No. 10-235

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

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

LOUIS P. WARCHOT
DANIEL SAPHIRE *
ASSOCIATION OF AMERICAN RAILROADS
425 3rd Street, S.W.
Washington, D.C. 20024
(202) 639-2505
DSaphire@aar.org

* Counsel of Record

Counsel for Amicus

September 17, 2010

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

Blank Page

IN THE

Supreme Court of the United States

No. 10-235

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

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

Pursuant to Rule 37.2(b), the Association of American Railroads (AAR) respectfully moves for permission to file the attached brief *amicus curiae*. Petitioner has consented to AAR's filing of a brief.[1] In accordance with Rule 37.2(a), AAR has provided notice to counsel for Respondent of AAR's intent to file a brief. Respondent has not consented.

[1] The letter expressing consent has been filed with the Clerk of the Court.

AAR is an incorporated, nonprofit trade association representing the nation's major freight railroads and Amtrak. AAR's members operate approximately 78 percent of the rail industry's line haul mileage, produce 94 percent of its freight revenues, and employ 92 percent of rail employees. In matters of significant interest to its members, AAR frequently appears before Congress, administrative agencies and the courts on behalf of the railroad industry, including participation as *amicus curiae* in cases raising significant legal and policy issues.

This case, arising under the Federal Employers' Liability Act (FELA), 45 U.S.C. §§51-60, presents such an issue. FELA, a federal negligence statute, takes the place of workers' compensation in the railroad industry. FELA presents unique issues and problems for railroads because, as a negligence law, it differs fundamentally from the no-fault compensation systems that cover virtually all other U.S. industries. Each year thousands of FELA claims and lawsuits, like the case below, are asserted against AAR member railroads, to which they devote substantial legal and financial resources: all told, the railroads spend three quarters of a billion dollars annually in the payment and defense of claims brought under FELA. Because FELA litigation is an ongoing event for all major railroads, AAR has a strong interest in assuring that lower courts do not improperly expand railroad liability under FELA.

Echoing prior decisions of some other lower state and federal courts, the court below erroneously sanctioned the application of a relaxed standard of causation in FELA cases, a ruling that is at odds with the plain language of the statute, Congressional intent and prior decisions of this Court and other courts.

This issue is relevant in virtually every FELA lawsuit, and numerous lower court decisions demonstrate that the way in which causation is interpreted can affect the outcome of a case.

When AAR participates as *amicus curiae* in a FELA case, it brings a broad, industry-wide perspective to the issues before the court. AAR works closely with its member railroads on a host of issues arising under FELA. Thus, AAR is thoroughly familiar with the trends and key issues that confront its members in FELA litigation. In its brief, AAR will urge this Court to grant certiorari in order to finally clarify the proper standard of causation in FELA cases, emphasizing that how the lower courts interpret this issue can have a decisive impact in FELA cases. As a trade association representing the nation's major railroads, AAR has an interest not only in assisting the petitioner in obtaining relief from an erroneous decision, but also in assuring that an important federal law is not misconstrued to the detriment of railroads in the future.

Respectfully submitted,

LOUIS P. WARCHOT
DANIEL SAPHIRE *
ASSOCIATION OF AMERICAN RAILROADS
425 3rd Street, S.W.
Washington, D.C. 20024
(202) 639-2505
DSaphire@aar.org

September 17, 2010

* Counsel of Record

Counsel for Amicus

Blank Page

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
STATEMENT OF INTEREST OF *AMICUS CURIAE*	1
STATEMENT OF THE CASE	2
SUMMARY OF THE ARGUMENT	2
ARGUMENT	3
THIS COURT SHOULD GRANT THE PETITION AND CLARIFY THE PROPER STANDARD OF CAUSATION UNDER FELA BECAUSE IT IS A FUNDAMENTAL ISSUE ARISING UNDER THE STATUTE WHICH CONTINUES TO BE THE SUBJECT OF CONFUSION AND LACK OF UNIFORMITY IN THE LOWER COURTS	3
A. The Erroneous Interpretation of FELA's Causation Standard by the Court Below and Other Lower Courts Has Had and Will Continue to Have a Substantial and Decisive Impact on the Outcome of FELA Cases	5
B. Although Prior Rulings of this Court Supporting Proximate Cause Have Never Been Overruled or Questioned the Court Below and Some Other Lower Courts Erroneously Believe That This Court's Decision in *Rogers* Broadened FELA's Causation Standard	9

TABLE OF CONTENTS—Continued

Page

C. Neither the Statute Nor Legislative History Supports the Lower Court's Holding that a Relaxed Standard of Causation Applies in FELA Cases..... 12

D. While the Reasoning of This Court's *Sorrell* Decision Appears to Support a Proximate Causation Standard, Uncertainty Continues in the Lower Courts That Can be Resolved Only By a Definitive Ruling By This Court 18

