniformity related to what damages a Jones Act seaman and FELA railway worker can recover. *See, i.e. Norfolk & Western Railway Co. v. Ayers*, 538 U.S. 135, 157 (2003); *Szymanski v. Columbia Transp. Co.,* 154 F. 3d 591 (6th Cir. 1997).

The divide among lower courts was expressly noted by Circuit Judge Jordan in his dissenting opinion, Pet. App. A., p. 14: I recognize that federal and state courts are divided about the scope of *Gottshall.* Some courts have read *Gottshall* more broadly, as the majority does, while others have interpreted it more narrowly, as I do. *Compare, e.g., Szymanski v. Columbia Transp. Co.*, 154 F.3d 591, 594-95 (6th Cir. 1998) (10-3 en banc decision), *and Capriotti v. Consolidated Rail Corp.*, 878 F. Supp. 429, 432-33 (N.D.N.Y. 1995), *with, e.g., Walsh v. Consolidated Rail Corp.*, 937 F. Supp. 380, 387-89 (E.D. Pa. 1996), *and Duncan v. Am. Commercial Barge Line, LLC*, 166 S.W.3d 78, 83-84 (Mo. App. E.D. 2004).

Second, certiorari is warranted because the Eleventh Circuit's ruling conflicts with the language, purpose, and spirit of the Federal Employers' Liability Act ("FELA"), 45 U.S.C. §51 *et seq*., and the Jones Act, 46 U.S.C. § 30104, concerning the rights of seamen and railway workers to recover damages for job-related injuries.

In the ruling, the Eleventh Circuit held that while the central focus of FELA, and the Jones Act by extension, is on physical perils; "[a]n arduous work schedule and irregular sleep schedule are not physical perils." The circuit court further held, "that Skye developed a physical injury is no matter, [because] the cause of his injury was work-related stress." Citing *Gothshall*, the Eleventh Circuit concluded that Mr. "Skye's complaint of an injury caused by work-related

stress is not cognizable under the Jones Act, which concerns injuries caused by physical perils."

The Eleventh Circuit's ruling eviscerates and effectively re-writes FELA and the Jones Act, jeopardizing the health and safety of over 81,000 American merchant mariners and 113,000 railway workers. In essence, the ruling impermissibly writes into the Jones Act and FELA immunity for employers who negligently (and often wilfully) impose excessive working schedules and physical job demands, which will invariably lead to severe worker injuries and deaths.

As Circuit Judge Fay explained, concurring specially: "The core purpose of both statutes [FELA and the Jones Act] is to provide covered employees with a safe place to work. Being required to work 90 and 105 hours per week for 70 or 84 days at a time is hardly being given a safe place to work. I fail to see the difference between being given a defective piece of equipment and being required to work outrageous hours, in determining whether or not the workplace was safe. Surely an employer is no less negligent in doing either."

During his employment with Maersk, Mr. Skye was required to work up to 107 hours in a seven day stretch. The jury found, based on the uncontroverted medical testimony, that the amount of physical work and the lack of rest, physically deteriorated Mr. Skye's heart resulting in his left ventricular hypertrophy. By ignoring the jury, and finding Maersk's conduct permissible under the Jones Act and FELA, the Eleventh Circuit overstepped Congress, effectively legalizing unrestricted and unlimited working hours on American vessels and railroads. The result: Jones Act and FELA employers now have a green light to work seafarers and railroad workers literally to death.

Third, certiorari is warranted because the Eleventh Circuit misinterpreted this Court's opinion in *Gottshall*, in order to improperly substitute the jury's factual findings and the uncontroverted medical evidence, with the Court's own judgment and view of the merits of the case.

In *Gottshall*, this Court limited recovery for railroad workers under FELA, in cases involving claims for negligent infliction of emotional distress, i.e., "mental or emotional harm (such as fright or anxiety) that is caused by the negligence of another that is not directly brought about by a physical injury, but may manifest itself in physical symptoms." In short, under *Gottshall*, stand-alone emotional distress claims not provoked by any physical injury are not compensable under the Jones Act and FELA.

However, as the district court recognized in this case, the holding in *Gottshall*, has no effect on the jury's verdict in favor of Mr. Skye. Unlike *Gottshall*, Mr. Skye did not file claims for stand-alone emotional distress. Mr. Skye sued for *physical* injuries to his heart (i.e. left ventricular hypertrophy) as a result of Maersk forcing him to *physically* work for an excessive number of hours, without providing him adequate rest periods.

Indeed, the uncontroverted medical evidence was that physical stress caused Mr. Skye to develop an occupational disease called "labile hypertension," a consequence of which was left ventricular hypertrophy. The expert medical evidence showed that people who live under constant physical stress secrete large amounts of adrenaline, provoking the so-called fight or flight response, and that in turn, over time, can lead to physical damage to the heart known as left ventricular hypertrophy. Based on this medical evidence, the jury found that the amount of *physical* work and lack of rest (negligently imposed by Maersk), *physically*

deteriorated Mr. Skye's heart resulting in his left ventricular hypertrophy.

There should be no question that heart damage, much like any other *physical* injury (such as injuries to the back, arms or legs) brought about by physically overworking a seafarer or railroad worker, is a compensable claim under the Jones Act and FELA. Skye's injury in this case is analogous to a seaman being asked to heave a heavy anchor by himself. Eventually the physical task becomes too difficult and the seaman's body breaks down. The only difference here is that instead of dealing with a herniated disc or a broken leg, Skye suffered a physical injury to his heart muscle. In either scenario, the injury should be compensable under the Jones Act.

