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

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER[1]

As the petition explains, review is warranted because (1) FELA requires proof of proximate causation; (2) the lower courts are divided on the issue; (3) the question is a recurring one of great importance; and (4) this case is an ideal vehicle for deciding it, because a properly instructed jury readily could find that McBride's injury was not proximately caused by CSXT's negligence. McBride does not deny that a determination that FELA requires proximate cause would necessitate a new trial. He explicitly concedes that the issue "is a matter of exceptional importance." Opp. 37. He does not dispute that there is a conflict among the lower courts, contending only that the courts that disagree with the Seventh Circuit are mistaken. Opp. 25-26. And while he argues at length that FELA does not require proximate causation, Opp. 6-15, 28-37, his merits arguments are unpersuasive and, in any event, provide no reason to deny certiorari on an important question that has divided the lower courts in a case that squarely presents it. That leaves only McBride's transparent attempt to manufacture mootness. Opp. 4-6. The case is not moot, because, contrary to McBride's assertion, CSXT did not settle the case but merely paid the judgment, and a party does not forfeit the right to further review by doing so.

A. The Case Is Not Moot

After the Seventh Circuit issued its decision and denied rehearing en banc, CSXT moved that court to stay issuance of the mandate pending the filing and

[1] The Rule 29.6 Statement in the petition remains accurate.

disposition of a petition for certiorari. On June 24, 2010, the court denied the motion. *McBride* v. *CSX Transp., Inc.*, 611 F.3d 316 (7th Cir. 2010) (Ripple, J., in chambers). Six days later, CSXT paid the judgment. Opp. App. 3. As this Court has made clear in a "familiar line of cases," paying a judgment does not render a case moot, because "money paid involuntarily pursuant to a judgment can be recovered" if the judgment is reversed. *Graddick* v. *Newman*, 453 U.S. 928, 945 n.* (1981) (opinion of Rehnquist, J.); see, *e.g.*, *Cahill* v. *New York, New Haven & Hartford R.R.*, 351 U.S. 183, 184 (1956) (per curiam); *Dakota County* v. *Glidden*, 113 U.S. 222, 224 (1885).

McBride does not contend otherwise. He argues that the case is moot, not because CSXT paid the judgment, but because it "settled the case" and the "settlement *** ended the controversy *** and constituted a surrender of the railroad's right to further review." Opp. 5-6. But CSXT did not settle the case, and no reasonable person could believe that it did.

McBride's position depends on three words—"settlement of judgement"—handwritten on the check with which the judgment was paid. One of the meanings of "settlement," however, is "[p]ayment" or "satisfaction," BLACK'S LAW DICTIONARY 1497 (9th ed. 2009), and it manifestly has that meaning in this context.

McBride bears the burden of establishing mootness. *Cardinal Chem. Co.* v. *Morton Int'l, Inc.*, 508 U.S. 83, 98 (1993). Yet he does not claim that the parties engaged in any post-judgment settlement discussions, entered into any settlement agreement, or compromised the judgment in any way. And for good reason, because they did not. Indeed, McBride concedes that CSXT paid "all of the money due him

under the judgment," Opp. 1, and so received nothing in return.[2] "A compromise and settlement requires an offer and acceptance[] [and] consideration," *Piver* v. *Pender County Bd. of Educ.*, 835 F.2d 1076, 1083 (4th Cir. 1987); all are lacking here. Beyond this, McBride omits to mention that CSXT had previously made clear its intent to file a petition for certiorari in moving to stay the mandate—which is obviously inconsistent with any intent to settle the case.

Under these circumstances, CSXT cannot have forfeited its right to file a petition for certiorari simply because, in paying the judgment in full, it issued a check on which its employee handwrote the notation "settlement of judgment" rather than "satisfaction of judgment." Cf. *United States* v. *Hougham*, 364 U.S. 310, 312-313 (1960) (finding it "wholly untenable," based on all the circumstances, that plaintiff-petitioner settled the case, and therefore mooted it, rather than having merely accepted payment of the judgment).