CONCLUSION 21

TABLE OF AUTHORITIES

CASES Page

Adams v. CSX Transp., Inc., 899 F.2d 536 (6th Cir. 1990) 15
Anderson v. Baltimore & Ohio R.R., 89 F.2d 629 (2d Cir. 1937) 11
Armstrong v. Kansas City Southern Ry. Co., 752 F.2d 1110 (5th Cir. 1985) 5, 6
Booth v. CSX Transp., Inc., 211 S.W.3d 81 (Ky. App. 2006) 7, 8
Brady v. Southern Ry. Co., 320 U.S. 476 (1943) 17, 18
Clark v. St. Paul & Sioux City R.R., 9 N.W. 581 (Minn. 1881) 14
Consolidated Rail Corp. v. Gottshall, 512 U.S. 532 (1994) 3, 18, 21
CSX Transp., Inc. v. Begley, 313 S.W.3d 52 (Ky. 2010) 20
Davis v. CSX Transp., Inc., 2005 WL 1935676 (W.D. Ky. 2005) 7
Davis v. Wolfe, 263 U.S. 239 (1923) ..10, 11, 16, 18
Farwell v. Boston & Worcester R.R., 4 Metc. 49 (Mass. 1842) 14
Gibbs v. Union Pac. R.R., 2009 WL 3064956 (S.D. Ill. 2009) 8
Gibson v. Erie Ry. Co., 63 N.Y. 449 (1875) .. 14
Grogg v. CSX Transp., Inc., 659 F.Supp.2d 998 (N.D. Ind. 2009) 13
Hall v. Norfolk Southern Ry. Co., 2007 WL 2765540 (N.D.Ga. 2007) 20
Harbin v. Burlington Northern Ry. Co., 921 F.2d 129 (7th Cir. 1990) 13
Heater v. Chesapeake & Ohio Ry. Co., 497 F.2d 1243 (7th Cir. 1974) 12

TABLE OF AUTHORITIES—Continued

Page

Johnson v. Southern Pac. Co., 196 U.S. 1, 19 (1904) 13
Kansas City Southern Ry. Co. v. Nichols Construction Co., 574 F.Supp.2d 590 (E.D. La. 2008) 8
Koller v. Burlington Northern Santa Fe Ry. Co., No. Civ. S-01-914 GGH (E.D. Calif. 2002) 7
Lang v. N.Y. Cent. R.R., 255 U.S. 455 (1921) 16
Larsen v. Chicago & Northwestern Ry. Co., 171 F.2d 841 (7th Cir. 1949) 11
McBride v. CSX Transp., Inc., 598 F.3d 388 (7th Cir. 2010) 3, 4, 12, 19
Medwig v. Long Island R.R., 2007 WL 1659201 (S.D.N.Y. 2007) 20
Metro North Comm. R.R. v. Buckley, 521 U.S. 424 (1997) 18
Mills v. CSX Transp., Inc., 2009 WL 4547685 (Tenn. 2009) 19
Mondou v. N.Y., N. H. & Hartford R.R., 223 U.S. 1 (1912) 15
Montgomery v. CSX Transp., Inc., 376 S.E.2d 20 (S.C. 2008) 19
Morrison v. N.Y. Cent. R.R., 361 F.2d 319 (6th Cir. 1966) 16
Nicholson v. Erie R.R., 253 F.2d 939 (2d Cir. 1958) 11
Norfolk & Western Ry. Co. v. Ayers, 538 U.S. 135 (2003) 6
Norfolk Southern Ry. Co. v. Sorrell, 459 U.S. 158 (2007) 3, 4, 18, 19, 20

TABLE OF AUTHORITIES—Continued

Page

Northwestern Pac. R.R. v. Bobo, 290 U.S. 499 (1934) 16
Oglesby v. Southern Pac. Transp. Co., 6 F.3d 603 (9th Cir. 1993) 12
Parker v. Atchison, Topeka & Santa Fe Ry. Co., 263 Cal.App.2d 675 70 Cal. Rptr. 8 (Cal. App. 1968) 4
Raab v. Utah Ry., 221 P.3d 219 (Utah 2009) 20
Reed v. Pennsylvania R.R., 351 U.S. 502 (1956) 17
Reetz v. Chicago & Erie R.R., 46 F.2d 50 (6th Cir. 1931) 10
Richards v. Consolidated Rail Corp., 330 F.3d 428 (6th Cir. 2003) 9, 10, 16
Rivera v. Union Pac. R.R., 378 F.3d 502 (5th Cir. 2004) 13
Rogers v. Missouri Pac. R.R., 352 U.S. 500 (1957) ..... *passim*
Shanks v. Delaware, Lackwanna & Western R.R., 239 U.S. 556 (1916) 16
Southern Pac. Co. v. Gileo, 351 U.S. 493 (1956) 17
Southern Ry. v. Gray, 241 U.S. 333 (1916) .. 3
St. Louis-S.F. Ry. v. Mills, 271 U.S. 344 (1926) 16
Summers v. Missouri Pac. R.R. Sys., 132 F.3d 599 (10th Cir. 1997) 12
Urie v. Thompson, 337 U.S. 163 (1949) 3
Williams v. Long Island R.R. Co., 196 F.3d 402 (2d Cir. 1999) 12
Zimmerman v. Long Island R.R., 2 Fed. Appx. 172 (2d Cir. 2001) 10, 11