In order for this case to fit under *Gothshall*, the Eleventh Circuit ignored the jury's determination (supported by uncontroverted medical evidence) specifically finding that Mr. Skye sustained *only* a "physical injury" brought about by physical overwork. Instead, the Eleventh Circuit, acting as the finder of fact (and as a medical expert), re-classified Mr. Skye's jury-defined physical injuries, as harm brought about by work-related emotional distress. In doing so, the Eleventh Circuit second-guessed the undisputed medical evidence at trial and impermissibly substituted its own judgment for the jury's findings.

Fourth, certiorari is warranted because the Eleventh Circuit's ruling also ignored binding precedent from this Court. In *Norfolk & Western Railway Co. v. Ayers*, 538 U.S. 135, 157 (2003), this Court interpreted *Gottshall* narrowly and gave it a constrained reading. In *Ayers*, this Court explained that *Gottshall* described two categories for emotional distress damages: Stand-alone emotional distress claims not provoked by any physical injury, for which recovery is sharply circumscribed by the common-law zone

of danger test; and emotional distress claims brought on by a physical injury, for which pain and suffering recovery is permitted. Under *Ayers*, the second category, emotional distress accompanied by a physical injury is compensable under the FELA, and by extension the Jones Act.

On that basis, in *Ayers*, this Court distinguished *Gottshall* and held that "an asbestosis sufferer [can] seek compensation under [FELA] for fear of cancer as an element of his asbestosis-related pain and suffering damages." In the words of *Ayers*, "[t]he plaintiffs in *Gottshall* grounded their suits on claims of negligent infliction of emotional distress. The claimants before us, in contrast, complain of negligently inflicted physical injury (asbestosis) and attendant pain and suffering."

As Circuit Judge Jordan pointed out in his dissenting opinion, "like the claimants in *Ayers*, Mr. Skye is complaining of a negligently inflicted physical injury – left ventricular hypertrophy." Accordingly, contrary to the Eleventh Circuit's ruling, even if work-related stress had been categorized by the jury as emotional distress (it was not); under *Ayers*, Mr. Skye would still have been able to recover because the work-related stress is associated with a physical injury (i.e. left ventricular hypertrophy to this heart). *See Ayers*, 538 U.S. 135, 148:

> [T]he parties agree that asbestosis is a cognizable injury under the FELA …As *Metro-North* plainly indicates, pain and suffering damages may include compensation for fear of cancer when that fear "accompanies a physical injury." Unlike stand-alone claims for negligently inflicted emotional distress, claims for pain and suffering associated with, or "parasitic" on, a physical injury are traditionally compensable.

RULE 14.1(b) STATEMENT

Petitioner is William C. Skye.

Respondent is Maersk Line, Limited Corporation, Corporation d.b.a. Maersk Line Limited.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully submits this petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The opinion of the court of appeals, dated May 15, 2014, was designated for publication and reported at 751 F. 3d 1262. Pet. App. A.[2] The Eleventh Circuit's denial of the Petition for Rehearing En Banc, dated July 10, 2014, was not reported. Pet. App. B. The district court's denial of Defendant/Respondent Maersk's Motion for Summary Judgment, dated March 28, 2012 was not reported. Pet. App. C. The district court's Final Judgment, dated May 18, 2012 was not reported. Pet. App. E. The district court's denial of Defendant/Respondent Maerk's Post-Trial Motion for Judgment as a Matter of Law, dated November 16, 2012 was not reported. Pet. App. F.

JURISDICTION

The court of appeals' opinion was entered on May 15, 2014. The court of appeals denied the Petition for Rehearing En Banc on July 10, 2014. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

[2] All references to the Appendix are denoted as "App. __." References are to the lower court trial transcripts which are denoted as "Trial Tran. Volume __, pg. ___." References to trial exhibits are denoted as "Trial Exh. ___; D.E. ___."

STATUTORY PROVISIONS INVOLVED

The Jones Act, 46 U.S.C. § 30104. *Personal injury to or death of seamen:*

> A seaman injured in the course of employment or, if the seaman dies from the injury, the personal representative of the seaman may elect to bring a civil action at law, with the right of trial by jury, against the employer. Laws of the United States regulating recovery for personal injury to, or death of, a railway employee apply to an action under this section.

The Federal Employers' Liability Act ("FELA"), 45 U.S.C. §51. *Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence*:

> Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

46 United States Code §8104 (d), "Watches:"

> (d) On a merchant vessel of more than 100 gross tons as measured under section 14502 of this title, or an alternate tonnage measured under section 14302 of this title as prescribed by the Secretary under section 14104 of this title (except a vessel only operating on rivers, harbors, lakes (except the Great Lakes), bays, sounds, bayous, and canals, a fishing, fish tender, or whaling vessel, a fish processing vessel of not more than 5,000 gross tons as measured under section 14502 of this title, or an alternate tonnage measured under section 14302 of this title as prescribed by the Secretary under section 14104 of this title, yacht, or vessel engaged in salvage operations), the licensed individuals, sailors, coal passers, firemen, oilers, and water tenders shall be divided, when at sea, into at least 3 watches, and shall be kept on duty successively to perform ordinary work incident to the operation and management of the vessel. The requirement of this subsection applies to radio officers only when at least 3 radio officers are employed. A licensed individual or seaman in the deck or engine department may not be required to work more than 8 hours in one day.

