No.

In the Supreme Court of the United States

CSX TRANSPORTATION, INC.,

Petitioner,

v.

ROBERT MCBRIDE,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Federal Employers' Liability Act, 45 U.S.C. §§ 51-60, requires proof of proximate causation.

RULE 29.6 STATEMENT

Petitioner CSX Transportation, Inc. has a parent company, CSX Corporation, which is publicly traded. No other publicly held company owns more than 10 percent of petitioner's stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, CSX Transportation, Inc., respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-40a) is reported at 598 F.3d 388. The memorandum and order of the district court denying petitioner's motion for reversal, a new trial, or remittitur (App., *infra*, 41a-43a) is unreported but is available at 2008 WL 4185933.

JURISDICTION

The judgment of the court of appeals was entered on March 16, 2010. A timely petition for rehearing en banc was denied on June 3, 2010. App., *infra*, 47a. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The provisions of the Federal Employers' Liability Act, 45 U.S.C. §§ 51-60, are reproduced in the Appendix. App., *infra*, 48a-52a.

STATEMENT

The Federal Employers' Liability Act (FELA or Act) authorizes a railroad employee to recover for a workplace injury "resulting in whole or in part from the negligence" of the railroad, 45 U.S.C. § 51, with damages reduced in proportion to any contributory negligence by the employee. In *Norfolk Southern Railway* v. *Sorrell*, 549 U.S. 158 (2007), this Court addressed whether a defendant's negligence and a

plaintiff's contributory negligence are governed by the same causation standard under the Act. The Court applied the established principle that "the elements of a FELA claim are determined by reference to the common law" unless the Act contains "express language to the contrary," *id.* at 165-166, and it held, consistent with the common law, that the causation standard is the same for both parties, *id.* at 166-171. The petitioner in *Sorrell* had also asked the Court to decide what the causation standard is, and to hold that both the plaintiff and the defendant must prove proximate causation. The Court declined to address that question, however, because it had not granted certiorari to do so. *Id.* at 163-165.

Two concurring opinions in *Sorrell* did address the standard of causation. In one, Justice Souter, joined by Justices Scalia and Alito, noted that this Court's decision in *Rogers* v. *Missouri Pacific Railroad*, 352 U.S. 500 (1957), had engendered a conflict among lower courts on whether FELA requires proximate causation. 549 U.S. at 173 & n.*. Justice Souter went on to explain that proximate cause was the common-law rule before FELA; that FELA did not abrogate it; that this Court consistently applied the rule in FELA cases throughout the first half of the 20th century; and that *Rogers* involved *multiple* causation, not the requisite *directness* of a cause, and thus did not adopt a different rule. *Id.* at 173-177. In an opinion concurring in the judgment, Justice Ginsburg disagreed. She took the position that the FELA causation standard articulated in *Rogers*—that an employee may recover if the railroad's negligence "played any part, even the slightest," in producing the injury—is more "relaxed" than the traditional proximate-cause standard. *Id.* at 177-178 (quoting *Rogers*, 352 U.S. at 506; emphasis omitted).

Since *Sorrell*, the lower courts have continued to render conflicting decisions on the causation issue—including the decision below. After examining the issue at length, the Seventh Circuit "decline[d] to hold that *** common-law proximate causation is required to establish liability under the FELA," and thus determined that the district court did not "commit[] instructional error in refusing [the railroad's] proffered instruction" on proximate cause. App., *infra*, 39a. The court of appeals acknowledged, however, that the three-Justice concurrence in *Sorrell* has "considerable force" and that a number of state courts of last resort "still apply traditional formulations of proximate cause in FELA cases." *Id.* at 35a & n.7. One such court is the Supreme Court of Utah, which reached that conclusion based on an equally thorough analysis just six months earlier in *Raab* v. *Utah Railway*, 221 P.3d 219 (Utah 2009). In adopting the contrary view, the Seventh Circuit stated that this Court "has not explained in detail how broadly or narrowly *Rogers* should be read"; that the Court "did not address, much less decide, the [proximate-cause] issue" in *Sorrell*; and that it would be inappropriate for the court of appeals "to anticipate future actions of the Supreme Court." App., *infra*, 18a, 36a.

The "significant" question whether FELA requires proof of proximate causation, *Sorrell*, 549 U.S. at 165, is thus ripe for definitive resolution by this Court. And this case squarely presents the question. Indeed, the case satisfies all the criteria for certiorari. *First*, the question presented has divided lower courts, both before *Sorrell* and after. *Second*, the question is an important and recurring one. The standard of causation is potentially at issue in each of the thousands of FELA cases filed annually, at

every stage of the litigation, as well as in every case brought under the Jones Act, which incorporates FELA principles. *Third*, this case is an ideal vehicle for deciding the question. The trial evidence permits a finding that the railroad's negligence was merely a "but for" and not a proximate cause of the employee's injury, and thus the outcome may have been different if the jury had been instructed that proximate causation is a prerequisite to recovery. *Fourth*, for the reasons explained in the three-Justice concurrence in *Sorrell*, the court of appeals' decision is incorrect. FELA incorporates the common-law principle of proximate causation, as this Court has repeatedly held.

A. Statutory Background

Enacted in 1908, FELA provides the compensation scheme for injuries sustained by railroad employees in the workplace. The Act provides for concurrent jurisdiction of state and federal courts, 45 U.S.C. § 56, but substantively FELA actions are governed by federal law, *Sorrell*, 549 U.S. at 165.

FELA is a negligence statute. Section 1 provides that

> [e]very common carrier by railroad *** shall be liable in damages to any person suffering injury while he is employed by such carrier *** for such injury *** resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier.

45 U.S.C. § 51. The basic elements of a FELA cause of action are thus duty, breach, injury, and causation. See, *e.g.*, *Sorrell*, 549 U.S. at 169.[1]

FELA employs a regime of comparative negligence. Under Section 1 of the Act, a railroad is liable even if the employee's injury resulted only "in part" from the railroad's negligence. 45 U.S.C. § 51. And under Section 3, "the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee." 45 U.S.C. § 53.

B. Factual Background

In addition to transporting freight over long distances, petitioner CSX Transportation, Inc. (CSXT) makes "local" runs that pick up individual rail cars for long-distance transportation or deliver cars to their final destinations. At each stop on a local run, cars are added to or removed from the train in a process known as "switching," which requires more frequent starts and stops than a long-distance journey. App., *infra*, 2a.