TABLE OF AUTHORITIES—Continued

Page

STATUTES AND REGULATIONS

45 U.S.C. §§51-60 2
45 U.S.C. §51 ..... 14, 19
45 U.S.C. §53 19
Act of Aug. 11, 1939, c. 685, 53 Stat. 1404 .. 17
Safety Appliances Act, c. 196, 27 Stat. 531 (1893) 13

OTHER AUTHORITIES

H.R Rep. No. 1386 (1908) 14, 15
Interstate Commerce Commission, Statistics of Railways in the United States 1908 (1909) 13
S. Rep. No. 460 (1908) 14
S. Rep. No. 661 (1939) 17

IN THE

Supreme Court of the United States

No. 10-235

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

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

STATEMENT OF INTEREST OF *AMICUS CURIAE*[1]

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

[1] Pursuant to Rule 37.6, AAR states that no person or entity other than AAR has made monetary contributions toward this brief, and no counsel for any party authored this brief in whole or in part.

STATEMENT OF THE CASE

AAR adopts the Statement of the Case of Petitioner.

SUMMARY OF THE ARGUMENT

This Court should grant the petition in order to provide guidance on a fundamental issue arising under the Federal Employers' Liability Act (FELA), 45 U.S.C. §§51-60, that has been the source of confusion and lack of uniformity for many years: the standard of causation. Time and again, in providing jury instructions, ruling on dispositive motions, and in reviewing such matters on appeal, some lower courts have held that a more "relaxed" burden applies to plaintiffs in proving causation in FELA cases than would in an ordinary common law action. Many of those decisions demonstrate that how courts interpret causation can have a significant impact on the outcome of a case. In contrast, other courts hold that FELA plaintiffs must show proximate cause. Only clarification of the proper standard of causation by this Court will end the intolerable lack of uniformity on this fundamental issue.

The language and legislative history of the statute, and early decisions of this Court, show that Congress did not intend to modify the common law standard of causation when it enacted FELA in 1908. Congress expressly modified some of the prevailing common law defenses that made recovery more difficult, including the traditional contributory negligence doctrine, but these modifications did not address the causation standard. Consequently, in the years following FELA's enactment this Court consistently held that plaintiffs had to prove their injuries were proximately caused by the defendant's negligence.

Neither subsequent amendments to FELA, nor this Court's decision in *Rogers v. Missouri Pac. R.R.*, offers support for lower court decisions that hold otherwise.

ARGUMENT

THIS COURT SHOULD GRANT THE PETITION AND CLARIFY THE PROPER STANDARD OF CAUSATION UNDER FELA BECAUSE IT IS A FUNDAMENTAL ISSUE ARISING UNDER THE STATUTE WHICH CONTINUES TO BE THE SUBJECT OF CONFUSION AND LACK OF UNIFORMITY IN THE LOWER COURTS

The rights and obligations under FELA depend upon the concepts of common law negligence. *Urie v. Thompson*, 337 U.S. 163, 182 (1949); *Southern Ry. v. Gray*, 241 U.S. 333, 339 (1916). And, except as Congress has explicitly altered those common law concepts, they are entitled to great weight in interpreting FELA. *Norfolk Southern Ry. Co. v. Sorrell*, 459 U.S. 158, 168 (2007); *Consolidated Rail Corp. v. Gottshall,* 512 U.S. 532, 543-44 (1994). Nonetheless, despite acknowledging that "[e]arly FELA cases did not interpret [FELA] as altering the common-law requirement of proximate cause" and that "[t]hese early cases never have been overruled explicitly," *McBride v. CSX Transp., Inc.*, 598 F.3d 388, 392-93 (7th 2010), the Seventh Circuit "decline[d] to hold that . . . common law proximate causation is required to establish liability under the FELA." *Id.* at 406. Instead, the Seventh Circuit opined that the concept of proximate cause has "broadened" over "FELA's history," and that a "new conception of proximate cause 'crystallized' in *Rogers* [*v. Missouri Pac. R.R.*, 352 U.S. 500 (1957)]." *Id.* at 395. In reaching this

conclusion, the Court seemed swayed not so much by *Rogers* itself, but rather, by the interpretation given *Rogers* by many, but by no means all, lower courts that have addressed the issue of causation under FELA during the last half century.[2]

During the first fifty years following FELA's enactment causation was a straightforward and non-controversial issue. Since *Rogers*, it has become muddled and confused. Commenting on the disarray that already existed a decade after *Rogers* was decided, the California Court of Appeal observed that "[i]t is almost impossible to frame a definition of causation for F.E.L.A. cases . . . because the federal decisions cannot themselves be fully harmonized on the subject." *Parker v. Atchison, Topeka & Santa Fe Ry. Co.,* 263 Cal.App.2d 675, 678, 70 Cal. Rptr. 8, 10 (Cal. App. 1968). As the Petition describes, this confusion and lack of uniformity has only increased, to the point where there presently is a serious split of authority in the lower federal and state courts on the standard of causation that applies in FELA cases. [Pet. at 22-25] Because the Seventh Circuit issued a comprehensive opinion, in which the causation issue was squarely presented, this case presents an excellent opportunity for this Court to answer the question left unresolved in *Sorrell*, and provide much needed

---

[2] The Seventh Circuit agreed with Justice Souter's concurring opinion in *Sorrell*, that *Rogers* "was a case that involved multiple causes," and, in particular, the "issue of when a case with multiple causes must be submitted to a jury," 598 F.3d at 404, but noted, as a countervailing point, that the majority of Federal Courts of Appeals hold that proximate cause does not apply in FELA cases. *Id.* at 399-400. However, as petitioner points out, eight state courts of last resort hold that proximate cause is required. Pet. at 23.

clear and definitive guidance on the proper standard of causation under FELA.

