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

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the petition should be dismissed pursuant to the mootness doctrine because the petitioner and respondent have settled their controversy.

2. Whether the causation standard recognized in *Rogers v. Missouri Pacific Railroad Co.*, 352 U.S. 500 (1957), for claims asserted under the Federal Employers' Liability Act, 45 U.S.C. §§ 51-60, is incorrect.

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STATEMENT OF THE CASE

The facts and procedural history of the case through the date of decision by the Court of Appeals are stated thoroughly in the opinion of that Court. *McBride v. CSX Transportation, Inc.,* 598 F.3d 388, 389-91 (7th Cir. 2010).

The Court of Appeals decided this appeal on March 16, 2010. *Id.* It denied the railroad's petition for rehearing *en banc* on June 3, 2010. App. at 1. No judge voted for rehearing. *Id.* On June 30, 2010, CSX Transportation, Inc., settled the judgment and paid Robert McBride all of the money due him under the judgment from which the appeal had been taken. App. at 3. The face of the railroad's check bears the following memorandum: "Settlement of Judgement for an on duty injury on or about April 12, 2004, at or near Mt. Vernon." *Id.*

Mr. McBride filed a Notice of Settlement and Dismissal in the District Court on July 16, 2010. App. at 4. The notice was filed through the District Court's electronic filing system and served upon counsel for the parties by that system. *Id.* CSX did not object or otherwise respond to that filing. Pursuant to the District Court's local rules, Mr. McBride also submitted a proposed order of dismissal to the Court as an attachment to an email message. App. at 5. On July 19, 2010, the Clerk of the District Court sent an email message advising counsel for both parties that the "notice of voluntary dismissal . . . is self-effectuating," that no further order would be entered by the Court,

and that "the Clerk's office has been advised to close the file." App. at 7.

CSX filed its petition for a writ of certiorari in this Court on August 18, 2010.

REASONS FOR DENYING THE WRIT

1. The petition should be denied because the parties' settlement rendered the underlying judgment moot. Article III of the Constitution posits the existence of an actual controversy as a condition of federal court jurisdiction. The issues in this case are no longer "live" between the parties and the litigation should be terminated. *United States Parole Commission of Geraghty,* 445 U.S. 388, 395 (1980).

2. There is no need to revisit the causation standard under FELA. This Court ruled more than 50 years ago that "the language of proximate causation" is not the appropriate causation standard under the FELA. *Rogers v. Missouri Pacific Railroad Co.,* 352 U.S. 500, 448-49 (1957). There was nothing revolutionary in *Rogers'* assessment of FELA causation. Section 1 of the Act states that the employer is liable for a worker's injury "resulting in whole or in part from [its] negligence." 45 U.S.C. § 51. *Rogers* recognized that Congress had rejected proximate cause, under which "the defendant's negligence [must be] the sole, efficient, producing cause of injury," in favor of a relaxed causation standard:

> Under this statute the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought.

352 U.S. at 506. That relaxed causation standard has been reiterated by this Court several times and followed by every federal circuit and most state appellate courts. *See* discussion, *infra,* at 8-24.

CSX begins its argument by claiming that in *Norfolk Southern Railway v. Sorrell,* 549 U.S. 158 (2007), the Court "reserved" and "left open" the question of whether the causation standard under FELA is proximate cause, and that certiorari should be granted in this case "to resolve [that question], once and for all." (Pet. Cert. at 13.) That characterization of the principal *Sorrell* opinion suggests that the Court perceived a need to revisit the issue of FELA causation. The railroad's argument also raises the specter that the FELA causation standard somehow lacks repose 53 years after the opinion that thoroughly analyzed and explained it.

That is not what happened in *Sorrell.* Nor is there a need to resolve anew the intent of Congress with respect to FELA causation. Rather, the Court in *Sorrell* noted the railroad's attempt to "smuggle" the issue into the case and cashiered that ploy. Nothing in the principal opinion hints at an intention or need to revisit the causation standard that the Court had recognized in FELA half a century earlier. Nor does

the reasoning of Justice Souter's concurrence in that case warrant reconsideration or abandonment of the causation analysis that has governed FELA claims since *Rogers* was decided.