Trains use multiple braking systems in slowing to a stop. The "automatic brake" slows the cars of the train, while a separate "independent brake" slows the locomotives. The automatic brake normally activates the independent brake as well, and careless use of the former can cause the locomotives to brake too quickly, leading the rear cars to run into

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[1] The elements of duty and breach can be satisfied by a showing that the defendant violated certain safety statutes (*e.g.*, the Safety Appliance Act, 49 U.S.C. §§ 20301-20306). See, *e.g.*, *Norfolk & W. Ry.* v. *Hiles*, 516 U.S. 400, 409 (1996).

the front ones. To slow a long train, engineers apply the automatic brake while releasing the independent brake, a maneuver known as "actuating" or "bailing off" the independent brake. Standard practice is to actuate the independent brake for four seconds per locomotive. App., *infra*, 2a.

On certain models of heavier, "wide-body" locomotives, the independent brake is actuated by pressing a button on the side of the brake handle. On some smaller, "conventional" locomotives, engineers actuate the independent brake by pushing the handle down with one hand. App., *infra*, 2a-3a.

Respondent McBride was a locomotive engineer for CSXT. On April 12, 2004, he was assigned to a local run on a train with five locomotives, including a wide-body locomotive in the lead. Towards the end of the run, McBride reached to release the independent brake and hit his hand on the brake handle. The injury produced swelling and pain. McBride sued CSXT under FELA, alleging that the train assigned to him was unsafe for switching and that his repeated pressing and holding of the actuator button had fatigued his hand, causing the injury. App., *infra*, 3a-5a.

C. Proceedings In The District Court

1. At trial, McBride's theory of negligence was that the type and number of locomotives on his train increased the risk of derailment or collision. McBride's railroad expert, Paul Byrnes, testified that wide-body locomotives have diminished visibility and more difficulty on curved tracks. App., *infra*, 55a-57a. Byrnes also expressed the opinion that the use of five locomotives required careful braking; other-

wise, he said, the locomotive brakes could be damaged, the cars could "sling-shot out," and there would be "a very good chance of breaking knuckles [between the cars] and even possibly putting something on the ground." *Id.* at 54a-55a, 57a-58a. McBride himself testified that he was concerned about the type and number of locomotives because he had not been trained to switch with a wide-body engine and feared that the extra weight of the locomotives could cause the rear cars "to come in and hit the engines and maybe jackknife them off the track." *Id.* at 60a-62a.

There was no derailment or collision in this case, however. McBride's theory of causation, as his lawyer expressed it in his summation, was that the injury to his hand "never would have happened but for the defendant giving him that train." App., *infra*, 67a. Elaborating on this "but for" theory, McBride's lawyer told the jury that, if he had been "given the right locomotive and the right train setup" (*i.e.*, fewer and narrower locomotives), McBride would "never have had to make these repetitive movements and grips with his right arm" and thus would "never have hit his [fatigued] hand" on the brake. *Id.* at 66a-67a.

2. McBride's proffered jury instruction 4, on causation, made no reference to proximate causation. It stated:

> Defendant "caused or contributed to" Plaintiff's injury if Defendant's negligence played a part—no matter how small—in bringing about the injury. The mere fact that an injury occurred does not necessarily mean that the injury was caused by negligence.

App., *infra*, 5a, 70a.

CSXT objected to the charge, arguing that it was "a misstatement of the causation standard." App., *infra*, 62a. In response, McBride pointed out that it was "a pattern instruction unmodified from the Seventh Circuit." *Id.* at 63a. The commentary to the pattern instruction cites *Rogers* for the proposition that "[t]he common law standard of proximate cause does not apply" in FELA actions. 7th Cir. Pattern Civil Jury Instrs. § 9.02 cmt. a. The district court ruled that it was "going to give [the instruction] over objection." App., *infra*, 63a.

CSXT's proffered jury instruction 15 would have required McBride to prove proximate causation. It stated:

> In order to establish that an injury was caused by the defendant's negligence, the plaintiff must show that (i) the injury resulted "in whole or in part" from the defendant's negligence, and (ii) the defendant's negligence was a proximate cause of the injury.

App., *infra*, 6a, 73a.

CSXT argued that the proffered charge reflected "the proper standard for causation as set forth by the Supreme Court opinions that are cited" in the charge, which hold that FELA requires proximate causation. App., *infra*, 64a; see *id.* at 73a. McBride objected, "based on the same reasons" he had previously stated. *Id.* at 64a. The district court denied

the requested instruction for the "[s]ame reasons." *Ibid.*[2]

3. In the charge it delivered, the district court paraphrased Section 1 of FELA, instructing the jury that the Act imposes liability

> where the injury results, in whole or in part, from the negligence of any of the officers, agents or other employees of the railroad.

App., *infra*, 64a. Dividing that language into FELA's basic elements, the court next told the jury that McBride was required to prove that

> 1, the defendant was negligent, and 2, defendant's negligence caused or contributed to plaintiff's injuries.

Id. at 65a.

The district court then delivered McBride's proffered instruction, approved at the charging conference, on the element of causation. The court informed the jury that

> [d]efendant "caused or contributed to" plaintiff's injury if defendant's negligence played a part—no matter how small—in bringing about the injury.

App., *infra*, 65a. The court did not give CSXT's proffered instruction on proximate causation or otherwise mention that concept during the charge.

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[2] The court also rejected CSXT's instruction 14, on contributory negligence, which likewise would have required a finding of proximate causation, and CSXT's instruction 11, which defined proximate cause. App., *infra*, 63a-64a; see *id.* at 71a-72a.

4. The jury ultimately returned a verdict for McBride, finding that CSXT was negligent and that its negligence caused or contributed to his injury. The jury also found McBride to have been contributorily negligent. It awarded damages of $275,000, of which 67 percent was attributed to CSXT's negligence and 33 percent to McBride's. The district court entered judgment in the amount of $184,250. It subsequently denied CSXT's post-trial motion, which argued, among other things, that CSXT was entitled to a new trial because the court failed to give an instruction on proximate cause. App., *infra*, 7a, 41a-46a, 68a-69a.

D. The Court Of Appeals' Decision

CSXT appealed, arguing that FELA requires proof of proximate causation. The court of appeals rejected that argument and affirmed. App., *infra*, 1a-40a. Although the court stated that "the question we must resolve is whether Section 1 of the FELA *** abrogates the common-law rule of proximate cause," *id.* at 7a, the thrust of the court's opinion was not so much that FELA does abrogate the rule as that it would be inappropriate for a lower court to hold that it does not. The court recognized that there was much to be said for the view that proximate causation is an element of a FELA plaintiff's case, but suggested that only this Court could so hold.