A. The Erroneous Interpretation of FELA's Causation Standard by the Court Below and Other Lower Courts Has Had and Will Continue to Have a Substantial and Decisive Impact on the Outcome of FELA Cases

The question presented in the petition raises an issue of great importance. The split among lower courts over the proper standard of causation under FELA is far more than a question of semantics or a matter of courts using different labels to apply the same substantive standard. As numerous cases demonstrate, the standard for showing causation utilized by a court, whether reflected in jury instructions, rulings on dispositive motions, or appellate review, frequently affects the outcome of FELA cases.

The Fifth Circuit's opinion in *Armstrong v. Kansas City Southern Ry. Co.*, 752 F.2d 1110 (5th Cir. 1985), is one of the most compelling examples of how the standard of causation can be outcome determinative. In *Armstrong*, the railroad had hired a local cab company to transport the plaintiff from the point where he disembarked from a train late at night to the railroad's yard offices. In route, the driver stopped the cab on the road without turning on the emergency flashers. The cab was hit from the rear by another motorist, injuring the plaintiff. Asserting that the "common-law proximate cause standard is modified and the employee has a less demanding burden of proving causal relationship," *id.* at 1113, the Court affirmed the jury's verdict finding the railroad liable, allowing the jury a wide berth to make inferences supporting its verdict.

The case also involved a state law indemnity action by the railroad against the cab company, its agent.[3] Under the very same set of facts, the Court of Appeals affirmed the denial of the railroad's claim, upholding the lower court's finding that the cab driver was not negligent. The Court held that "even though the jury found that [defendant] was liable to Armstrong [in the FELA action] because of the negligent conduct of its agent, the district court was neither constrained nor required to find the negligence of [the cab company] proximately caused Armstrong's injury." *Id.* at 1115. The Court explained that the railroad's "argument ignores the different causation standards of the two actions . . . The standards of liability for negligence under §1 of [FELA] are significantly broader than in ordinary common-law negligence actions." *Id.* Thus, the very conduct that gave rise to liability in the FELA action did not support liability in the indemnity action, an outcome directly attributable to the Court's ruling that a different, "significantly broader" standard of causation applies under FELA. *Id.*[4]

---

[3] In *Norfolk & Western Ry. Co. v. Ayers*, 538 U.S. 135 (2003), this Court held that while joint and several liability applies to FELA, railroads have the right to bring indemnity and contribution actions against third parties under applicable state or federal law. *Id.* at 162.

[4] Not only does the *Armstrong* decision demonstrate starkly how applying a relaxed causation standard can affect the outcome of a case, it highlights the inherent unfairness of such a rule. *Ayers* suggests that the impact of holding railroads jointly liable for the negligence of other tortfeasors is mitigated by the railroads' right to seek indemnity under state law. However, the fairness of this balance is undermined if railroads must defend against a relaxed standard of causation as FELA defendants, but must prove proximate cause as indemnity plaintiffs.

Other examples of the impact of FELA's purported "relaxed" causation standard abound. In *Davis v. CSX Transp.*, Inc., 2005 WL 1935676, at *1 (W.D. Ky. 2005), the Court explained that the "burden of proof of causation under FELA is relaxed compared to ordinary negligence actions" and therefore the plaintiff "need offer little more than a scintilla of evidence that the employer's negligence played any part in the plaintiff's injury." As a result, the Court dispensed with the need for the plaintiff to offer evidence connecting the alleged negligent conduct (allowing pools of grease to accumulate in the yard) to her injury (losing her footing and falling off a boxcar sill step), and denied the railroad's motion for summary judgment. *Id.* at *2.

In *Koller v. Burlington Northern Santa Fe Ry. Co.*, No. Civ. S-01-914 GGH (E.D. Calif. 2002), the plaintiff brought a FELA action based on his employer's failure to prevent an assault by a third party. The Court evaluated the railroad's motion for summary judgment under the premise that "[i]n a FELA case, the causation standard is relaxed" and "the jury's power to engage in inferences is significantly broader than in common law negligence actions." Slip op. at 4. Examining the evidence in the context of these legal conclusions, the court denied the railroad's motion "given the weakened causation standard in FELA cases." *Id.* at 7.

Even in the rare instance where a trial court grants a defendant's dispositive motion in a FELA case, such rulings typically do not survive appellate review in courts applying a relaxed standard of causation. For example, in *Booth v. CSX Transp., Inc.*, 211 S.W.3d 81, 85 (Ky. App. 2006), the trial court granted summary judgment for the railroad,

finding that "it does not appear that the testimony of either of Plaintiff's physicians provides the necessary testimony stated within a reasonable degree of medical probability to establish causation on the part of CSX." However, the Kentucky Court of Appeals reversed, expressing its view that "Congress intended FELA to be a departure from common law principles of liability . . ." and that "plaintiffs have a lower standard of proof than plaintiffs in ordinary negligence cases." *Id.* at 83-84.