A. The case was rendered moot by the parties' settlement and there is no longer a justiciable controversy

"Article III of the Constitution limits federal 'Judicial Power,' that is, federal court jurisdiction, to 'Cases' and 'Controversies.'" *Geraghty,* 445 U.S. at 395. That limitation serves two purposes: (1) restricting federal courts to matters "presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process," and (2) defining the role of the judiciary within the "tripartite allocation of power" to preclude courts from intruding into areas reserved for the executive and legislative branches. *Id.* at 395-96 (quoting *Flast v. Cohen,* 392 U.S. 83, 95 (1968)). The mootness doctrine that has arisen under Article III requires that the parties continue to have a "personal interest" sufficient to assure adversarial presentation of the issues throughout the course of the litigation. *Id.* at 397. Thus a case becomes moot under Article III "when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Id.* at 396 (quoting *Powell v. McCormack,* 395 U.S. 486, 496 (1969)).

After the Court of Appeals had rendered its decision and denied the railroad's petition for rehearing, CSX settled the case and paid Mr. McBride the money he was due under the judgment. App. at 3. The face of the check bears the following handwritten memorandum: "Settlement of Judgement for an on duty injury on or about April 12, 2004, at or near Mt. Vernon." *Id.* Mr. McBride then notified the District Court that the matter had been settled and his case was dismissed. App. at 4. The principal legal issue in this case arose from disagreement regarding the proper method of instructing the jury with respect to causation; the controversy consisted in Mr. McBride's claim for damages caused by the railroad's negligence and the railroad's denial of liability. The parties' settlement terminated the controversy.

A losing party who settles a dispute "has voluntarily forfeited his legal remedy by the ordinary processes of appeal or certiorari." *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership,* 513 U.S. 18, 25 (1994). The issues in this case "are no longer live." *Geraghty* found that the controversy was still live between the petitioners and at least some members of the putative class of respondents. 455 U.S. at 396-97. CSX and Mr. McBride are the only litigants in this case. In contrast to the circumstances that this Court found in *Geraghty,* the controversy between these parties is over. "'If a judgment has become moot [while awaiting review], this Court may not consider its merits, but may make such disposition of the whole case as justice may require.'" *Bonner Mall,* 513

U.S. at 21-22 (1994) (quoting *Walling v. James V. Reuter Co., Inc.* 321 U.S. 671, 677 (1944)).

The causation issue raised by the railroad in the present petition has become moot. The petition should be denied because CSX's settlement of its obligation under the judgment of the District Court ended the controversy between these parties and constituted a surrender of the railroad's right to further review.

B. The legislative history of the FELA makes clear that proximate cause is not the proper test for causation in cases arising under the Act.

This Court looks first to congressional intent in construing a statute. *American Tobacco Co. v. Patterson,* 456 U.S. 63, 68 (1982). It "assume[s] 'that the legislative purpose is expressed by the ordinary meaning of the words used.'" *Id.* "Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive." *Consumer Product Safety Commission v. GTE Sylvania, Inc.,* 447 U.S. 102, 108 (1982).

Although FELA does not mention proximate cause expressly, Congress did address the issue of causation. It deliberately adopted a negligence standard different from the common law. The phrase "in whole or in part" 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. The language adopted in 45 U.S.C. §§ 51 and 54 was not consonant with a proximate cause standard for recovery. Rather, Congress imposed another standard – causation "in whole or in part" – that by its terms did not depend upon the presence or absence of other possible causes for the recognition of employer liability. As the Court has recognized: "[T]he language selected by Congress to fix liability in cases of this kind is simple and direct. Consideration of its meaning by the introduction of dialectical subleties can serve no useful purpose." *Coray v. Southern Pacific Co.*, 335 U.S. 520, 524 (1949).

In 1938 and 1939 Congress considered an amendment to the FELA that would have introduced a proximate cause standard into § 54, the provision covering assumption of risk. H.R. Rep. 2153, 75th Cong., 3d Sess. 1 (1938). The proposed amendment provided:

> In any action brought against any common carrier . . . such employee shall not be held to have assumed the risks of his employment in any case where . . . the negligence of such common carrier, its officers, agents, or employees, proximately contributed to the injury or death of such employees.