1. The court of appeals acknowledged that, "[a]bsent express language to the contrary, the elements of a FELA claim are determined by reference to the common law"; that "[p]roximate causation is not explicitly mentioned in the statute"; and that this Court "never has identified proximate causation as among those principles of common law that have

been abrogated by the FELA." App., *infra*, 35a (quoting *Sorrell*, 549 U.S. at 165-166). The court also acknowledged that this Court's early decisions "required that the [plaintiff's] injury be a direct or proximate result of *** the negligent act[] in order for liability under the FELA to be imposed" and that those cases "never have been overruled explicitly." *Id.* at 11a-12a.

In particular, the court of appeals observed, this Court's decision in *Rogers* did not "explicitly overrul[e] earlier FELA cases that had spoken in terms of common-law proximate cause." App., *infra*, 18a. The court went on to say that, while some lower courts have interpreted *Rogers* to "relax[] the proximate cause requirement," *this* Court "has not explained in detail how broadly or narrowly *Rogers* should be read." *Id.* at 18a, 23a. And the court identified a reason for *not* reading *Rogers* to have abandoned proximate cause—namely, that *Rogers* "involved multiple causes," not the requisite directness of a cause, and addressed "the issue of when a case with multiple causes must be submitted to a jury." *Id.* at 35a-36a.

The court of appeals thus acknowledged that the three-Justice concurrence in *Sorrell* has "considerable force." App., *infra*, 35a. Indeed, the court believed that "there is some indication that, had it reached the substantive issue, at least some [other] members of the majority [in *Sorrell*] may have been sympathetic to Justice Souter's view" as well. *Id.* at 36a.

2. The court of appeals nevertheless concluded that four "countervailing considerations" prevented it from holding that FELA requires proximate causation. App., *infra*, 36a. *First*, the court pointed out

that it "ha[s] been admonished not to anticipate future actions of the Supreme Court." *Ibid.* The court relied on that consideration even though (a) the import of the admonition is that a lower court is obliged to follow decisions of this Court that have not been "expressly overrule[d]," *United States* v. *Hatter*, 532 U.S. 557, 567 (2001), and (b) the court acknowledged that this Court's decisions holding that a FELA plaintiff must prove proximate causation have not been expressly overruled.

Second, the court of appeals stated that it "must treat with great respect the prior pronouncements of the Supreme Court"—including the statement in *Consolidated Rail Corp.* v. *Gottshall*, 512 U.S. 532, 543 (1994), that "a relaxed standard of causation applies under FELA"—"even if those pronouncements are technically dicta." App., *infra*, 37a. The court implicitly rejected CSXT's arguments that earlier holdings of this Court control over later dicta, Pet. C.A. Reply Br. 14 n.3, and that, in any event, *Gottshall*'s "relaxed standard" dictum is best understood as a reference to *Rogers*' holding that FELA allows recovery even when the railroad bears only a small proportion of responsibility for the injury, Pet. C.A. Br. 39.

Third, the court of appeals expressed concern that a holding in CSXT's favor "would cause a conflict with every other [federal] court of appeals," each of which "ha[s] taken the view, based on *Rogers*, that there is a 'relaxed' standard of [causation] under the FELA." App., *infra*, 38a. The court relied on that consideration despite the fact that, like *Gottshall*, "many of these cases simply recite 'the general proposition that FELA employs a "relaxed standard" of causation, without discussing (or even mentioning)

proximate cause,'" *id.* at 25a n.6 (quoting Pet. C.A. Reply Br. 19), and despite the court's recognition that a number of state courts of last resort "still apply traditional formulations of proximate cause in FELA cases," *id.* at 35a n.7.

Fourth, the court of appeals believed that "[c]ongressional inaction, in the wake of *Rogers* and circuit law broadly interpreting *Rogers*, counsels against adopting a common-law formulation of [proximate] cause in FELA cases." App., *infra*, 38a-39a. The court implicitly rejected CSXT's argument that congressional inaction is "a particularly dangerous ground on which to rest an interpretation of a *** statute," because "several equally tenable inferences may be drawn from [it]," including, in this case, "the inference that the existing legislation already incorporated" a proximate-cause requirement. Pet. C.A. Reply Br. 22-23 (quoting *United States* v. *Craft*, 535 U.S. 274, 287 (2002)).

REASONS FOR GRANTING THE PETITION

This case presents the question that the Court reserved in *Norfolk Southern Railway* v. *Sorrell*, 549 U.S. 158 (2007); that divided four concurring Justices in *Sorrell*; that divided lower courts before *Sorrell*; and that has continued to divide them since: whether, to recover under FELA, a railroad employee must prove that the railroad's negligence was a proximate cause of the employee's injury. The lower courts and Justices that have answered that question yes have relied on this Court's settled interpretive methodology, under which FELA incorporates common-law principles unless it expressly provides otherwise, and on nearly 50 years' worth of this Court's precedents, which hold that FELA incorporates the common-law principle of proximate causation. The lower courts

and Justice that have answered the question no have relied principally on *Rogers* v. *Missouri Pacific Railroad*, 352 U.S. 500 (1957), which they have interpreted to abrogate traditional proximate causation and effectively overrule a half century of precedents.

The Court should grant certiorari in this case to resolve, once and for all, the issue left open in *Sorrell*. There is a longstanding and ongoing conflict on the issue, which can arise in every FELA case, at every stage of the litigation, as well as in every Jones Act case. The issue is squarely presented in *this* case, in which the evidence permits a finding that CSXT's negligence was merely a "but for" and not a proximate cause of McBride's injury. And the court of appeals decided the issue incorrectly. Indeed, by endorsing much of the reasoning in the three-Justice *Sorrell* concurrence, but taking the position that its hands are tied by post-*Rogers* dicta and the prohibition on anticipating future actions of this Court, the court of appeals essentially invited the Court to decide the issue.

A. FELA Requires Proof Of Proximate Causation

FELA requires proximate causation—"some direct relation between the injury asserted and the injurious conduct alleged," *Hemi Group, LLC* v. *City of New York*, 130 S. Ct. 983, 989 (2010) (internal quotation marks omitted)—for two related reasons. *First*, as this Court's decision in *Sorrell* confirms, FELA presumptively incorporates common-law principles; proximate causation is a bedrock principle of common-law negligence; and there is nothing in FELA that abrogates it. *Second*, consistent with the settled interpretive methodology, this Court has

repeatedly held that proximate causation is an element of a FELA claim; as the three-Justice concurrence in *Sorrell* explained, *Rogers* did not hold otherwise; and no post-*Rogers* decision of this Court has done so either.