The significance of the causation standard applied was recently underscored by a district court which, referring to FELA's purported "relaxed standard for proving causation," explained that while the plaintiff's "first claim might not survive a motion for summary judgment in the traditional tort context, the low negligence threshold of FELA ensures that this count will live to see another day." *Gibbs v. Union Pac. R.R.*, 2009 WL 3064956, at *4 (S.D. Ill. 2009). Similarly, a federal court in Louisiana summarized the judicial attitude about FELA cases when it found that "FELA plaintiffs can survive dispositive motions by offering evidence which would be insufficient to overcome a similar motion in an ordinary civil case." *Kansas City Southern Ry. Co. v. Nichols Construction Co.*, 574 F.Supp.2d 590, 594 (E.D. La. 2008).

B. Although Prior Rulings of this Court Supporting Proximate Cause Have Never Been Overruled or Questioned the Court Below and Some Other Lower Courts Erroneously Believe That This Court's Decision in *Rogers* Broadened FELA's Causation Standard

Only a definitive ruling by this Court will resolve this important issue as it is clear that many lower courts read *Rogers* as mandating a substantive change in how the issue of causation is analyzed in FELA cases. For example, in *Richards v. Consolidated Rail Corp.*, 330 F.3d 428 (6th Cir. 2003), the plaintiff was the conductor on a train which had stopped as a result of an unexpected application of the air brake system. He was injured when he lost his footing and slipped on ballast while walking alongside the train to inspect it. Plaintiff's theory was that the train stop was caused by a defective valve, and but for that defect he would not have been walking the train at that time. It was not alleged that any negligence by the railroad directly caused him to slip.

The District Court granted summary judgment for the railroad on the grounds that the plaintiff "could not demonstrate that his injury was causally linked to the allegedly defective appliance." *Id.* at 431. Rather, the court found that the "injury merely was an incidental condition of the defect," concluding that plaintiff's "slip and injury bears too tenuous a connection with the defective appliance so as to give rise to liability." *Id.* The Sixth Circuit reversed, holding that *Rogers* "announced a relaxed test for establishing causation in FELA cases," *id.* at 433, and rejecting the prior Sixth Circuit decision in *Reetz v.*

Chicago & Erie R.R., 46 F.2d 50 (6th Cir. 1931), as "no longer good law in light of *Rogers*." *Id.* at 437. *Richards* provides yet another example of how a court's reading of *Rogers* can change the outcome of a FELA case.

The District Court's analysis of causation in *Richards* had not only followed prior circuit precedent, it also was faithful to this Court's analysis of causation in *Davis v. Wolfe*, 263 U.S. 239 (1923). In *Davis*, this Court directly addressed the standard of causation in FELA cases, explaining that "on the one hand, an employee cannot recover" if the employer's negligence or failure to comply with a safety statute

> is not a proximate cause of the accident which results in his injury, but merely creates an incidental condition or situation in which the accident, otherwise caused, results in such injury; and, on the other hand, he can recover if the failure to comply with the requirements of the Act is a proximate cause of the accident, resulting in injury to him . . .

263 U.S. at 243.

The Second Circuit's decision in *Zimmerman v. Long Island R.R.*, 2 Fed. Appx. 172 (2d Cir. 2001), provides an example of how a "but for" causation standard has replaced the concepts articulated in *Davis*. In *Zimmerman*, the plaintiff tripped and injured himself while returning from a job he had been assigned to do on his own. He claimed that in assigning him to his job, and in training its employees, the railroad had violated a federal regulation, the Roadway Worker Protection Rule (RWPR). Even though there was no apparent connection

between the alleged violation of the RWPR and the plaintiff's accident, the Court held that there was sufficient evidence of causation under FELA's "relaxed" standard to support the jury's verdict for the plaintiff. The Court explained that inasmuch as a FELA "plaintiff is 'not required to prove common law proximate causation,'" the jury could have concluded that had the plaintiff's supervisor "been aware that the plaintiff was not qualified as a lone worker, the plaintiff would presumably not have been dispatched on the night of" the accident. *Id.* at 175-76.

Although *Davis* and other precedent of this Court applying proximate cause in FELA cases have never been overruled, the Second and Sixth Circuits, like the Court below, believe that *Rogers* changed the standard of causation under FELA to permit plaintiffs to prevail by showing only a tenuous connection between alleged railroad negligence and their injury.