The House attempted to add the words "proximate cause," which had not been included in the version of the bill passed by the Senate. 42 Cong. Rec. 10,709-10 (1939). The phrase "proximate cause" was stripped from the House version in the conference committee

in favor of the Senate bill. *See* Act of Cong., August 11, 1939, Chapter 685, 53 Stat. 1404.

The language adopted in the 1939 amendment of FELA has remained unchanged for more than 70 years. Congress is presumed to be aware of this Court's interpretation of a statute, *Lorillard v. Pons,* 434 U.S. 575, 580-81 (1978), and has taken no action to alter the causation standard recognized in *Rogers.* Moreover, Congress has rebuffed the railroad industry's repeated attempts to have the Act repealed. *See, e.g., Federal Employers' Liability Act: Hearing Before the Subcommittee on Transportation and Hazardous Materials of the House Committee on Energy and Commerce,* 101st Cong., 1st Sess. (1989); *Railroad Safety Programs: Hearings Before the Subcommittee on Transportation and Hazardous Materials of the House Committee on Energy and Commerce,* 102nd Cong., 1st Sess. 178-80 (1991); *The Impact of Railroad Injury, Accident and Discipline Policies on the Safety of American Railroads: Hearing Before the House Committee on Transportation and Infrastructure,* 110th Cong., 1st Sess. 238, 243-46 (Oct. 25, 2007) (statement of Edward Hamberger, President and Chief Executive Officer, American Association of Railroads).

C. For more than 50 years this Court and others have interpreted FELA as not requiring a plaintiff to establish proximate cause

Rogers recognized that FELA "was enacted because the Congress was dissatisfied with the common-law duty of the master to his servant," and that the statute "supplant[ed] that duty with the far more drastic duty of paying damages for injury . . . at work due in whole or in part to the employer's negligence." 352 U.S. at 507. *Rogers* tied the relaxed causation threshold to a specific legislative purpose of getting the claims of injured railroad workers to juries:

> The Congress when adopting the law was particularly concerned that the issues whether there was employer fault and whether that fault played any part in the injury . . . of the employee should be decided by the jury whenever fair-minded men could reach these conclusions on the evidence.

Id. at 508.

The state court ruling that gave rise to *Rogers* had held that in order for a railroad's negligence to be actionable under the FELA, "there must not only be a causal connection so that the injury would not have occurred but for the negligence, but such negligence must also be a proximate (legal) cause of the injury." *Rogers v. Missouri Pacific Railroad Co.,* 284 S.W.2d 467, 471 (Mo. 1955). This Court stated that it had granted certiorari in *Rogers* "to prevent [the Act's] erosion by narrow and niggardly construction." 352

U.S. at 509. The Court chastised the state tribunal "for fail[ing] to take into account the special features of this statutory negligence action that make it significantly different from the ordinary common law negligence action." *Id.* at 509-10. And the Court held in particular that the proximate cause standard was not the correct test for employer liability under the FELA:

> Under the FELA the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury . . . for which damages are sought.

Id.

The Court has reaffirmed that proximate cause is not appropriate under FELA in subsequent opinions.[1] In *Gallick v. Baltimore & Ohio Railroad Co.*, 372 U.S. 108 (1963), where an employee was bitten by an insect while working near a stagnant pool, the Court quoted at length from *Rogers* and held that negligence could be found if the railroad had played any role in producing the harm. *Id.* at 116-17. The Court concluded that there can be a jury question of causation when there is "evidence that any employer

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[1] The railroad attempts to take comfort from pre-*Rogers* decisions. Appellant's Br. at 28-31. These cases are of no relevance here, because *Rogers* made it clear that such cases could not have been correct in their interpretation of the statutory phrase "in whole or in part." 352 U.S. at 507-08.

negligence caused the harm, or, more precisely, enough to justify a jury's determination that employer negligence had played any role in producing the harm." *Id.* at 116.

Soon after, in *Dennis v. Denver & R. G. W. Railroad Co.,* 375 U.S. 208 (1963), where a railroad worker lost two fingers to frostbite and sought recovery based on negligent supervision of his working conditions, the Court quoted *Rogers* for the proposition that a railroad employer is subject to liability "[o]nce it is shown that 'employer negligence played any part, even the slightest, in producing the injury.'" *Id.* at 210 (quoting *Rogers,* 352 U.S. at 506).