1. Under long-settled precedent, the elements of a FELA claim, and the defenses to such a claim, are determined "by reference to the common law," unless the Act includes "express language to the contrary." *Sorrell*, 549 U.S. at 165-166; *accord, e.g.*, *Norfolk & W. Ry.* v. *Ayers*, 538 U.S. 135, 145 (2003); *Consol. Rail Corp.* v. *Gottshall*, 512 U.S. 532, 543-444 (1994). Express language in FELA abrogates several "common-law tort defenses that had effectively barred recovery by injured workers," *Gottshall*, 512 U.S. at 542-543—namely, the fellow-servant rule, contributory negligence, assumption of risk, and exemption from the Act through contract, 45 U.S.C. §§ 51, 53-55. Otherwise, however, FELA is "founded on common-law concepts." *Urie* v. *Thompson*, 337 U.S. 163, 182 (1949).

"Prior to FELA, it was clear common law that a plaintiff had to prove that a defendant's negligence caused his injury proximately, not indirectly or remotely." *Sorrell*, 549 U.S. at 173 (Souter, J., concurring); see, *e.g.*, 3 John D. Lawson, *Rights, Remedies & Practice* § 1028, at 1740 (1890); 1 Thomas G. Shearman & Amasa A. Redfield, *A Treatise on the Law of Negligence* § 26, at 27 (5th ed. 1898). That of course remains the rule today. See, *e.g.*, 1 Dan B. Dobbs, *The Law of Torts* § 180, at 443 (2001); W. Page Keeton et al., *Prosser & Keeton on the Law of Torts* § 41, at 263 (5th ed. 1984). The requirement of proximate causation reflects the recognition that,

"[i]n a philosophical sense, *** the causes of an event go back to the dawn of human events, and beyond"; that "any attempt to impose responsibility upon such a basis would result in infinite liability for all wrongful acts"; and that a "boundary must [therefore] be set to liability for the consequences of any act," Keeton, *supra*, § 41, at 264.

As the court of appeals correctly recognized (App., *infra*, 35a), there is no language in FELA, much less *express* language, that dispenses with the common-law requirement of proximate cause. On the contrary, "FELA sa[ys] nothing *** about the familiar proximate cause standard." *Sorrell*, 549 U.S. at 174 (Souter, J., concurring). As far as causation is concerned, FELA provides only that an employee may recover for an injury "resulting in whole or in part" from the railroad's negligence. 45 U.S.C. § 51. That language authorizes recovery when the railroad's negligence is merely *one of the causes* of the plaintiff's injury, but it says nothing about the requisite *directness* of a cause. As the Court explained in *Sorrell*, the words "make clear that there could be recovery against the railroad even if it were only partially negligent." 549 U.S. at 170.

2. a. In the period "between FELA's enactment and the decision in *Rogers*," this Court "consistently recognized and applied proximate cause as the proper standard in FELA suits." *Sorrell*, 549 U.S. at 174 (Souter, J., concurring). The Court not only recognized and applied the standard, but stated it in the clearest possible terms. "In order to recover under [FELA]," the Court said, "it [i]s incumbent upon [the plaintiff] to prove that [the defendant] was negligent and that such negligence was the proximate cause in whole or in part of the *** accident." *Tennant* v. *Peo-*

ria & Pekin Union Ry., 321 U.S. 29, 32 (1944). The Court made clear that "but for" causation was insufficient, explicitly contrasting negligence that is the "proximate cause" of an injury with negligence that "merely creates an incidental condition or situation in which the accident, otherwise caused, results in such injury." *Davis* v. *Wolfe*, 263 U.S. 239, 243 (1923). Altogether, the Court applied the proximate-cause standard in more than 15 FELA cases through the middle of the 20th century.[3]

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[3] In addition to the cases cited in the text, see *Norfolk & W. Ry.* v. *Earnest*, 229 U.S. 114, 118-119 (1913) (jury was "rightly" instructed that, "if the said engineer did not exercise *** reasonable care and caution, and his failure so to do was the proximate cause of the accident, then [you] must find for the plaintiff"); *St. Louis, Iron Mountain & S. Ry.* v. *McWhirter*, 229 U.S. 265, 280 (1913) ("it must be shown that the alleged negligence was the proximate cause of the damage"); *Lang* v. *N.Y. Cent. R.R.*, 255 U.S. 455, 461 (1921) (jury's verdict must be reversed because "the collision was not the proximate result of the defect"); *Minneapolis, St. Paul & Sault Ste. Marie Ry.* v. *Goneau*, 269 U.S. 406, 410-411 (1926) ("As there was substantial evidence tending to show that the defective coupler was a proximate cause of the accident ***, the case was rightly submitted to the jury ***."); *St. Louis-San Francisco Ry.* v. *Mills*, 271 U.S. 344, 347 (1926) ("Nor is there evidence from which the jury might infer that petitioner's [negligence] was the proximate cause of decedent's death."); *N.Y. Cent. R.R.* v. *Ambrose*, 280 U.S. 486, 489 (1930) (plaintiff "failed to prove that the accident was proximately due to the negligence of the company"); *Nw. Pac. R.R.* v. *Bobo*, 290 U.S. 499, 503 (1934) ("If petitioner was negligent ***, there is nothing whatsoever to show that this was the proximate cause of the unfortunate death."); *Swinson* v. *Chi., St. Paul, Minneapolis & Omaha Ry.*, 294 U.S. 529, 531 (1935) ("The Safety Appliance Act *** give[s] a right of recovery [under FELA] for every injury the proximate cause of which was a failure to comply with a requirement of the act."); *Tiller* v. *Atl. Coast Line R.R.*, 318 U.S. 54, 67 (1943) (FELA

b. Contrary to the view of some lower courts, this Court did not "smuggle[] proximate cause out of *** FELA" in *Rogers*. *Sorrell*, 549 U.S. at 173 n.* (Souter, J., concurring). That case "did not address, much less alter, existing law governing the degree of causation necessary for redressing negligence." *Id.* at 173 (Souter, J., concurring).

(i) At common law, a plaintiff's contributory negligence "operated as an absolute bar to relief." *Sorrell*, 549 U.S. at 166. FELA abolished that defense, replacing it with the doctrine of comparative negligence. *Gottshall*, 512 U.S. at 542. As the court of appeals correctly recognized (App., *infra*, 35a-36a), *Rogers* concerned that principle, and multiple causation more generally.