46 United States Code of Federal Regulations §15.111, *Work hours and rest periods*:

> (a) Each person assigned duty as officer in charge of a navigational or engineering watch, or duty as a rating forming part of a navigational or engineering watch, on board any vessel that operates beyond the Boundary Line shall receive a minimum of 10 hours of rest in any 24–hour period.
>
> (b) The hours of rest required under paragraph (a) of this section may be divided into no more than two periods, of which one must be at least 6 hours in length.

(c) The requirements of paragraphs (a) and (b) of this section need not be maintained in the case of an emergency or drill or in other overriding operational conditions.

(d) The minimum period of 10 hours of rest required under paragraph (a) of this section may be reduced to not less than 6 consecutive hours as long as—

(1) No reduction extends beyond 2 days; and

(2) Not less than 70 hours of rest are provided each 7–day period.

(e) The minimum period of rest required under paragraph (a) of this section may not be devoted to watchkeeping or other duties.

(f) Watchkeeping personnel remain subject to the work-hour limits in 46 U.S.C. 8104 and to the conditions when crew members may be required to work.

(g) The Master shall post watch schedules where they are easily accessible. They must cover each affected member of the crew and must take into account the rest requirements of this section as well as port rotations and changes in the vessel's itinerary.

STATEMENT OF THE CASE

This is a case about a Jones Act seafarer and career mariner who was nearly worked to death by Respondent/Defendant Maersk's negligence.

At trial Mr. Skye alleged and proved to the satisfaction of a jury, that he suffered physical damage to his heart as a result of Maersk forcing him to work for an excessive

number of hours (about 16 hours a day on average) without providing him adequate periods of rest.

The verdict form asked the jury whether Mr. Skye sustained a "physical injury" or an "emotional injury." The jury specifically found that Mr. Skye sustained *only* a "physical injury" due to Maersk's negligence, and characterized this physical injury as "left ventricular hypertrophy."

At trial, Mr. Skye presented the following evidence regarding the extreme physical nature of his job:

As the chief mate on the Maersk vessel, *Sealand Pride*, Mr. Skye was regularly forced to work between 90 and 105 hours a week for 70 or 84 days at a time.[3] Evidence indicated that in Mr. Skye's most 'back-breaking' week, Maersk required him to work 107 hours.

Federal "work/rest" laws including 46 U.S.C. 8104, and 46 C.F.R. 15.111, expressly limit the number of hours seamen can work, and dictate the minimum number rest hours. The evidence presented at trial showed hundreds of violations of these federal laws.

Notably, Skye's hours were not worked straight in row, but rather scattered throughout the day and night, and organized in irregular patterns due to changing time zones and shifts.[4] Often Mr. Skye was not given more than 2-3 hours of "unbroken rest" for days at a time, or alternatively would go days without sleeping.[5] Even when Mr. Skye was afforded short opportunities to rest, taking advantage of them was unrealistic since the constant up and down demanded by Maersk would prevent his body from properly shutting down.

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[3] Trial Exh. 19; D.E. 70-6 and/or D.E. 199.

[4] Trial Exh. 18; D.E. 70-5 and/or D.E. 199.

[5] Trial Exh. 18 and 19; D.E. 70-5, 70-6 and/or D.E. 199.

The work performed by Skye was extremely physical in nature. Skye spent multiple hours a day climbing up and down ladders to read reefers,[6] and climbing into and out of spaces and tanks[7] in the belly of the *Sealand Pride*. Skye was also required to perform constant maintenance on the *Sealand Pride*. This physical labor was piled on top of the rest of Skye's chief mate duties as dictated by Maersk's Global Ship Management System. ("GSMS").[8]

Medical evidence offered at trial demonstrated that this pattern of work caused *physical* stress on Mr. Skye's body, eventually wearing it down to the point of injury. Specifically, medical testimony showed that the physically demanding work and consistent sleep deprivation and/or degradation caused a physiological response in the body commonly known as the "fight or flight" response and/or long term vigilance reaction.

The medical evidence further demonstrated that when this happens, adrenaline and hormones are realized into the blood stream which, among other things, elevates blood pressure. After experiencing this over an extended period of time, a patient can develop labile hypertension (intermittent episodes of elevated blood pressure) which then leads to ventricular hypertrophy (hardening and thickening of the muscle wall making up the pumping chambers in the heart).

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[6] Reading reefers means monitoring the settings and recording temperatures on refrigerated containers aboard the *Sealand Pride*. Mr. Skye was required to do this every day and sometimes twice a day. Trial Tran. Volume II, pg. 439, L: 4-20. Generally the *Sealand Pride*, carried 144 reefers, some stacked forty feet in the air, all of which had to be checked individually by Skye.

[7] Tank entry was a grueling task that had Skye crawling into a hot confined space, often filled with noxious fumes.

[8] Trial Exh. 1; D.E. 199.

In the end, this condition can ultimately lead to a heart attack or congestive heart failure.

After these physical working conditions caused Mr. Skye to develop labile hypertension and left ventricular hypertrophy, he was advised by his cardiologist to retire or "risk dropping dead on the job."[9] As Skye testified: With a wife and two children, Skye did the only thing he could; he left his job, forcing him to lose years of his working life and substantial income. [10]

Thus, the evidence submitted to the jury showed that by subjecting Mr. Skye to extreme *physical* work for an excessive number of hours, Maersk's negligence caused *physical harm* to Mr. Skye's heart.

Notably, none of the medical evidence showed that Skye suffered emotional or mental harm. To the contrary, the medical evidence showed that Skye's well-defined physical injuries were the physiological effect of extreme physical working conditions.