In *Crane v. Cedar Rapids & Iowa City Railway Co.,* 395 U.S. 164 (1969), a FELA case arising from a violation of the Safety Appliance Act of 1893, 45 U.S.C. § 2, the Court cited *Rogers* as part of the authority for a causation standard that does not require a finding of proximate cause. *Id.* at 166. *Crane* stated specifically that a plaintiff proceeding under the FELA "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 (quoting 45 U.S.C. § 51).

In *Consolidated Rail Corporation v. Gottshall,* 512 U.S. 532 (1994), the Court acknowledged its history of construing the FELA "liberally . . . to further Congress' remedial goal." *Id.* at 543. As an example of that practice, *Gottshall* noted the Court's

determination in *Rogers* "that a relaxed standard of causation applies under FELA." *Id.* The Court reiterated its ruling that "'[u]nder this statute the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought.'" *Id.* (quoting *Rogers,* 352 U.S. at 506).

In *Norfolk & Western Railway Co. v. Ayers*, 538 U.S. 135 (2003), six former railroad workers suffering from asbestosis sought recovery under the FELA and the railroad sought to avoid or limit liability for their condition. 538 U.S. at 140-41. Observing that the company's argument for reading a limitation of railroad liability into the statute "asks us to narrow employer liability without a textual warrant [and] . . . also runs counter to a century of FELA jurisprudence," the Court recalled its analysis of the Act in *Rogers* as authority for rejecting the employer's request for judicial narrowing of Congress' language: "In *Rogers,* we described as 'irrelevant' the question 'whether the immediate reason' for an employee's injury was the proven negligence of the defendant railroad or 'some cause not identified from the evidence.'" 538 U.S. at 161-62 (quoting *Rogers,* 352 U.S. at 503).

The railroad dismisses both *Crane's* and *Gottshall's* reiteration of the *Rogers* language rejecting a proximate cause standard as "dictum." (Pet. Cert. at 21-22.) Principles of law incorporated into this Court's opinions, even as dictum, are not to be disregarded as

random thoughts or extraneous notions. In a separate opinion in *County of Allegheny v. American Civil Liberties Union,* 492 U.S. 573 (1989), joined by the Chief Justice and two other Justices, Justice Kennedy wrote: "As a general rule, the principle of *stare decisis* directs us to adhere not only to the holdings of our prior cases, but also to their explications of the governing rules of law." *Id.* at 668 (Kennedy, J., concurring in part and dissenting in part); *see Florida Central Railroad Co. v. Schutte,* 103 U.S. 118, 143 (1880) (noting that "[i]t cannot be said that a case is not authority on one point because, although that point was properly presented and decided in the regular course of the consideration of the cause, something else was found in the end which disposed of the whole matter"); *see* discussion of *stare decisis, infra,* at 24-26.

The railroad also argues that both *Gottshall* and *Crane* are consistent with the view that *Rogers* addressed only the issue of multiple causes. (Pet. Cert. at 21-22.) Neither of those cases suggested that the presence of multiple causes was a controlling consideration in *Rogers.* Of course multiple causes are encompassed within the principle set forth in *Rogers.* Several subsequent decisions of this Court make it clear that the relaxed causation standard recognized in that opinion is not limited to multiple-cause cases:

- In *Gallick v. Baltimore & Ohio Railway Co.,* 372 U.S. 108 (1963), the single cause of injury was an insect bite and the railroad's negligence consisted in maintaining a "fetid pool" containing "dead and

decayed rats and pigeons" and inhabited by insects near the location at which the claimant worked briefly and was bitten. 372 U.S. at 113-14. The Court quoted and adhered to the relaxed causation standard it had articulated in *Rogers*. *Id.* at 115-16.