Quoting FELA's comparative-negligence provisions, 352 U.S. at 506 n.12, 507 & n.14, this Court

"leave[s] for practical purposes only the question of whether the carrier was negligent and whether that negligence was the proximate cause of the injury"); *Brady* v. *S. Ry.*, 320 U.S. 476, 483 (1943) ("evidence of the unsuitability of the rail for ordinary use *** would justify a finding for [the plaintiffs], if the defective rail was the proximate cause of the derailment"); *Coray* v. *S. Pac. Co.*, 335 U.S. 520, 523 (1949) (plaintiff "was entitled to recover if this defective equipment was the sole or a contributory proximate cause of the decedent employee's death"); *Urie*, 337 U.S. at 177 (complaint stated claim under FELA because "[a]ll the usual elements [we]re comprehended, including want of due or ordinary care, proximate causation of the injury, and injury"); *O'Donnell* v. *Elgin, Joliet & E. Ry.*, 338 U.S. 384, 390 (1949) ("a failure of equipment to perform as required by the Safety Appliance Act is *** an actionable wrong, *** for the proximate results of which there is liability [under FELA]"); and *Carter* v. *Atlanta & St. Andrew's Bay Ry.*, 338 U.S. 430, 435 (1949) ("if the jury determines that the defendant's breach is 'a contributory proximate cause' of injury, it may find for the plaintiff").

explained in *Rogers* that a railroad is liable if its negligence "played any part, even the slightest," in producing the employee's injury, regardless of whether the injury also had "other causes, including the employee's contributory negligence," *id.* at 506. The Court ultimately held that the evidence in the case supported a finding that the defendant's negligence "played a part" in the plaintiff's injury. *Id.* at 503. *Rogers* thus addressed only the question of "how to proceed when there are multiple cognizable causes of an injury." *Sorrell*, 549 U.S. at 173 (Souter, J., concurring). It did not address "the necessary directness of cognizable causation." *Id.* at 175.

The statutory "in whole or in part" language applied in *Rogers* had always been part of FELA, and this Court had consistently interpreted the Act to require proximate causation. Indeed, the Court had explicitly stated that FELA requires proof that the defendant's negligence was the "proximate cause in whole or in part" of the plaintiff's injury, *Tennant*, 321 U.S. at 32, thereby confirming that directness of causation ("proximate cause") and multiplicity of causation ("in whole or in part") are distinct. *Rogers* merely clarified that "in part" means in "any part, even the slightest." 352 U.S. at 506.

(ii) Far from having rejected proximate causation, *Rogers* assumed that it is an element of a FELA claim. For example, the jury instructions in the case required a verdict for the defendant if the plaintiff's own negligence was the "sole proximate cause" of his injuries and the injuries were not "directly contributed to or caused" by the defendant's negligence. *Rogers*, 352 U.S. at 505 n.9. That aspect of the instruction was "free of controversy" and one with

which the Court "took no issue." *Sorrell*, 549 U.S. at 176 (Souter, J., concurring). Indeed, in sustaining the jury's finding of liability, the Court assumed that "the verdict was obedient to the trial judge's charge." *Rogers*, 352 U.S. at 505.

"The absence of any intent to water down the common law requirement of proximate cause is [also] evident from the prior cases on which *Rogers* relied." *Sorrell*, 549 U.S. at 175 (Souter, J., concurring). Thus, for the proposition that the test under the Act is whether the defendant's negligence "played any part, even the slightest," in producing the plaintiff's injury, *Rogers*, 352 U.S. at 506, the Court cited *Coray* v. *Southern Pacific Co.*, 335 U.S. 520, 523 (1949), which holds that a FELA plaintiff may recover if the defendant's negligence was "the sole or a contributory proximate cause" of the injury. See *Rogers*, 352 U.S. at 506 n.11. And for the proposition that the question in a FELA case is whether a jury may reasonably conclude that the defendant's negligence "played any part at all" in the plaintiff's injury, *id.* at 507, the Court cited *Carter* v. *Atlanta & St. Andrews Bay Railway*, 338 U.S. 430, 435 (1949), which holds that a jury may find for a FELA plaintiff if it determines that the defendant's negligence is "a contributory proximate cause" of the injury. See *Rogers*, 352 U.S. at 507 n.13.

Rogers is thus "no authority for anything less than proximate causation in an action under FELA." *Sorrell*, 549 U.S. at 177 (Souter, J., concurring). Consistent with common-law principles as qualified by the statutory language ("in whole or in part"), the holding of the case is not that a FELA defendant's negligence need not be a proximate cause of the

plaintiff's injury, but that it need not be the *sole* proximate cause.

c. In her concurrence in *Sorrell*, Justice Ginsburg relied on two post-*Rogers* decisions—*Crane* v. *Cedar Rapids & Iowa City Railway*, 395 U.S. 314 (1969), and *Consolidated Rail Corp.* v. *Gottshall*, 512 U.S. 532 (1994)—to support the view that FELA causation is more "relaxed" than ordinary proximate causation. 549 U.S. at 177-178. But neither case so held.

In *Crane*, the Court cited *Rogers* for the proposition that a FELA plaintiff "is not required to prove common-law proximate causation but only that his injury resulted 'in whole or in part' from the railroad's [negligence]." 395 U.S. at 166. That statement is dictum, because the suit against the railroad was filed by a *non*-employee, and thus the issue of causation was governed by state law rather than FELA. *Id.* at 166-167. In any event, the statement is properly read to mean only that FELA does not embody the common-law concept of *sole* proximate causation, as the Court's quotation of the Act's "in whole or in part" language confirms.

In *Gottshall*, the Court cited *Rogers* for the proposition that "a relaxed standard of causation applies under FELA." 512 U.S. at 543. That statement, too, is dictum, because *Gottshall* involved an issue—the standard for negligent infliction of emotional distress—that did not require the Court to express a view on causation. In any event, the illustrative language that immediately followed the statement—the quotation from *Rogers* that the employer's negligence need only have "played any part, even the slightest, in producing the injury," *ibid.* (quoting 352 U.S. at

506)—is consistent with the proper understanding of *Rogers* (*i.e.*, that it is a case about multiple causes).