At trial, Maersk asked for and obtained a jury instruction explaining the difference between emotional and physical injuries. The Jury was instructed that:

> A purely emotional injury is an injury that has no physical causes, but rather was solely caused by the injured person's perception of a non-physical stress. The injured person, however, may receive compensation for an injury caused in any part by physical stress.

[9] Trial Tran. Vol. 1, pg. 222, L: 25 – pg. 223, L: 5.
[10] *Id*, at pg. 226, L: 3-6.

Further, also at Maersk's insistence and over Plaintiff's objection, the Jury was given a special verdict form that required the jury to decide whether Skye's injury was "physical" or "emotional."

After listening to all of the evidence (including the uncontroverted medical evidence), the Jury found that Maersk was negligent and that said negligence was a legal cause of Skye's injuries. Further, the jury determined Skye's injury was **physical** in nature (and thus compensable under the Jones Act).

Maersk moved for a judgment as a matter of law on the ground that the decision in *Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532 (1994), barred Mr. Skye's Complaint. The district court denied that motion and entered judgment in Mr. Skye's favor, holding:

> The jury determined Plaintiff sustained a physical injury. (Jury Verdict 1). Maersk argues, however, that even when viewing the evidence with all inferences in favor of Plaintiff, Skye "did not suffer a compensable physical injury, but rather an emotional injury with physical manifestations." (Maersk's Mot. 34). Such an analysis does not advance Maersk's position, however, as Maersk engages in no specific discussion of the evidence. In particular, Maersk completely ignores Dr. Wachpress's[11] opinion that Skye's left ventricular hypertrophy was caused by physical stress. Thus, Maersk has failed to demonstrate that no record evidence supports the jury's finding that Plaintiff suffered a physical injury. As Defendant acknowledges,

[11] Skye's treating cardiologist, who was also designated as an Expert Witness.

"[a] physical injury is compensable." (Maersk's Mot. 33). Relief on this ground is denied.

Maersk appealed. In a 2-1 decision, the Eleventh Circuit vacated the jury's finding of negligence against Maersk, and rendered judgment in favor of Maersk. Relying on this Court's opinion in *Gottshall*, the Eleventh Circuit held that as a matter of law, Mr. "Skye's complaint of an injury caused by work-related stress is not cognizable under the Jones Act, which concerns injuries caused by physical perils." Skye filed a Petition for Rehearing En Banc, which the Eleventh Circuit denied.

REASONS FOR GRANTING THE PETITION

Certiorari is warranted because there is a split among the circuits (and later decisions of this Court) regarding the scope of *Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532 (1994). District and Circuit courts have struggled to determine the scope of the *Gottshall* holding. This has resulted in non-uniformity related to what damages a Jones Act seaman and FELA railway worker can recover.

In the case of the Eleventh Circuit's opinion, it disregarded the jury's determination that Mr. Skye sustained a physical injury, and disregarded the medical evidence that Mr. Skye's physical injury (left ventricular hypertrophy) was caused by Maersk physically overworking Skye almost to the point of death.

Instead, the Eleventh Circuit, acting as the finder of fact (and as a medical expert), re-classified Mr. Skye's jury-defined physical injuries, as harm brought about by work-related emotional distress. In doing so, the Eleventh Circuit second-guessed the undisputed medical evidence at trial and impermissibly substituted its own judgment for the jury's findings.

To justify its lack of deference to the jury's verdict, and in support of the argument that 'as matter of law' Mr. Skye's injury was purely emotional; the Eleventh Circuit broadly misinterpreted *Gottshall*, for the proposition that Mr. "Skye's complaint of an injury caused by work-related stress is not cognizable under the Jones Act, which concerns injuries caused by physical perils." *See also* Pet. App. A., p. 10:

> As the Supreme Court explained in *Gothshall*, the 'central focus' of the Federal Employers' Liability Act, and the Jones Act by extension, is "on physical perils." 512 U.S. at 555. An arduous work schedule and an irregular sleep schedule are not physical perils. That Skye developed a "physical injury" is no matter, the cause of the injury was work-related stress.

As discussed below, the circuits are interpreting and applying *Gottshall* differently, thereby providing very different and conflicting answers to the simple question of "what damages are injured seamen and railroad workers entitled to collect, and under what circumstances?" This is the seminal question here in which *Gottshall* has only confused rather than clarify.

The divide among lower courts was expressly noted by Circuit Judge Jordan in his dissenting opinion, Pet. App. A., p. 14: I recognize that federal and state courts are divided about the scope of *Gottshall.* Some courts have read *Gottshall* more broadly, as the majority does, while others have interpreted it more narrowly, as I do. *Compare, e.g.*, *Szymanski v. Columbia Transp. Co.*, 154 F.3d 591, 594-95 (6th Cir. 1998) (10-3 en banc decision), *and Capriotti v. Consolidated Rail Corp.*, 878 F. Supp. 429, 432-33 (N.D.N.Y. 1995), *with, e.g., Walsh v. Consolidated Rail Corp.*, 937 F. Supp. 380, 387-89 (E.D. Pa. 1996), *and*

Duncan v. Am. Commercial Barge Line, LLC, 166 S.W.3d 78, 83-84 (Mo. App. E.D. 2004).

I. *Gottshall* does not bar Skye's claim. The Eleventh Circuit's broad interpretation of *Gottshall* conflicts with subsequent precedent of this Court in *Norfolk & Western Railway Co. v. Ayers*, 538 U.S. 135, 157 (2003).

Gottshall says only that in an action under FELA,[12] a plaintiff cannot recover for an emotional injury where that emotional injury was not accompanied by a physical impact, or where the seaman was not placed within the "zone of danger" of an immediate impact.