McBride does not contend that the notice of dismissal he filed in the district court, Opp. App. 4-5, independently renders the case moot. Nor could he, because a plaintiff may not dismiss a case unilaterally after the judgment has been entered and paid, see Fed. R. Civ. P. 41(a)—a prohibition that prevents "voluntary dismissals which unfairly affect the other side," *Paulucci* v. *City of Duluth*, 826 F.2d 780, 782 (8th Cir. 1987). Instead, a plaintiff's dismissal at this late stage requires either a "stipulation of dis-

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[2] The $293.91 discrepancy between the amount of the judgment ($184,250) and the amount of the payment ($183,956.09) is attributable to the addition of costs and interest and the deduction of the amount of a Railroad Retirement Board lien.

missal signed by all parties" or a "court order" following "the plaintiff's motion to dismiss." Fed. R. Civ. P. 41(a). There was no stipulation here, and McBride neither filed a motion nor obtained an order. See Dkt. in *McBride* v. *CSX Transp., Inc.*, No. 3:06-cv-01017 (S.D. Ill.).

This Court has an "interest in preventing litigants from attempting to manipulate the Court's jurisdiction to insulate a favorable decision from review." *City of Erie* v. *Pap's A.M.*, 529 U.S. 277, 288 (2000). For that reason, too, McBride's mischaracterization of the payment should be rejected, not rewarded with a denial of certiorari.

B. The Lower Courts Are Divided On Whether FELA Requires Proximate Causation

Six Circuits and two state courts of last resort have concluded that a FELA plaintiff need not prove proximate causation, while at least one Circuit and eight state courts of last resort have reached the opposite conclusion. See Pet. 23 & nn.5-6. Federal district courts and intermediate appellate courts are likewise divided on the question. See Pet. 24 & n.7. Pattern instructions also differ on the issue, as do instructions that have been given in particular cases. See Pet. 25; see also *Lowe* v. *CSX Transp., Inc.*, No. CT-000474-07 (Cir. Ct. Shelby County, Tenn. Oct. 7, 2010) (giving proximate-cause instruction that district court refused to give here).

Like the court of appeals, McBride quibbles with our description of which courts should go in which column. Opp. 15-27. The petition explains why our tally is correct. Pet. 27 n.8. But even if there is a basis for reasonable disagreement about precisely

how the lower courts are divided, ultimately McBride neither can nor does dispute that there is in fact a conflict.

Take *Raab* v. *Utah Railway*, 221 P.3d 219 (Utah 2009), for example. The Utah Supreme Court there held that FELA requires proximate cause, agreeing with the three-Justice concurrence in *Norfolk Southern Railway* v. *Sorrell*, 549 U.S. 158 (2007), and disagreeing with the Tenth Circuit, in which the State of Utah is located. Six months later, the Seventh Circuit decided this case. It provided an equally comprehensive treatment of the subject but reached the opposite conclusion, effectively agreeing with Justice Ginsburg's concurrence in *Sorrell*. McBride does not deny that there is a square conflict between *Raab* and the decision below. He simply argues that the decision below is correct and *Raab* erroneous—the latter reflecting, according to him, an "aberrant analysis" and "inappropriate repudiation of binding authority." Opp. 26.

Or take the Iowa Supreme Court's decision in *Snipes* v. *Chicago, Central & Pacific Railroad*, 484 N.W.2d 162, 164 (Iowa 1992), which concluded that FELA requires proof that the employer's negligence "proximately caused, in whole or in part," the employee's injury. McBride does not deny that, in light of the decision below, a railroad sued in state court in Iowa will be entitled to a proximate-cause instruction, while a railroad sued in federal court across the border in Illinois or Wisconsin will not. He asserts, instead, that *Snipes* wrongly relied on *Tennant* v. *Peoria & Pekin Union Railway*, 321 U.S. 29 (1944), which requires proximate causation, see Pet. 16-17, rather than on *Rogers* v. *Missouri Pacific Railroad*,

352 U.S. 500 (1957), which McBride understands to have abrogated it. Opp. 26.

A respondent's argument that the decision below is correct, while decisions of lower courts that reach the opposite conclusion are wrong, may be a basis for affirming the decision below at the merits stage, if the Court finds the argument persuasive. But it is not a reason to deny certiorari at the petition stage. Quite the contrary. See Sup. Ct. R. 10(a). Indeed, this Court's review is particularly warranted because McBride's merits arguments are *not* persuasive.