The court of appeals recognized that these statements are dicta, but believed that they are nevertheless entitled to "great respect." App., *infra*, 37a. Earlier *holdings* that FELA requires proximate causation, however, control over later dicta, and, in any event, the dicta can be reconciled with the holdings, for the reasons explained above. At the very least, any conflict between this Court's pre-*Rogers* holdings and its post-*Rogers* dicta provides an additional reason to grant certiorari, so that railroads, their employees, and lower courts may know which of them control. The Seventh Circuit suggested as much, when it stated that it would not itself hold that FELA requires proximate causation because it has been "admonished not to anticipate future actions of the Supreme Court." *Id.* at 36a.[4]

B. The Question Whether FELA Requires Proximate Causation Has Divided The Lower Courts

1. As the three-Justice concurrence in *Sorrell* observed, *Rogers* has generated a conflict among the

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[4] The court of appeals also believed that "[c]ongressional inaction, in the wake of *Rogers* and circuit law broadly interpreting *Rogers*, counsels against adopting a common-law formulation of [proximate] cause in FELA cases." App., *infra*, 38a-39a. But "congressional inaction *** deserve[s] little weight in the interpretive process." *Alexander* v. *Sandoval*, 532 U.S. 275, 292 (2001) (internal quotation marks omitted). In any case, this Court's only square holdings on point are that FELA requires proximate causation, and there is no consensus in the lower courts on that issue. If anything is to be inferred from Congress's failure to change FELA's causation standard, therefore, it is that Congress does not disapprove of this Court's *holdings*.

lower courts on whether FELA requires proof of proximate causation. See 549 U.S. at 173 n.*. Six Circuits—the Second, Fifth, Sixth, Seventh, Ninth, and Tenth—and two state courts of last resort—those of Florida and Texas—have concluded that a FELA plaintiff need not prove proximate causation.[5] At least one Circuit—the First—and eight state courts of last resort—those of Alabama, Iowa, Minnesota, Montana, Nebraska, Ohio, Utah, and West Virginia—have reached the opposite conclusion.[6]

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[5] See *Marchica* v. *Long Island R.R.*, 31 F.3d 1197, 1207 (2d Cir. 1994) ("in the FELA context the traditional concept of proximate cause is supplanted"); *Page* v. *St. Louis Sw. Ry.*, 312 F.2d 84, 89 (5th Cir. 1963) (there has been "[a] definite departure from traditional common-law tests of proximate causation as applied to [FELA]"); *Churchwell* v. *Bluegrass Marine, Inc.*, 444 F.3d 898, 907 (6th Cir. 2006) (FELA plaintiff "need not establish proximate causation"); App., *infra*, 39a (Seventh Circuit's decision below) ("we decline to hold that *** common-law proximate causation is required to establish liability under the FELA"); *Ogelsby* v. *S. Pac. Transp. Co.*, 6 F.3d 603, 609 (9th Cir. 1993) ("'proximate cause' is not required to establish causation under the FELA"); *Summers* v. *Mo. Pac. R.R. Sys.*, 132 F.3d 599, 606 (10th Cir. 1997) ("analyz[ing] liability under the FELA in terms of proximate causation" has been "definitively abandoned"); *McCalley* v. *Seaboard Coast Line R.R.*, 265 So.2d 11, 15 (Fla. 1972) ("the concept of proximate cause no longer has any place in an action under [FELA]); *Dutton* v. *S. Pac. Transp.*, 576 S.W.2d 782, 785 (Tex. 1978) ("common law 'proximate cause' is not a proper test of the evidence in F.E.L.A. cases").

[6] See *Boston & Me. R.R.* v. *Talbert*, 360 F.2d 286, 288 (1st Cir. 1966) ("the plaintiff has the burden of proving negligence and proximate cause"); *CSX Transp., Inc.* v. *Miller*, ___ So.3d ___, 2010 WL 996541, at *13 (Ala. Mar. 19, 2010) ("the jury in this case was properly instructed by the trial court that Miller could not be compensated for any injury not proximately caused by CSX's negligence"); *Snipes* v. *Chicago, Cent. & Pac. R.R.*, 484 N.W.2d 162, 164 (Iowa 1992) ("Recovery under the FELA re-

Federal district courts in other Circuits and intermediate state appellate courts in other States are likewise divided on the question.[7]

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quires an injured employee to prove that the defendant employer was negligent and that the negligence proximately caused, in whole or in part, the accident."); *Brabeck* v. *Chicago & Nw. Ry.*, 117 N.W.2d 921, 923 (Minn. 1962) ("violation of an operating rule may impose liability on an employer if it is the proximate cause of the accident"); *Marazzato* v. *Burlington N. R.R.*, 817 P.2d 672, 675 (Mont. 1991) ("The plaintiff has the burden of proving that defendant's negligence was the proximate cause in whole or in part of plaintiff's [death]."); *Ballard* v. *Union Pac. R.R.*, 781 N.W.2d 47, 53 (Neb. 2010) ("to recover under FELA, an employee must prove the employer's negligence and that the alleged negligence is a proximate cause of the employee's injury"); *Reed* v. *Pa. R.R.*, 171 N.E.2d 718, 721 n.3 (Ohio 1961) ("In order to support recovery [under FELA] ***, a violation of the Safety Appliance Act *** must amount to *a* proximate cause of [the] injury, although it need not be *the* proximate cause thereof."); *Raab* v. *Utah Ry.*, 221 P.3d 219, 225 (Utah 2009) (declining to "read[] *Rogers* as eliminating the common law proximate cause requirement"); *Gardner* v. *CSX Transp., Inc.*, 498 S.E.2d 473, 483 (W. Va. 1997) ("[T]o prevail on a claim under [FELA], a plaintiff employee must establish that the defendant employer acted negligently and that such negligence contributed proximately, in whole or in part, to plaintiff's injury.").

[7] Compare, *e.g.*, *Grothusen* v. *Nat'l R.R. Passenger Corp.*, 603 F. Supp. 486, 488 n.4 (E.D. Pa. 1984) (proximate cause not required); *Magelky* v. *BNSF Ry.*, 579 F. Supp. 2d 1299, 1306 (D.N.D. 2008) (same); *Hall* v. *Norfolk S. Ry.*, 829 F. Supp. 1571, 1578 (N.D. Ga. 1993) (same); *Fontaine* v. *Nat'l R.R. Passenger Corp.*, 63 Cal. Rptr. 2d 644, 647 (Ct. App. 1997) (same); *Albin* v. *Ill. Cent. R.R.*, 660 N.E.2d 994, 999 (Ill. App. Ct. 4th Dist. 1995) (same); *Hamilton* v. *CSX Transp., Inc.*, 208 S.W.3d 272, 278 (Ky. App. 2006) (same); *Jackson* v. *Kansas City S. Ry.*, 619 So. 2d 851, 858 (La. App. 1993) (same); *Boyt* v. *Grand Trunk W. R.R.*, 592 N.W.2d 426, 431 (Mich. App. 1998) (same); *Whitley* v. *S. Pac. Transp. Co.*, 902 P.2d 1196, 1201 (Or. App. 1995) (same), with, *e.g.*, *Moore* v. *Chesapeake & Ohio Ry.*, 493 F. Supp. 1252, 1265 (S.D. W. Va. 1980) (proximate cause re-