The inapplicability of *Gottshall* is best shown by the facts in that case. The relevant fact pattern in *Gottshall* deals with the plaintiff Alan Carlisle, who because of job responsibilities, "began to experience insomnia, headaches, depression, and weight loss. After an extended period during which he was required to work 12-hour to 15-hour shifts for weeks at a time, Carlisle suffered a nervous breakdown. Carlisle sued Conrail under FELA for negligent infliction of emotional distress." *Id*. at 539. *See Gottshall*, 512 U.S. at 547-48 (adopting zone of danger test to "limit[ ] recovery for emotional injury to those plaintiffs who sustain a physical impact as a result of a defendant's negligent conduct, or who are placed in immediate risk of physical harm by that conduct"). [13]

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[12] The Jones Act incorporates the provisions of the Federal Employers Liability Act ("FELA"). *See Kernan v. American Dredging Co.*, 355 U.S. 426 (1958). Accordingly, rights and causes of action available to railroad workers under FELA, are also available to seafarers under the Jones Act.

[13] In *Gottshall*, the Plaintiff was attempting to recover for Negligent Infliction of Emotional Distress

This fact pattern has no relevance whatsoever to the physical heart damage caused to Mr. Skye. As articulated by Circuit Judge Jordan in his dissenting opinion "We owe 'great deference' to the jury's factual findings, *Grant v. Preferred Research, Inc.*, 885 F.2d 795, 798 (11th Cir. 1989), and I do not believe we can say, as a matter of law on this record, that Mr. Skye's injury was purely emotional. As a result, the zone of danger test articulated in *Gottshall* does not apply." *See Dissenting Opinion*, Pet. App. A., p. 13-14.

Indeed, in *Norfolk & W. Ry. Co. v. Ayers*, 538 U.S. 135, 147 (2003), this Court held that *Gottshall* is narrowly tailored to instances where the Plaintiff has **no** physical injuries.[14]

This point was also recognized by Circuit Judge Jordan in in his dissenting opinion herein, explaining that "the more constrained reading of *Gottshall* is supported by the Supreme Court's more recent decision in *Norfolk & Western Railway Co. v. Ayers*, 538 U.S. 135, 157 (2003), which distinguished *Gottshall* and held that 'an asbestosis sufferer [can] seek compensation for fear of cancer as an element of his asbestosis-related pain and suffering damages.'" In the words of *Ayers*, "[t]he plaintiffs in *Gottshall* and [*Metro-North Commuter Railroad Co. v. Buckley*, 521 U.S. 424 (1997)] grounded their suits on claims of negligent infliction of emotional distress. The claimants before us, in contrast, complain of a negligently inflicted physical injury (asbestosis) and attendant pain and suffering." Id. at 148. [15] *See Ayers*, at 148:

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[14] To be clear, Skye never pled nor made any claim for Negligent Infliction of Emotional Distress. His claims were only for Jones Act Negligence and unseaworthiness.

[15] *See Dissenting Opinion*, Pet. App. A., p. 14. This is the inevitable end result of the panel's split opinion herein. It is the proverbial greenlight for shipowners to literally work their seafarers to death.

> [T]he parties agree that asbestosis is a cognizable injury under the FELA…As *Metro-North* plainly indicates, pain and suffering damages may include compensation for fear of cancer when that fear "accompanies a physical injury." Unlike stand-alone claims for negligently inflicted emotional distress, claims for pain and suffering associated with, or "parasitic" on, a physical injury are traditionally compensable.

Ayers was preceded by *Metro-North Commuter Railroad Co. v. Buckley*, 521 U.S. 424 (1997). In *Buckley*, this Court made it clear that plaintiffs could recover emotional damages related to fear of cancer stemming from asbestosis exposure when that fear is accompanied by a physical injury.

Here, like the claimants in *Ayers* and *Buckley*, Mr. Skye is complaining of a negligently inflicted *physical* injury, left ventricular hypertrophy (and the occupational disease labile hypertension). Accordingly, the jury properly awarded him damages against his employer for Negligence under the Jones Act. Notably, contrary to the Eleventh Circuit's ruling, even if Sky's work-related stress had been categorized by the jury as emotional distress (it was not); under *Buckley* and *Ayers*, Mr. Skye would still have been able to recover because the work-related stress is associated with a physical injury (i.e. left ventricular hypertrophy to this heart).

With the exception of Circuit Judge Jordan's dissent, the Eleventh Circuit's panel opinion fails to even address the *Ayers* decision. This is a critical oversight as the *Ayers* decision sharply circumscribes the very case on which the panel relied (*Gottshall)* to deprive Mr. Skye of any remedy. Indeed, the Eleventh Circuit's opinion ignores that *Ayers*

expressly limited the *Gottshall* holding to Plaintiffs with **no** physical injuries. [16]

Pursuant to the more narrow reading of *Gottshall* as properly espoused in *Ayers*, Skye's claim is cognizable because he undeniably suffered a physical injury to his heart. Further, the willingness of the Supreme Court in *Ayers* to allow compensation to an employee for an injury not occasioned by an acute accident, but rather due to negligent working conditions again militates towards compensating Skye for being exposed to hazardous working conditions which led to physical injury.

II. The Eleventh Circuit's broad interpretation of *Gottshall* conflicts with the plain language of FELA and the Jones Act.