Indeed, some federal courts of appeals, which previously had understood FELA to incorporate proximate cause, came to the conclusion that *Rogers* required them to repudiate their previous holdings. *Compare Anderson v. Baltimore & Ohio R.R.*, 89 F.2d 629, 630 (2d Cir. 1937) (the issue is whether the defect "was the proximate cause of [plaintiff's] death") *with Nicholson v. Erie R.R.*, 253 F.2d 939, 940 (2d Cir. 1958) ("[T]o impose liability on the defendant, the negligence need not be the proximate cause of the injury."); *Larsen v. Chicago & Northwestern Ry. Co.*, 171 F.2d 841, 844 (7th Cir. 1949) ("To recover under [FELA] plaintiff must prove that the defendant was negligent and that such negligence in whole or in part was the proximate cause of his injuries.") *with* the decision below, "declin[ing] to hold that . . . common law proximate causation is required

to establish liability under the FELA." 598 F.3d at 406. The Tenth Circuit summarized this judicial attitude, explaining that "[d]uring the first half of this century, it was customary for courts to analyze liability under the FELA in terms of proximate causation," but that *Rogers* "definitively abandoned this approach." *Summers v. Missouri Pac. R.R. Sys.*, 132 F.3d 599, 606 (10th Cir. 1997).

C. Neither the Statute Nor Legislative History Supports the Lower Court's Holding that a Relaxed Standard of Causation Applies in FELA Cases

The purported abandonment of proximate cause erroneously ascribed to *Rogers* has moved FELA closer to a no-fault compensation system in many jurisdictions. As the Seventh Circuit candidly explained in an earlier case:

> Having accorded the customary . . . deference to the non-insurer aspect of the FELA defendant we will now proceed to discuss the statute as it is. Before doing so, we observe that while FELA in its terms does not purport to border on a workman's compensation act, certain parallelisms may be found.

Heater v. Chesapeake & Ohio Ry. Co., 497 F.2d 1243, 1246 (7th Cir. 1974). This has occurred in large part as a result of the abandonment of proximate causation, which, as the cases cited above demonstrate, has made a finding of employer liability far more likely. *E.g., Williams v. Long Island R.R. Co.*, 196 F.3d 402, 406 (2d Cir. 1999) ("with respect to causation, a relaxed standard applies in FELA cases"); *Oglesby v. Southern Pac. Transp. Co.*, 6 F.3d 603, 607 (9th Cir. 1993) (*Rogers* "has been read to indicate that common

law 'proximate cause' is not required under the FELA.")[5] Notwithstanding these holdings, there is no evidence whatsoever that in 1908 when Congress enacted a federal negligence statute to compensate rail workers injured on the job it intended to eliminate proximate cause.

Congress enacted FELA in response to what was perceived as an intolerably high injury rate in the railroad industry.[6] At that time, the concept of no-fault workers' compensation—today the predominant method of compensating workplace injuries—had not yet gained a foothold in the United States. Therefore, Congress adopted what was then the universal compensation model in the United States: the law of negligence. The policy embodied in FELA was

---

[5] Indeed, some courts have placed an extremely light burden on FELA plaintiffs in holding their employers liable for workplace injuries. *See Harbin v. Burlington Northern Ry. Co.*, 921 F.2d 129, 132 (7th Cir. 1990) (explaining that to sustain a jury verdict in a FELA case requires "evidence scarcely more substantial than pigeon bone broth"); *Rivera v. Union Pac. R.R.*, 378 F.3d 502, 506 (5th Cir. 2004) (calling the plaintiff's burden of proof "featherweight"). Recently, a district court in Indiana agreed with the defendant that "the causation evidence in the record as it stands is tenuous" but nonetheless denied the defendant's motion for summary judgment "in light of the featherweight standard of proof required" under FELA. *Grogg v. CSX Transp., Inc.*, 659 F.Supp.2d 998, 1005 (N.D. Ind. 2009).

[6] In the year ending June 30, 1907, 4,534 rail workers were killed on the job and 87,644 were injured. Interstate Commerce Commission, Statistics of Railways in the United States 1908, 41, 99 (1909). On several occasions at the end of the previous century, President Harrison had admonished Congress to act to protect rail employees, a plea which resulted in enactment of the Safety Appliances Act, c. 196, 27 Stat. 531 (1893), the first federal railroad safety legislation. *See Johnson v. Southern Pac. Co.*, 196 U.S. 1, 19 (1904).

straightforward: railroads were to be liable in damages for injuries sustained by their employees in the course of their railroad employment when such injuries were caused by the negligence of the railroad. 45 U.S.C. §51.

When Congress enacted FELA, it made express changes to some of the harsher aspects of nineteenth century common law which often erected insurmountable barriers to recovery by workers sustaining job-related injuries.[7] Accordingly, contemporaneous with the statute's enactment, the Senate reported that FELA "revises the law as now administered in the courts in the United States in four important particulars." S. Rep. No. 460, at 1 (1908). Specifically, the Senate Report described these revisions to the common law as addressing the fellow servant doctrine, assumption of the risk, contributory negligence, and prohibiting contracts that relieve the employer of liability. *Id.* at 1-3. There was no suggestion that the common law standard of causation was being modified. The House of Representatives offered an identical list when it described how FELA "change[d] the common-law liability of employers," H.R Rep. No. 1386, at 1 (1908), noting in addition, that the FELA "makes each party responsible for his

---

[7] For example, recovery was denied if the worker knew the inherent dangers of a job and assumed those risks by accepting employment. *E.g., Clark v. St. Paul & Sioux City R.R.,* 9 N.W. 581 (Minn. 1881); *Gibson v. Erie Ry. Co.,* 63 N.Y. 449 (1875). The fellow servant rule, a variant of the assumption of the risk doctrine, held that among the ordinary risks of employment the employee takes upon himself is the "carelessness and negligence of those who are in the same employment," on the theory that "these are perils which the servant is as likely to know, and against which he can as effectually guard, as the master." *Farwell v. Boston & Worcester R.R.,* 4 Metc. 49, 57 (Mass. 1842).