C. FELA Requires Proximate Causation

1. a. McBride does not dispute that FELA incorporates common-law principles unless it explicitly provides otherwise, and he does not deny that proximate cause is a bedrock principle of common-law negligence. He does contend, however, that FELA abrogates that principle. Without any citation of authority, and without any analysis of the text, McBride argues that "[t]he phrase 'in whole or in part'" in the Act "was designed to make it clear that negligence of an employer need not be either the sole *or the proximate cause* of injury in order for a worker to recover." Opp. 6-7 (emphasis added).

That is not correct. The phrase instead makes clear, as this Court has put it, that "there could be recovery against the railroad even if it were only partially negligent." *Sorrell*, 549 U.S. at 170. It authorizes recovery, in other words, when the railroad's negligence is *one of the causes* of the employee's injury—either the "whole" cause or a "part[ial]" cause. The language does not address the requisite *directness* of a cause, an issue that, under the established

methodology, is therefore governed by the common law.

Quoting *Coray* v. *Southern Pacific Co.*, 335 U.S. 520, 524 (1949), McBride claims that CSXT's reading of "in whole or in part" introduces unwarranted "dialectical subtleties" into the Act. Opp. 7. But *Coray* is a curious choice of authority, inasmuch as it permitted recovery when defective equipment was "the sole or a contributory *proximate cause*" of the employee's death. *Coray*, 335 U.S. at 523 (emphasis added). That is the standard that CSXT advocates.

McBride also asserts that CSXT's interpretation somehow "disable[s]" the statutory phrase "in whole or in part" in certain cases. Opp. 33. To the contrary, the disjunctive language simply makes clear that an employee may recover whenever a jury finds *either* that the railroad's negligence was the sole cause of the injury ("in whole") *or* that it was one of multiple causes of the injury ("in part"). The language hardly compels the conclusion that FELA abrogates proximate causation. If it did, *Tennant* would not have said that the railroad's negligence must be the "proximate cause in whole or in part" of the employee's injury. 321 U.S. at 32.

b. McBride's principal argument is based, not on FELA's text, but on its post-enactment legislative history. He contends that the rejection, in the late 1930s, of an amendment that would have used the term "proximate cause" shows that Congress did not intend proximate cause to be the standard. Opp. 6-7, 33-34. But "failed legislative proposals are a particularly dangerous ground on which to rest an interpretation," because "several equally tenable inferences may be drawn from [congressional] inaction, includ-

ing the inference that the existing legislation already incorporated the offered change." *United States* v. *Craft*, 535 U.S. 274, 287 (2002) (internal quotation marks omitted). That inference is warranted here. Because this Court had consistently interpreted FELA to require proximate cause, see Pet. 16-17 & n.3, the most likely explanation for Congress's decision not to use the term "proximate cause" in the final bill is that it was unnecessary. Indeed, a union representative testified that the language would be "pure surplusage, because unless the negligence proximately caused the injury there can be no recovery." *Hearings on H.R. 4988 and H.R. 4989 Before the H. Comm. on the Judiciary*, 76th Cong. 5 (1939) (statement of general counsel of Brotherhood of Railroad Trainmen).

Insofar as any legislative history bears upon the question, it shows that the Congress that enacted FELA intended it to abrogate the common law in only "four *** particulars." S. Rep. No. 60-460, at 1 (1908); accord H.R. Rep. No. 60-1386, at 1 (1908). None has anything to do with proximate causation. See Pet. 15.

c. McBride also contends that FELA cannot require proximate causation because "Congress intended [the Act] to be given the liberal interpretation commonly afforded remedial legislation." Opp. 36. But the very same theory was advanced in *Sorrell*, and the Court was "not persuaded." 549 U.S. at 171.

While acknowledging that FELA "was indeed enacted to benefit railroad employees"—"as the express abrogation of [certain] common-law defenses *** make[s] clear"—the Court explained that it nevertheless "does not follow *** that this remedial pur-

pose requires [the Court] to interpret every uncertainty in the Act in favor of employees." *Sorrell*, 549 U.S. at 171. The Court went on to say that "FELA's text does not support the proposition that Congress meant to take the unusual step of applying different causation standards" to the plaintiff and the defendant and that "the statute's remedial purpose cannot compensate for the lack of a statutory basis." *Ibid.* The Court therefore held that "FELA does not abrogate the common-law approach." *Ibid.* So too here.