To again quote Circuit Judge Jordan's on point dissenting opinion: "Congress enacted the Jones Act for the benefit and protection of seamen who are peculiarly the wards of admiralty. Given that purpose, and absent definitive indication from the Supreme Court, I would not read the Jones Act to preclude liability for an employer who makes a seaman work so hard and so continuously that he suffers

[16] Further to this point, in finding that Skye's claim was barred as a matter of law as an "emotional injury," the panel opinion relied on several opinions from other Circuit Courts of Appeal, including *Smith v. Union Pac. R.R. Co.*, 236 F.3d 1168, 1173-74 (10th Cir. 2000); *Szymanski v. Columbia Transp. Co.*, 154 F.3d 591 (6th Cir. 1998); and *Crown v. Union Pac. R.R. Co.*, 162 F.3d 984, 985 (8th Cir. 1998). However, all of the aforementioned decisions predate the Supreme Court's decision in *Ayers*. These decisions were made without the benefit of the Supreme Court's clarification provided in *Ayers*, a clarification which shows these decisions are all an overly broad interpretation of *Gottshall*.

physical injury in the form of heart disease, heart attack, organ failure, seizure, or stroke."[17]

The more constrained reading of *Gottshall* that this Court recognized in *Ayers* and Circuit Judge Jordan explained in his dissenting opinion, is also supported by prior precedent of this Court.

For instance, in *Urie v. Thompson*, 337 U.S. 163 (1949), this Court, in allowing a railroad worker to recover for silicosis[18] claims, held that the remedies under FELA were very broad:

> The language is as broad as could be framed: 'any person suffering injury while he is employed'; and 'such injury or death resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier'; 'by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances,' etc. **On its face, every injury suffered by any employee while employed by reason of the carrier's negligence was made compensable**. The wording was not restrictive as to the employees covered; the cause of injury, except that it must constitute negligence attributable to the carrier; or the particular kind of injury resulting.
>
> To read into this all-inclusive wording a restriction as to the kinds of employees covered, the degree of

[17] *See Dissenting Opinion*, Pet. App. A., p. 15

[18] Silicosis is a form of occupational lung disease caused by inhalation of crystalline silica dust, and is marked by inflammation and scarring in the form of nodular lesions in the upper robes of the lungs. As a practical/legal matter, silicosis (*Urie*), asbestosis (*Ayers*) and labile hypertension/left ventricular hypertrophy (*Skye*) should all be considered similarly compensable under the Jones Act and FELA.

> negligence required, or the particular sorts of harms inflicted, would be contradictory to the wording, remedial and humanitarian purpose, and the constant and established course of liberal construction of the Act followed by this Court.

Id. (Emphasis added).

Identical to this Court's assessment of FELA in *Urie*, the language of the Jones Act is also as broad as could be framed: "A seaman injured in the course of employment or, if the seaman dies from the injury, the personal representative of the seaman may elect to bring a civil action at law, with the right of trial by jury, against the employer."

On its face, every injury suffered by any seaman 'in the course of employment' is compensable. Contrary to the Eleventh Circuit's opinion, the wording of the Jones Act is not restrictive as to the "cause of the injury," or the "particular kind of injury resulting." Indeed, as this Court explained in *Urie*, to "read into this all-inclusive wording a restriction" as to "the degree of negligence required, or the particular sorts of harms inflicted, would be contradictory to the wording, remedial and humanitarian purpose, and the constant and established liberal construction of the Act followed by this Court." Id. *See also Guidry v. South Louisiana Contractors, Inc.*, 614 F. 2d 447 (1980) ("The Jones Act is remedial legislation and as such should be liberally construed in favor of injured seamen.").

There is no question that heart damage, much like any other *physical* injury (such as injuries to the spine, the extremities, etc.) brought about by physically overworking a seafarer or railroad worker, is a compensable claim under the Jones Act and FELA. Skye's injury in this case is analogous to a seaman being asked to heave a heavy anchor by himself. Eventually the physical task becomes too difficult and the

seaman's body breaks down. The only difference here is that instead of dealing with herniated disc or a torn bicep, Skye suffered an injured heart muscle. In either example, the injury is compensable under the Jones Act.

As Circuit Judge Fay explained, concurring specially, to interpret the Jones Act in any other way would frustrate the congressional purpose to benefit and protect of seamen who are peculiarly the wards of admiralty. *See Concurring Opinion*, Pet. App. A.:

> The core purpose of both statutes is to provide covered employees with a safe place to work. Being required to work 90 and 105 hours per week for 70 or 84 days at a time is hardly being given a safe place to work. I fail to see the difference between being given a defective piece of equipment and being required to work outrageous hours, in determining whether or not the workplace was safe. Surely an employer is no less negligent in doing either.

The Eleventh Circuit's ruling eviscerates and effectively rewrites FELA and the Jones Act, jeopardizing the health and safety of over 81,000 American merchant mariners and 113,000 United States railroad workers. The ruling impermissibly writes into the Jones Act and FELA immunity for employers who negligently (and often wilfully) impose excessive work schedules and *physical* job demands that can severely injure and kill workers.

By ignoring the jury, and finding Maersk's conduct permissible under the Jones Act and FELA, the Eleventh Circuit overstepped Congress, effectively legalizing unrestricted and unlimited working hours on vessels and railroads. The result: Jones Act and FELA employers now have a green light to work seafarers and railroad workers literally to death. *See Rittenhouse v. Eisen*, 404 F. 3d 395,

397 (6th Cir. 2005) ("[T]he judiciary's job is to enforce the law that Congress enacted, not to write a different one that judges think superior."); *U.S. v. LKAV*, 712 F. 3d 436 (9th Cir. 2013) ("[A] decision to rearrange or rewrite a statute falls within the legislative, not the judicial, prerogative.").