own negligence and requires each to bear the burden thereof," *id.*, hardly language that suggests an intent to subject FELA plaintiffs to a "featherweight" burden when proving one of the essential elements of their cause of action.[8]

Similarly, this Court's understanding of the revisions of common law made by FELA did not include any modification to the standard of causation. Shortly after its enactment, the constitutionality of FELA was challenged. Among other arguments advanced by those challenging the statute was that in modifying the common law Congress exceeded its authority to regulate interstate commerce. In addressing this challenge, which it rejected, this Court described those modifications as including (1) the abrogation of the fellow servant rule; (2) the replacement of the contributory negligence rule with a scheme of comparative negligence;. (3) the abrogation of the assumption of the risk doctrine where a violation of a safety statute caused the injury; and (4) the right of a personal representative to seek damages for the death of an employee for the benefit of designated relatives. *Mondou v. N.Y., N. H. & Hartford R.R.*, 223 U.S. 1, 49-50 (1912). Absent, however, is any mention of the standard of causation. Accordingly, the decisions of this Court in the first few decades after FELA's enactment—decisions the Court below acknowledged have never been overruled—clearly articulated a traditional standard of causation that cannot be squared with the so-

---

[8] As in any negligence action, causation is a fundamental issue in litigation arising under FELA. *See e.g., Adams v. CSX Transp., Inc.*, 899 F.2d 536, 539 (6th Cir. 1990) (a FELA plaintiff must "prove the traditional common law elements of negligence: duty, breach, foreseeability, and causation").

called "relaxed" standard that some lower courts apply today. *E.g., Davis v. Wolfe supra; see also, Lang v. N.Y. Cent. R.R.*, 255 U.S. 455, 461 (1921); *St. Louis-S.F. Ry. v. Mills*, 271 U.S. 344, 347 (1926); *Northwestern Pac. R.R. v. Bobo*, 290 U.S. 499, 503 (1934).

Because Congress has made no change to the relevant language of FELA since 1908, there simply is no basis to support the assertion that the concept of proximate cause has broadened over the years since FELA was enacted. Important amendments to FELA were enacted in 1939, and some courts have asserted that *Rogers*' purported introduction of a relaxed causation standard was to conform to those amendments. *E.g., Richards*, 330 F.3d at 434; *Morrison v. N.Y. Cent. R.R.*, 361 F.2d 319, 320 (6th Cir. 1966). However, review of those amendments gives lie to that rationale.

Rogers does briefly reference the 1939 amendments, 352 U.S. at 509-10, but never suggests that they required a reexamination of the causation standard under FELA, for the simple reason that they did not. The 1939 amendments were primarily intended to ease the path toward recovery by FELA plaintiffs by modifying aspects of the statute that had served to prevent injured employees from recovering, either because they could not meet the strict test of interstate commerce[9] or because the employer successfully argued that the employee had assumed the risks inherent in the employment. However, the

---

[9] In order to recover, "the employee, at the time of the injury," had to be "engaged in interstate transportation, or in work so closely related to it as to be practically a part of it." *Shanks v. Delaware, Lackwanna & Western R.R.*, 239 U.S. 556, 558 (1916).

1939 amendments did not purport to address, let alone modify, the standard of causation.

Adding a provision to section 1 of FELA, the 1939 amendments expanded the scope of FELA's coverage so that workers would no longer have to prove they were engaged directly in interstate commerce at the time they were injured in order to come within the scope of FELA's coverage. Act of Aug. 11, 1939, c. 685, §1, 53 Stat. 1404; *see* S. Rep. No. 661, at 2-3 (1939); *see Southern Pac. Co. v. Gileo*, 351 U.S. 493 (1956); *Reed v. Pennsylvania R.R.*, 351 U.S. 502 (1956). In addition, in 1939, Congress amended FELA to eliminate the defense of assumption of the risk in all cases. Act of Aug. 11, 1939, at §1. The 1939 amendments also increased the statute of limitations under FELA from two to three years, *id.* at §2, and prohibited railroads from establishing and enforcing rules which penalized employees for giving information concerning an accident to the injured person or his representative. *Id.* at §3. Thus, the 1939 amendments provide no basis for incorporating into FELA a standard of causation that differs from what Congress intended in 1908. Indeed, a few years after enactment of the 1939 amendments, this Court described the "proximate cause" standard applicable in FELA cases as requiring a finding "that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances," adding that "[e]vents too remote to require reasonable prevision need not be anticipated." *Brady v. Southern Ry. Co.*, 320 U.S. 476, 483 (1943).