Trial courts must "instruct the jury on the proper legal standard" in FELA cases. *CSX Transp., Inc.* v. *Hensley*, 129 S. Ct. 2139, 2141 (2009) (per curiam). As a consequence of the divergent interpretations of *Rogers*, FELA juries in some jurisdictions receive proximate-cause instructions, while those in others do not. Even among States and Circuits in which there is no controlling appellate decision, pattern instructions differ on the issue, as do instructions that have been given in particular cases. Unlike those of some other States and Circuits, for example, Virginia's pattern instructions permit a jury to find for the employee only if the railroad's negligence "was the proximate cause of or proximately contributed to cause [the employee's injury]." 1 Va. Prac. Jury Instr. § 40:1 (4th ed. 2009). See generally *Sorrell*, 549 U.S. at 167 n.2 (cataloguing pattern causation instructions). And in a FELA case tried just a few months ago, a Mississippi trial court gave the precise proximate-cause instruction that the district court refused to give here. Compare App., *infra*, 77a, with *id.* at 6a, 73a. See also *id.* at 74a (instruction from Maryland trial court that FELA plaintiff may recover only if defendant's negligence "was a proximate cause, in whole or in part, of the [p]laintiff's injury").

2. It is therefore apparent that neither this Court's decision in *Sorrell* nor the dueling concurrences in that case have put the matter to rest. On the contrary, *Sorrell* has merely led lower courts to choose sides in the debate between Justices Souter,

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quired), aff'd, 649 F.2d 1004 (4th Cir. 1981); *Dickerson* v. *Staten Trucking, Inc.*, 428 F. Supp. 2d 909, 915 (E.D. Ark. 2006) (same); *Kelson* v. *Central of Ga. R.R.*, 505 S.E.2d 803, 808 (Ga. App. 1998) (same); *Brooks* v. *Brennan*, 625 N.E.2d 1188, 1193 (Ill. App. Ct. 5th Dist. 1994) (same); *Lehman* v. *Nat'l R.R. Passenger Corp.*, 661 A.2d 17, 19 (Pa. Super. Ct. 1995) (same).

Scalia, and Alito, on the one hand, and Justice Ginsburg, on the other.

Six months before the Seventh Circuit issued its decision here, for example, the Supreme Court of Utah decided *Raab* v. *Utah Railway*, 221 P.3d 219 (Utah 2009). Like the Seventh Circuit's decision, *Raab* undertook a lengthy analysis of whether FELA requires proximate cause, *id.* at 225-230; pointed out that *Rogers*' "any part, even the slightest" formulation has "spawned an extensive debate" among both lower courts and members of this Court, *id.* at 227-228 & nn. 28-29, 33-34; and noted that this Court "has never squarely addressed the issue of *Rogers*'s impact on proximate cause," *id.* at 228. *Un*like the Seventh Circuit, however, the Utah Supreme Court *agreed* with the three-Justice concurrence in *Sorrell* and, as the Seventh Circuit recognized, "held that common-law proximate cause *is* the correct standard of causation under the FELA." App., *infra*, 34a (emphasis added). "While other courts, including the Court of Appeals for the Tenth Circuit, have stated that *Rogers* 'definitively abandoned' the requirement that a FELA plaintiff show proximate cause," the Utah Supreme Court explained, "such an interpretation is not supported by FELA's plain language, not mandated by the Supreme Court's statement in *Rogers*, and inconsistent with the Supreme Court's general interpretive approach to FELA." *Raab*, 221 P.3d at 228-229 (quoting *Summers* v. *Mo. Pac. R.R. Sys.*, 132 F.3d 599, 606 (10th Cir. 1997)).

As a result of the Utah Supreme Court's decision, different causation standards now apply in FELA cases, not only *across* States and Circuits, but also *within* the State of Utah itself (which is located in the Tenth Circuit), depending on whether the suit is

filed in state or federal court. The same is true in Ohio (which is located in the Sixth Circuit) and Montana (which is located in the Ninth). That is an intolerable state of affairs, all the more so because one of the very purposes of FELA was to "create uniformity throughout the Union." *Norfolk & W. Ry.* v. *Liepelt*, 444 U.S. 490, 493 n.5 (1980) (internal quotation marks omitted). Indeed, there is particular need to resolve a conflict in the lower courts when, as here, it stems from pervasive confusion over the meaning of one of this Court's decisions.[8]

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[8] The court of appeals acknowledged that there is a division among the lower courts, compare App., *infra*, 25a-26a, with *id.* at 34a n.7, but took the position that "every [federal] court of appeals" has rejected traditional proximate causation and that only three state courts of last resort—those of Montana, Utah, and West Virginia—"still apply" the standard, *id.* at 23a, 35a n.7. Although certiorari would be warranted even if the court of appeals' tally were correct, ours is more accurate.

As to the federal court of appeals cases that the decision below cited for the proposition that FELA does not require proximate causation, App., *infra*, 23a-26a, many of them, like this Court's decision in *Gottshall*, merely state that FELA employs a "relaxed" standard of causation, without discussing (or even mentioning) proximate cause. Like *Gotshall*, those decisions may be referring to *Rogers*' holding that FELA allows recovery even when the railroad bears only a small proportion of responsibility for the employee's injury.

As to the six additional decisions that *we* cite for the proposition that FELA *does* require proximate causation, see *supra* note 6, we respond to the decision below as follows. *First*, both the First Circuit's decision in *Talbert* and the Iowa Supreme Court's decision in *Snipes* explicitly state that proximate cause is required; the language in those decisions on which the court below relied, App., *infra*, 24a n.5, 34a n.7, appears to address the distinct principle—not peculiar to causation—that a FELA plaintiff's claim should ordinarily be decided by a jury. *Second*, the Ohio Supreme Court's decision in *Reed*, the Minnesota Su-

C. The Question Presented Is A Recurring One Of Great Importance

Because FELA "pre-empt[s] state tort remedies," *Sorrell*, 549 U.S. at 165, it is the exclusive remedy for injuries sustained by railroad employees in the workplace. And the remedy is frequently invoked. An average of just under 600 FELA suits were filed each year in federal court alone in the five-year period ending in 2009. See http://www.uscourts.gov/Statistics/StatisticalTablesForTheFederalJudiciary.aspx (Table C-3). That number is merely a fraction of the total number of FELA actions commenced in *all* courts (federal and state), nearly 5,000 of which were filed annually during the ten-year period ending in 2008. See Br. of Ass'n of Am. R.Rs. as *Amicus Curiae* in *CSX Transp., Inc.* v. *Rivenburgh*, No. 08-269 (U.S. Oct. 2, 2008), 2008 WL 4484590, at *9 n.6.