It is worth noting that the Eleventh Circuit's overly broad application of *Gottshall* was driven by misplaced fear. The panel opinion's justification for its broad interpretation of *Gottshall* was that upholding Skye's claim would lead to "a flood of trivial suits, the possibility of fraudulent claims … and the specter of unlimited and unpredictable liability." Pet. App. A., p. 10. This justification is wholly misplaced because the uncontroverted medical evidence at trial proved that Skye's heart injury and its etiology were as predictable as a seaman whose leg breaks when hit by a piece of equipment.[19]

Further, the Eleventh Circuit's opinion incorrectly states that "there is no way to predict what effect a stressful work environment…would have on any given employee." Pet. App. A., p. 10. At trial, however, Mr. Skye presented record evidence and testimony of the well-established medical science linking sleep deprivation, long working hours and heart problems. Thus, there is undeniably a way for Jones Act employers to predict the effects of these types of harsh working conditions at sea.[20]

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[19] Maersk offered no evidence at any point below to contradict the evidence offered by Skye. That is, there was no medical evidence offered by Maersk to prove that Skye's injury was emotional in nature or had emotional causes.

[20] Mariner fatigue and excessive working conditions at sea are nothing new or novel. Maersk's conduct (which a jury found was negligent) is not unique in the shipping industry. The health issues associated with chronic mariner fatigue, lack of rest, and inadequate sleep are well known in the maritime industry. Studies show that mariner fatigue is a severe problem onboard modern

In the end, the Eleventh Circuit's decision gives Jones Act and FELA employers a green light to literally work seafarers and railroad workers to death and will undoubtedly lead to the continued degradation of workplace safety for tens of thousands of these American workers. Under the Eleventh Circuit's decision, shipowners are now free to violate U.S. federal statutes meant to regulate working hours aboard commercial vessels[21] and meant to protect seafarers from dangerous working conditions.[22] [23]

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cargo vessels. *See Andy Smith, Adequate Crewing and Seafarers Fatigue: The International Perspective*, Center for Occupational Health and Psychology Cardiff University 2007. D.E. 70-2, pg. 21. The National Transportation and Safety Board has criticized the U.S. Coast Guard for not doing enough to address this monumental health and safety issue. The Coast Guard has taken some steps to increase awareness of the issues resulting from the extreme fatigue and inadequate rest onboard vessels through its Crew Endurance Management training program. Unfortunately, this program is voluntary and Maersk chose not to participate during Skye's tenure with the company. D.E. 70, pg. 20 fn. 19.

[21] 46 U.S.C. 8104(d) and 46 C.F.R. 15.111, commonly referred to as the Standards of Training, Certification, and Watchkeeping. The Eleventh Court's split opinion effectively erases these federal laws. These regulations are intended to limit the amount of work and ensure that seamen are ensure adequate rest hours If shipowners cannot be liable for injuries as a result of violation of these laws, then there is no reason for shipowners to obey them.

[22] Congress enacted the Jones Act, 46 U.S.C. § 30104, to give seafarers a cause of action for negligence against employers who fail to provide a safe work environment.

[23] Notably, the Eleventh Circuit's opinion was essentially decided on the issue of causation. That is, the court held that because Mr. Skye's physical injury was **caused** by workplace stress, the claim was not compensable under the Jones Act/FELA. It is important to note that the Eleventh Circuit's holding is also incompatible with the "featherweight" causation standard applicable to Jones

III. The Eleventh Circuit's broad interpretation of *Gottshall* conflicts with the precedent of other circuits. This has created a split, resulting in non-uniformity related to what damages a Jones Act seaman and FELA worker can recover.

Certiorari is warranted in order for this Honorable Court to clarify the scope of *Gottshall*. There is an unmistakable conflict among the lower courts regarding the scope of *Gottshall.*

This conflict was highlighted by Circuit Judge Jordan in his dissenting opinion, Pet. App. A., p. 14: I recognize that federal and state courts are divided about the scope of *Gottshall.* Some courts have read *Gottshall* more broadly, as the majority does, while others have interpreted it more narrowly, as I do. *Compare, e.g., Szymanski v. Columbia Transp. Co.*, 154 F.3d 591, 594-95 (6th Cir. 1998) (10-3 en banc decision), *and Capriotti v. Consolidated Rail Corp.*, 878 F. Supp. 429, 432-33 (N.D.N.Y. 1995), *with, e.g., Walsh v. Consolidated Rail Corp.*, 937 F. Supp. 380, 387-89 (E.D. Pa. 1996), *and Duncan v. Am. Commercial Barge Line, LLC*, 166 S.W.3d 78, 83-84 (Mo. App. E.D. 2004).

The more constrained reading of *Gottshall* that this Court recognized in *Norfolk & W. Ry. Co. v. Ayers*, 538 U.S. 135, 147 (2003), is also supported by established precedent in other circuits.