- The plaintiff in *Dennis* suffered frostbite and ultimately lost two fingers after working a 12-hour overnight shift in extremely cold weather without adequate protective clothing. 375 U.S. at 209. There was evidence sufficient to prove that a foreman who controlled the worker's activity throughout the shift knew of the danger and failed to take reasonable precautions to prevent the injury. *Id.*

- In *Crane* the claimant was injured while trying to stop runaway train cars. He fell from the top of one of the cars onto a cement apron. The sole cause of injury submitted to the jury was the railroad's negligent maintenance of a freight car with a defective coupler. 395 U.S. at 165-66.[2]

- The railroad employee in *Gottshall* sought recovery under FELA for negligent infliction of emotional distress. 512 U.S. at 535-37. One of the crew members suffered a heart attack. The railroad had taken its radio base station off the air for repairs, and

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[2] In *Ayers,* a case seeking recovery for asbestosis, the Court noted that it is irrelevant whether the immediate cause of an employee's injury was the proven negligence of the defendant railroad or some cause not identified in the evidence. 538 U.S. at 161-62.

the crew members were unable to obtain medical assistance before the stricken worker died. Mr. Gottshall later was admitted to a psychiatric institution and diagnosed as suffering from depression and post-traumatic stress disorder. He sued, alleging that the railroad had been negligent in creating circumstances under which he was forced to observe and participate in the events attendant to his colleague's death. No other cause of injury was alleged. This Court noted both its practice of "liberally construe[ing] FELA to further Congress' remedial goal" and the "relaxed standard of causation" found applicable to FELA claims in *Rogers*. 352 U.S. at 543.

- In *McBride v. Toledo Terminal Railroad Co.,* a worker claimed that the railroad's failure to provide adequate workplace lighting had caused him to slip while descending an icy ladder on a rail car. *See McBride v. Toledo Terminal Railroad Co.,* 140 N.E.2d 319, 320 (Ohio), *rev'd per curiam,* 354 U.S. 517 (1957).

CSX also contends that there is a conflict among "the lower courts" about whether FELA requires proof of proximate causation. (Pet. Cert. at 22-27.) The notion of widespread uncertainty and disagreement suggested by the railroad is untenable. All of the federal circuits and the great majority of state courts have followed this Court's interpretation of the FELA causation standard:

First Circuit

In its first post-*Rogers* decision the court noted both its prior requirement that plaintiffs establish proximate cause in order to recover under the FELA and its need to conform to the "contrary principles laid down" by the Supreme Court. *Boston & Maine Railroad v. Talbert,* 360 F.2d 286, 288 (1st Cir. 1966) (citing *New York, New Haven and Hartford Railroad Co. v. Dox,* 249 F.2d 572 (1st Cir. 1957), and *Rogers,* 352 U.S. at 506). The railroad relies on *Talbert* as authority for its claim that the First Circuit requires proof of proximate causation in FELA cases and that there is a split among the circuits on this issue. (Pet. Cert. at 23 n.6.) But the First Circuit subsequently aligned itself with all of the other federal circuits:

> We recognize the considerably relaxed standard of proof in FELA cases. The test for minimally adequate proof of causation is "whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury." But although a plaintiff need not make a showing that the employer's negligence was the sole cause, there must be a sufficient showing (*i.e.,* more than a possibility) that a causal relation existed.

Moody v. Maine Central Railroad Co., 823 F.2d 693, 695 (1st Cir. 1987) (quoting *Rogers*, 352 U.S. at 506).

Second Circuit

The Second Circuit acknowledged *Rogers* in *Nicholson v. Erie Railroad Co.,* 253 F.2d 959 (2nd Cir. 1958):

> It is true that, to impose liability on the defendant, the negligence need not be the proximate cause of the injury. The F.E.L.A. has its own rule of causation. The injury need only be one "resulting in whole or in part" from the negligence. 45 U.S.C. § 52. The question of causation is one for the jury if "the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury."

Id. at 940 (quoting *Rogers,* 352 U.S. at 506); *see also Williams v. Long Island Railroad Co.,* 196 F.3d 402, 406 (2d Cir. 1999) (quoting *Rogers* and stating that "a relaxed standard applies in FELA cases so that an employer is liable for injuries caused 'in whole or in part' by the employer's negligence").

Third Circuit

In *Hines v. Consolidated Rail Corp.,* 926 F.2d 262 (3d Cir. 1991), the Third Circuit cited *Rogers* and *Gallick* as the most notable in a line of decisions in which this Court had recognized the expanded concept of causation created in the FELA. *Id.* at 267. The Court of Appeals stated:

> In *Rogers,* the Court held that "the test of a [FELA] jury case is simply whether the

> proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury . . . Similarly, in *Gallick,* the Court stated that there can be a jury question of causation when there is "evidence that any employer negligence caused the harm, or, more precisely, enough to justify a jury's determination that employer negligence had played any role in producing the harm."