Because causation is a basic element of a FELA claim, moreover, the question whether proximate causation is required can arise in every case. And it can arise at every phase of the litigation: before trial, at the summary-judgment stage; during trial, when the defendant moves for judgment as a matter of law; at the end of trial, when the jury is in-

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preme Court's decision in *Brabeck*, and the Nebraska Supreme Court's decision in *Ballard* likewise state, explicitly, that proximate cause is required; the decisions of the intermediate appellate courts on which the court below relied, *id.* at 35a n.7, are not controlling when there are contrary decisions of higher courts. In any event, the unpublished decision of the Ohio intermediate appellate court addressed the issue of *multiple* causation, not proximate causation, and the decision of the Nebraska intermediate appellate court antedates the Nebraska Supreme Court's decision in *Ballard*. *Third*, the Alabama Supreme Court's holding in *Miller* that FELA requires proximate causation came after the decision below was issued.

structed; after trial, when the defendant renews its motion for judgment as a matter of law; and on appeal, when challenges to jury instructions and the sufficiency of the evidence can be raised again.

The question presented can also arise in all cases brought under the Jones Act, 46 U.S.C. § 30104(a), the law that governs liability for workplace injuries by seamen. In such cases, courts apply the "[l]aws of the United States regulating recovery for personal injury to *** a railway employee," *ibid.*, and this Court has held that the Jones Act "adopts the entire judicially developed doctrine of liability under [FELA]," *American Dredging Co.* v. *Miller*, 510 U.S. 443, 456 (1994) (internal quotation marks omitted).

D. This Case Is An Ideal Vehicle For Deciding The Question

1. Whether FELA requires proximate causation is frequently outcome-determinative. This case illustrates the point, because a properly instructed jury easily could have found that McBride's injury was not proximately caused by any negligence on CSXT's part.

McBride's theory of negligence was that his assigned train—which had five locomotives with a wide-body in the lead—was unsafe because of its propensity to cause derailment or collision, not because of its propensity to cause imprecise hand movements by fatiguing the thumbs of engineers actuating the independent brake. Yet McBride was injured while operating the brake, not in a rail accident. On this record, a properly instructed jury could have found that CSXT had a duty "to take precautions against a different kind of loss from the one

that materialized," *Movitz* v. *First Nat'l Bank*, 148 F.3d 760, 763 (7th Cir. 1998) (Posner, J.), and that any negligence on CSXT's part did not "directly injure[]" McBride, *Holmes* v. *Sec. Investor Prot. Corp.*, 503 U.S. 258, 269 (1992).

The train assigned to McBride may well have been a necessary condition for his injury. Had there been fewer locomotives, he may have needed less time to bail off the brake; and had a conventional locomotive been in the lead, he may have actuated the brake with his whole hand rather than his thumb. But the existence of a necessary condition does not establish proximate cause. And the jury was never asked to find proximate causation.

McBride's counsel capitalized on the lack of a proximate-cause instruction in his summation. Quoting the district court's charge, he argued: "What we *** have to show is defendant's negligence caused or contributed to [the] injury. It never would have happened *but for* the defendant giving him that train." App., *infra*, 67a (emphasis added). McBride thus asked the jury, in effect, to return a verdict in his favor on the ground that CSXT's negligence created "an incidental condition or situation" that resulted in his injury. *Davis*, 263 U.S. at 243. If the Court grants certiorari in this case and reaffirms that a FELA plaintiff may not recover in that circumstance, CSXT will likely be entitled to a new trial. See *Gooden* v. *Neal*, 17 F.3d 925, 929 (7th Cir. 1994) (Easterbrook, J.) (erroneous failure to give defense instruction on causation is harmless "only if the evidence so favored" the plaintiff that a properly instructed jury "could not find" in favor of the defendant).

2. Among post-*Sorrell* cases in which a petition for certiorari on the proximate-cause issue has been filed, this case is far and away the best vehicle for deciding it. As a consequence of the decision below, there are now two comprehensive lower-court decisions on the issue—the Utah Supreme Court's in *Raab* and the Seventh Circuit's in this case—that have come to opposite conclusions. And no other petition that has been acted upon or filed since the Seventh Circuit's decision presents the issue as squarely as this one.

In *Norfolk Southern Railway* v. *Jordan*, No. 09-788 (cert. denied Apr. 19, 2010), for example, the railroad argued that the jury should have been instructed that the employee must "prove that the railroad's negligence was 'the proximate cause in whole or in part' of the employee's injury." *Jordan* v. *Burlington N. Santa Fe R.R.*, 2009 WL 112561, at *7 (Tenn. Ct. App. Jan. 15, 2009). Unlike the Seventh Circuit in this case, however, the Tennessee Court of Appeals ruled that the trial court correctly refused the instruction, not because FELA does not require proximate cause, but because "the substance of the[] proposed instruction[] was covered in the trial court's instructions." *Ibid.*

Also unlike this case, *Reinauer Transportation Cos.* v. *Brown*, No. 10-56 (pet. for cert. filed July 2, 2010), ultimately concerns multiple causation, not the requisite directness of a cause. As the petition in that case acknowledges (at 11-13, 17-18, 33-34), the issue at trial was whether the employee's injuries were attributable to preexisting medical conditions rather than the accident that gave rise to the suit; there was no dispute that, if the railroad's negligence caused the injuries, it did so directly. And even if the

case does involve proximate causation, the petition essentially concedes (at 34 n.12) that the decision below rests on an independent and adequate state ground.

Finally, in *Conrail* v. *Battaglia*, No. 10-75 (pet. for cert. filed July 13, 2010), the Ohio Court of Appeals should have expressly required proximate cause. But the court's discussion of the causation standard was far more truncated—and also more ambiguous—than the Seventh Circuit's in this case. See *Battaglia* v. *Conrail*, 2009 WL 3325903, at *3, *5 (Ohio Ct. App. Oct. 16, 2009). Whether any error could be deemed reversible in that case, moreover, is not as clear as it is here, where a properly instructed jury unquestionably could have found that the negligence attributed to CSXT was not a direct cause of McBride's injury. Cf. *CSX Transp., Inc.* v. *Begley*, 313 S.W.3d 52, 63-64 (Ky. 2010) ("leav[ing] the question of whether the FELA generally requires a proximate cause instruction for another day," because "[s]uch an instruction was unnecessary under the evidence").

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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