2. a. Like the lower-court decisions with which he agrees, McBride places heavy reliance on *Rogers*. Opp. 9-10. But he does not deny that, before *Rogers*, this Court repeatedly held that FELA requires proof of proximate causation, see Pet. 16-17 & n.3, and he does not challenge our characterization of those decisions. His only response is that they "are of no relevance," because "*Rogers* made it clear that such cases could not have been correct." Opp. 10 n.1. McBride's position thus reduces to the claim that *Rogers* not only overruled at least 15 of this Court's decisions, but overruled them without saying (or even suggesting) that it was doing so—and, indeed, that it overruled the decisions even as it was citing a number of them with approval, see Pet. 20.

Such an understanding of *Rogers* is highly implausible, to put it mildly. An overruling by implication, like a repeal by implication, is disfavored. That is especially true when, as in this case, the precedent is long-settled, has been repeatedly reaffirmed, and involves an issue of statutory interpretation, where, as McBride himself acknowledges, Opp. 28-29, *stare decisis* considerations are strongest. See, *e.g.*, *IBP, Inc.* v. *Alvarez*, 546 U.S. 21, 32 (2005). If at all possible, therefore, *Rogers* must be interpreted in a man-

ner consistent with this Court's prior decisions. *Cf. Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 98 (1998) (finding it "clear" that a decision "was not meant to overrule, *sub silentio*, two centuries of jurisprudence"). As three Justices explained in *Sorrell*, an interpretation of *Rogers* that is consistent with the Court's prior decisions on proximate causation is not only possible but correct. See Pet. 18-21.

McBride disagrees. According to him, *Rogers* "held *** that the proximate cause standard was not the correct test for employer liability under the FELA." Opp. 10. But the language in *Rogers* on which he relies is that "the test of a jury case" is "whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury." *Ibid.* (quoting *Rogers*, 352 U.S. at 506). That language concerns multiple—not proximate—causation, see *Sorrell*, 549 U.S. at 175 (Souter, J., concurring), a fact confirmed by the sentence that immediately follows (and that McBride omits): "It does not matter that *** the jury may also *** attribute the result to *other causes*, including the employee's contributory negligence." *Rogers*, 352 U.S. at 506 (emphasis added).

b. McBride also contends that this Court has "reaffirmed" post-*Rogers* that "proximate cause is not appropriate under FELA." Opp. 10. But the cases on which he relies, Opp. 10-15, are entirely consistent with the long line of decisions recognizing and applying the requirement of proximate cause.

Most of the cases did not involve causation at all. *Sinkler* v. *Missouri Pacific Railroad*, 356 U.S. 326 (1958), decided whether a contractor was an "agent" of the railroad under FELA. *Crane* v. *Cedar Rapids & Iowa City Railway*, 395 U.S. 164 (1969), deter-

mined whether a State could make the defense of contributory negligence available to a railroad sued by a non-employee under the common law. *Consolidated Rail Corp.* v. *Gottshall*, 512 U.S. 532 (1994), addressed the proper standard for negligent infliction of emotional distress. And *Norfolk & Western Railway* v. *Ayers*, 538 U.S. 135 (2003), considered whether FELA permits recovery for a fear of cancer and authorizes joint and several liability.

The two other cases cited by McBride did involve causation, but they held only that there was sufficient evidence that the railroad's negligence was a cause of the employee's injury. See *Gallick* v. *Baltimore & Ohio R.R.*, 372 U.S. 108, 113–117 (1963); *Dennis* v. *Denver & Rio Grande W. R.R.*, 375 U.S. 208, 210 (1963) (per curiam). Neither decision called into question the requirement that the cause be a proximate one. Indeed, in both cases—as in *Rogers*—the jury was instructed that it must be. See *Gallick*, 372 U.S. at 111; *Dennis*, 375 U.S. at 211 n.* (Douglas, J., dissenting).

In discussing *Crane* and *Gottshall*, McBride highlights their dicta on causation. Opp. 11-12. But the dicta are consistent with the proper understanding of *Rogers—i.e.*, that FELA rejects any requirement of *sole* proximate causation. See Pet. 21-22. McBride also argues that the dicta are entitled to *stare decisis* respect. Opp. 12-13. But that is obviously not true; "a formula repeated in dictum but never the basis for judgment is not owed *stare decisis* weight." *Gonzalez* v. *United States*, 553 U.S. 242, 256 (2008). In any event, any conflict between pre-*Rogers* holdings and post-*Rogers* dicta is a reason to grant certiorari, not to deny it.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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