Id. (quoting *Rogers,* 352 U.S. at 306, and *Gallick,* 372 U.S. at 116); *see also Pehowic v. Erie Lackawanna Railroad Co.,* 430 F.2d 697, 699-70 (3d Cir. 1970) (holding that causation is an issue for the jury except in "extremely rare" cases in which there is no probability that any employer negligence contributed to the employee's injury).

Fourth Circuit

The Fourth Circuit acknowledged in a Jones Act case that the FELA calls for a "relaxed . . . standard of causation" under which employer liability is imposed "whenever 'employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought.'" *Hernandez v. Trawler Miss Vertie Mae, Inc.*, 187 F.3d 432, 436 (4th Cir. 1999) (quoting *Rogers,* 352 U.S. at 506, and *Gottshall,* 512 U.S. at 543); *see also Estate of Larkins v. Farrell Lines, Inc.,* 806 F.2d 510, 512 (4th Cir. 1986) (recognizing the "light burden of proof on negligence and causation" established for the plaintiff in a FELA

or Jones Act case and noting the particular statutory emphasis on having such claims decided by juries); *Brown v. Baltimore & Ohio Railroad Co.*, 805 F. 2d 1133, 1137 (4th Cir. 1986) (quoting *Rogers* as authority for "this most lenient standard of proof" with respect to causation in an FELA action).

Fifth Circuit

In *Gautreaux v. Scurlock Marine, Inc.,* 107 F.3d 331 (5th Cir. 1997), a unanimous *en banc* decision, the Fifth Circuit noted that this Court had used the term "slightest" in *Rogers* "to describe the reduced standard of causation between the employer's negligence and the employee's injury" in FELA cases. *Id.* at 335. And in *Nivens v. St. Louis Southwestern Railway Co.,* 425 F.2d 114 (5th Cir. 1970), the court quoted at length from *Rogers* and held that "the common-law proximate cause standard is modified, and the employee has a less demanding burden of proving causal relationship." *Id.* at 118 (quoting *Rogers,* 352 U.S. at 506-08).

Sixth Circuit

The Sixth Circuit recognized in *Hausrath v. New York Central Railroad Co.,* 401 F.2d 634 (6th Cir. 1968), that in the FELA "Congress deliberately adopted a negligence standard different from that of the common law," and that the statutory phrase "'in whole or in part' was obviously designed to make even more explicit that negligence of an employer did not

have to be the sole cause or 'the proximate cause' of the injury." *Id.* at 637. Later, in *Richards v. Consolidated Rail Corp.*, 330 F.3d 428 (6th Cir. 2003), the court noted that *Rogers* had adopted a relaxed causation standard "in order to effectuate Congress' intent . . . 'to preserve the plaintiff's right to a jury trial.'" And in *Aparicio v. Norfolk & Western Railway Co.*, 84 F.3d 803 (6th Cir. 2003), the court concluded that *Rogers* requires a plaintiff alleging a FELA violation to offer "more than a scintilla of evidence in order to create a jury question on the issue of employer liability, but not much more." *Id.* at 810.

Seventh Circuit

The Seventh Circuit has recognized and followed this Court's opinions regarding the FELA causation in prior cases as well as this one. The court has held:

> Because it is meant to offer broad remedial relief to railroad workers, a plaintiff's burden when suing under the FELA is significantly lighter than in an ordinary negligence case. Indeed, a railroad will be held liable where "employer negligence played any part, even the slightest, in producing the injury.

Holbrook v. Norfolk Southern Railway Co., 414 F.3d 739, 741-42 (7th Cir. 2005); *see also Harbin v. Burlington Northern Railroad Co.*, 921 F.2d 129, 130-31 (7th Cir. 1990) (quoting *Rogers* and recognizing that "[i]t is well established that the quantum of evidence

required to establish liability in an FELA case is much less than in an ordinary negligence action").