For instance, in *Hagerty v. L&L Marine Services, Inc.*, 788 F. 2d 315 (5th Cir. 1986), the Fifth Circuit cited a string of cases in support for the broad types of compensable

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Act/FELA cases, (which was recently re-affirmed by this Court in *CSX Transp., Inc. v. McBride*, 131 S. Ct. 2630 (2011)), which states that a Jones Act or FELA employer is liable if its negligence play *any* part, *no matter how small*, in causing or contributing to the incident.

emotional injuries, including allowing recovery for cancerphobia:[24]

> Cancerphobia is merely a specific type of mental anguish or emotional distress. Courts have long allowed plaintiffs to recover for psychic and emotional harm in Federal Employers' Liability Act or Jones Act/maritime cases. *See, e.g., Erie R. Co. v. Collins*, 253 U.S. 77, 85 (1920) ("shame and humiliation"); *Wood v. Diamond M. Drilling Co.*, 691 F. 2d 1165 (5th Cir. 1982) ("pain, suffering, mental anguish and loss of life's enjoyment); *Bullard v. Central Vermont Railway, Inc.*, 565 F. 2d 193 (1st Cir. 1977) ("fright or mental suffering resulting from injury"); *see also Tampa Ship Repair & Dry Dock, Co., Inc. v. Director*, 535 F. 2d 936 (5th Cir. 1976) (upholding finding of permanent disability, under Longshoremen's and Harbor Workers' Compensation Act, for psychological condition). Indeed, these statutes are intended to provide broad coverage for all work-related "injuries," whether characterized as mental or physical. *See Buell v. Atchison, Topeka & Santa Fe Railway, Co.*, 771 F.2d 1320, 1324 (9th Cir.1985) (recognizing claim for purely emotional injury resulting from employer's negligent and intentional harassment, threats, and intimidation).

Hagerty, at 317-18.

To be clear, Skye did not assert claims for mental or emotional harm. The point, however, is that there is a clear conflict amongst the circuits regarding whether a recovery can be made for these types of harms. Herein, Skye argues that even if he were merely claiming mental or emotional

[24] Cancerphobia is an emotional condition in which the patient suffers from a severe dread of being afflicted by cancer.

harms, then these injuries are nonetheless compensable under the Jones Act and FELA.

In *Hagerty*, a seaman was employed on a barge that was being used to load chemicals. Because of a defect in the barge and/or equipment being used to load the chemicals, the plaintiff was completely drenched with dripolene, a chemical containing benzene, toluene, and xyolene. After the incident the plaintiff suffered a brief period of dizziness, and feelings of stinging in his extremities. Because of these symptoms, the extent of his immersion in the chemical, and his understanding of the carcinogenic effect of the chemical, the plaintiff became fearful that he would, in time, get cancer.

The Fifth Circuit held that while "[c]learly, he d[id] not have the disease, [cancer]," he could still seek compensation under the Jones Act for his canceropobia. More importantly, it held that the determination of whether an injury or harm was sincere, was a factual question that had to be determined by the jury. *See Hagerty*, at 317-18 (emphasis added):

> Defendants contend that a plaintiff's cancerphobia should not be considered a present injury unless accompanied by "physical manifestations" … The physical injury requirement, like its counterpart, the physical impact requirement was developed to provide courts with an objective means of ensuring that the alleged mental injury is not feigned. We believe that notion to be unrealistic. It is doubtful that the trier of fact is any less able to decide the fact or extent of mental suffering in the event of physical injury or impact. **With or without physical injury or impact, a plaintiff is entitled to recover damages for serious mental distress arising from fear of developing cancer where his fear is reasonable and casually related to the defendant's negligence … It is for the**

jury to decide questions such as the existence, severity and reasonableness of the fear.

Other circuits have applied similar reasoning in FELA and Jones Act cases. *See Bullard v. Central Vermont Railway, Inc.*, 565 F. 2d 193 (1st Cir. 1977) ("fright or mental suffering resulting from injury"); and *Buell v. Atchison, Topeka & Santa Fe Railway, Co.*, 771 F. 2d 1320, 1324 (9th Cir. 1985) (recognizing claim for purely emotional injury resulting from employer's negligent, and intentional harassment, threats and intimidation).[25]

Certiorari is warranted because the Eleventh Circuit's decision is contrary to, and conflicts with all of these other circuit court holdings. For instance, in contrast to *Hagert*y, in this case, the Eleventh Circuit's opinion takes away from the jury the determination of whether an injury is sincere and valid. Here, despite the fact that the jury determined that Mr. Skye suffered a physical injury to his heart, (after review of medical evidence indicating that his heart problems were caused by Maersk's excessive physical workloads); the Eleventh Circuit made the determination, as a matter of law, that the cause for the injuries was emotional harm (i.e. work-related stress) and such, not "compensable."

Certiorari is also warranted because this broad interpretation of *Gottshall* is devastating to tens of thousands of America seafarers and railroad workers. By effectively legalizing unrestricted and unlimited working hours on American vessels and railroads; Jones Act and FELA employers now have a green light to work seafarers and railroad workers to death.

[25] These circuit court opinions are consistent with this Court's narrow interpretation of *Gottshall* in *Norfolk & W. Ry. Co. v. Ayers*, 538 U.S. 135, 147 (2003)

As Circuit Judge Fay explained, concurring specially: Faye: Most respectfully, my hope is that the Supreme Court will revisit this area of the law. As Justice Ginsburg stated in her dissent in *Gottshall*: "Instead of the restrictive 'zone' test that leaves severely harmed workers remediless, however negligent their employers, the appropriate FELA claim threshold should be keyed to the genuineness and gravity of the worker's injury." *Gottshall*, 512 U.S. at 572, 114 S. Ct. at 2419 (Ginsburg, J., dissenting).

CONCLUSION

The petition for a writ of certiorari should be granted. The Court may also wish to consider summary reversal of the court of appeals' judgment. This case provides this Court with the much needed opportunity to address the conflicts between the circuit courts and to clarify exactly what damages are recoverable by injured seamen under the Jones Act, and by extension railway workers under FELA. It also provides the framework for the Court to clarify *Gottshall*, in order to give lower courts clear directions in this respect.

Respectfully submitted on October 3, 2014.

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