D. While the Reasoning of This Court's *Sorrell* Decision Appears to Support a Proximate Causation Standard, Uncertainty Continues in the Lower Courts That Can be Resolved Only By a Definitive Ruling By This Court

Rather than repudiate *Brady* and dozens of other prior decisions, as the Petition explains, quoting Justice Souter, *Rogers* is "'no authority for anything less than proximate cause in an action under FELA.' *Sorrell*, 549 U.S. at 177." [Pet. at 20] In *Sorrell,* this Court held that the causation standard for employee contributory negligence was equivalent to the standard for employer negligence, 549 U.S. at 171, but did not specifically identify the proper standard of causation. While this Court's analysis in *Sorrell* suggests support for its earlier decisions in *Davis* and *Brady*—that Congress intended to incorporate common law proximate cause into FELA—*Sorrell* appears to have led to greater uncertainty in the lower courts.

This Court based its *Sorrell* decision in part on the fact that under common law the same standard of causation applied to both employer and employee negligence, which, it explained, was "strong evidence against Missouri's disparate standards." *Id.* at 168. Thus, *Sorrell* was grounded in the well established rule that except where Congress expressly altered the common law, FELA is to be interpreted in accordance with common law principles. *Gottshall*, 512 U.S. at 544; *Metro-North Comm. R.R. v. Buckley*, 521 U.S. 424, 429 (1997). As with the principle of equivalence of standards, proximate cause also was the common law rule when FELA was enacted. It would be curious indeed to hold that Congress adopted the

common law rule of equivalence, but at the same time rejected the equally entrenched common law rule of proximate cause. Certainly, there is no statutory basis for such a conclusion.

In *Sorrell*, the plaintiff argued that use of the term "in whole or in part," in section 1 of FELA, but not in section 3, signaled that each section incorporated a different standard of causation, with section 1, which addresses employer negligence, calling for a more relaxed standard. *See* 45 U.S.C. §§51, 53. This Court rejected that argument. *Sorrell* instead confirmed that the "in whole or in part" language—the alleged statutory basis for the elimination of proximate cause—simply is descriptive of FELA's comparative negligence standard, under which the employer's negligence need not be the sole cause of an injury for the employer to be liable for damages (albeit damages reduced to the extent the employee's negligence also contributes to the injury). 549 U.S. at 170-71. Indeed, the Court below acknowledged that had *Sorrell* "reached the substantive issue, at least some members of the majority may have been sympathetic to Justice Souter's view." 598 F.3d at 405.

Notwithstanding the reasoning of *Sorrell*, and Justice Souter's concurring opinion, critiquing with "considerable force" the cases suggesting that FELA has abolished proximate cause, *id.* at 404, it is clear that uncertainty over the proper standard of causation will continue among lower courts. *See e.g., Mills v. CSX Transp., Inc.* 2009 WL 4547685, at *5, n. 4 (Tenn. 2009) ("It is not entirely clear which standard of causation *Rogers* applies to FELA cases—the common law standard or a relaxed standard."); *Montgomery v. CSX Transp., Inc.,* 656 S.E.2d 20, 27 (S.C. 2008) ("[T]he *Sorrell* Court did not establish

precisely what the FELA standard for causation is."); *Hall v. Norfolk Southern Ry. Co.*, 2007 WL 2765540, at *6, n.2 (N.D.Ga. 2007) ("With respect for [sic] a standard of causation, the Supreme Court continues to debate the precise contours of its holding in *Rogers*.") Echoing this confusion, the Kentucky Supreme Court recently observed that "[t]he [U.S.] Supreme Court has yet to state clearly whether *Coray*, *Carter*, and *Rogers* altered the common-law proximate cause standard." *CSX Transp., Inc. v. Begley*, 313 S.W.3d 52, 62 (Ky. 2010).

Though *Sorrell* has ignited debate over the meaning of *Rogers,* and the proper standard of causation under FELA, like the court below, some lower courts erroneously continue to view *Rogers* as precedent for the abandonment of proximate cause in FELA cases. *E.g., Medwig v. Long Island R.R.*, 2007 WL 1659201, at *3-*4 (S.D.N.Y. 2007) (adhering to Second Circuit precedent interpreting *Rogers* as countenancing a relaxed standard of both causation and negligence in FELA cases, finding that *Sorrell* did not overrule that precedent). Others do not. *See Raab v. Utah Ry.*, 221 P.3d 219, 288-29 (Utah 2009) (notion that *Rogers* "'definitively abandoned' the requirement that a FELA plaintiff show proximate cause" is "not mandated by the Supreme Court's statement in *Rogers*").

The "relaxed" standard of causation that has become entrenched in many jurisdictions will continue to affect the outcome of numerous FELA cases. Several thousand FELA lawsuits are filed each year. Other than in the occasional case where the railroad defendant admits liability, causation is an element of the plaintiff's case in each such lawsuit. In those cases where the court applies a

relaxed standard of causation FELA takes on the character of an insurance program, no longer resembling the statute Congress enacted in 1908. *See Gottshall*, 512 U.S. at 543 ("FELA 'does not make the employer the insurer of the safety of his employees while they are on duty.'")

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

LOUIS P. WARCHOT
DANIEL SAPHIRE *
ASSOCIATION OF AMERICAN RAILROADS
425 3rd Street, S.W.
Washington, D.C. 20024
(202) 639-2505
DSaphire@aar.org

September 17, 2010

* Counsel of Record

Counsel for Amicus

Blank Page