Eighth Circuit

In *Nordgren v. Burlington Northern Railroad Co.,* 101 F.3d 1246 (8th Cir. 1996), the Eighth Circuit cited *Atchison, Topeka & Santa Fe Railway Co. v. Buell,* 480 U.S. 557 (1987), as authority for the statement that "[t]he Supreme Court has recognized FELA as a broad remedial statute and has construed FELA liberally in order to accomplish Congress' goals," and *Rogers* as authority for the particular proposition that FELA establishes a relaxed standard for causation. And in *Paul v. Missouri Pacific Railroad Co.,* 963 F.2d 1058 (8th Cir. 1992), the court noted that "[u]nder FELA, the plaintiff carries only a slight burden on causation," and recognized that "[i]t is only when plaintiff's act is the sole cause – when defendant's act is no part of the causation – that defendant is free from liability." 963 F.2d at 1061 (quoting *Rogers,* 352 U.S. at 506, and *Grand Trunk Western Railway v. Lindsay,* 233 U.S. 42, 47 (1914)).

Ninth Circuit

The Ninth Circuit cited *Rogers* in support of the proposition that "[t]he standard for receiving a jury trial is less stringent in FELA cases than in common law tort cases." *Mullahon v. Union Pacific Railroad,* 64 F.3d 1358, 1363 (9th Cir. 1995). The court explained:

> Although federal courts have generally rejected the "scintilla rule" that any evidence supporting a tort claim raises a jury question, courts have applied a rule very much like the "scintilla rule" to FELA cases. In FELA cases, "it is only necessary that the jury's conclusion be one which is not outside the possibility of reason on the facts and circumstances shown.

Id. at 1363-64. It noted that "[t]his relaxed standard applies to both negligence and causation determinations." *Id.* at 1364 (citing *Rogers,* 352 U.S. at 506). The court articulated the requirements for proof of causation in a FELA case:

> [U]nder FELA the quantum of evidence sufficient to present a jury question of causation is less than it is in a common law tort action. Under FELA, the jury should determine liability so long as the evidence justifies "with reason, the conclusion that employer negligence played any part, even the slightest, in producing the injury." This . . . means only that in FELA cases the negligence of the defendant "need not be the sole cause or whole cause" of the plaintiff's injuries. FELA plaintiffs still must demonstrate some causal connection between a defendant's negligence and their injuries.

Claar v. Burlington Northern Railroad Co., 29 F.3d 499, 503 (9th Cir. 1994) (internal citations omitted) (quoting Rogers, 532 U.S. at 507, and *Oglesby v. Southern Pacific Transportation Co.,* 6 F.3d 603, 608

(9th Cir. 1993)); *see also Mendoza v. Southern Pacific Transportation Co.*, 733 F.2d 631, 632 (9th Cir. 1984) (observing that "courts have held that only 'slight' or 'minimal' evidence is needed to raise a jury question of negligence under FELA").

Tenth Circuit

In *Summers v. Missouri Pacific Railroad System*, 132 F.3d 599 (10th Cir. 1997), the court quoted the statutory provision that a railroad employer is liable for injury to its employee "resulting in whole or in part" from its negligence. 132 F.3d at 606 (quoting 45 U.S.C. § 51). Then the court stated: "During the first half of this century, it was customary for courts to analyze liability under the FELA in terms of proximate causation. However, the Supreme Court definitively abandoned this approach in *[Rogers]." Id.* The court next quoted *Rogers* at length and concluded: "A jury instruction containing both the statutory language and the explanatory language of Rogers is certainly the clearest articulation of the appropriate causation standard." *Id.* at 607.

Eleventh Circuit

Comeaux v. T. L. James & Co., 702 F.2d 1023 (5th Cir. 1983), a case that arose in Louisiana prior to the division of the former Fifth Circuit, characterized the plaintiff's burden of proof with respect to causation as "featherweight" and stated that "[t]he 'producing cause' FELA standard" contemplates evidence

"incorporating any cause regardless of immediacy." *Id.* at 1024. The Eleventh Circuit held more recently that "[u]nder FELA, a carrier will be liable if its negligence 'played any part, even the slightest, in producing the employee's injury.'" *Sea-Land Service, Inc. v. Sellan,* 231 F.3d 848, 851 (11th Cir. 2000).

District of Columbia Circuit

In *Brooks v. Washington Terminal Co.,* 593 F.2d 1285 (D.C. Cir. 1979), the District of Columbia Circuit adopted the relaxed causation standard that *Rogers* had declared:

> The test whether an F.E.L.A. case should be submitted to the jury "is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought."

Id. at 1288 (quoting *Rogers,* 532 U.S. at 506. The court noted the "liberality" of this causation test and stressed the Congressional intent that liability in FELA cases be determined by juries whenever possible: "Thus, unless 'fair-minded jurors cannot honestly differ whether fault of the employer played any part in the employee's injury,' the case should be decided by the jury." *Id.* (quoting *Rogers,* 532 U.S. at 510).

State Courts

CSX effectively admits that a great majority of state courts have recognized and adhere to the relaxed causation standard recognized in *Rogers*. (Pet. Cert. at 23.) Further, the approach to FELA causation actually articulated by several of the minority state courts cited by CSX adds scant weight to the argument for review of the statutory causation standard by this Court.

The railroad places its greatest reliance upon *Raab v. Utah Railway,* 221 P.3d 219 (Utah 2009), which concluded that FELA requires proof that a railroad's negligence was the proximate cause of a claimant's injury. *Id.* at 228-29. The petition argues that this opinion reflects a "pervasive confusion over the meaning of one of this Court's decisions." (Pet. Cert. at 26-27.) CSX claims that seven additional state courts of last resort have concluded that the FELA causation standard is proximate cause. Neither *Raab* nor the other state court decisions cited by the railroad reflect "pervasive confusion" about the statutory causation standard.

The Utah Supreme Court acknowledged that this Court has cited *Rogers* "for the proposition that 'a relaxed standard of causation applies under the FELA.'" 221 P.2d at 228 (quoting *Gottshall*, 512 U.S. at 543). It also recognized that every federal appellate court that has ruled on the issue "has held that Rogers eliminates the obligation of a FELA negligence plaintiff to prove proximate cause." *Id.* Whatever the *Raab*

opinion may represent – and Mr. McBride submits that it represents a single instance of aberrant analysis and inappropriate repudiation of binding authority – it is not "pervasive confusion" abroad in the judiciary with respect to this Court's causation analysis and holding in *Rogers*.

CSX relies upon *Snipes v. Chicago, Central & Pacific Railway Co.,* 484 N.W.2d 162 (Iowa 1992), as authority that the Iowa Supreme Court does not adhere to the relaxed causation standard recognized in *Rogers*. (Pet. Cert. at 23 n.6.) Although *Snipes* does make perfunctory reference to proximate cause as the causation standard, it attributes that reference to this Court's 1944 opinion in *Tennant v. Peoria & Pekin Union Railway,* 321 U.S. 29 (1944). *Tennant* was handed down more than a decade before the Court analyzed Congressional intent regarding the causation standard in *Rogers*.

In *Snipes* the Iowa Supreme Court quoted and plainly acknowledged that analysis: "'Under this statute the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played a part, *even the slightest,* in producing the injury or death for which damages are sought.'" 484 N.W.2d at 165 (quoting *Rogers,* 352 U.S. at 506) (emphasis added by Iowa court)). *Snipes* proceeded to observe that "[t]his low threshold for recovery" was reaffirmed in *Gallick. Id.*

Neither does *Brabeck v. Chicago & Northwestern Railway*, 117 N.W.2d 921, 923 (Minn. 1962), support

the notion that Minnesota courts reject the causation standard recognized in *Rogers*. (Pet. Cert. at 23-24 n.6.) In *Narusiewicz v. Burlington Northern Railway Co.*, 391 N.W.2d 895 (Minn. App. 1986), a quarter of a century more recent than *Brabeck*, the Court of Appeals quoted *Rogers* regarding FELA's relaxed causation standard and placed its own emphasis on the proposition that a railroad is liable if its negligence "played any part, no matter how small," in bringing about the worker's injury. *Id.* at 898-99. The Minnesota court explained: "The FELA standard dispenses with the 'substantial factor' requirement of proximate cause, as well as other aspects of the common-law definition of proximate cause." *Id.* at 899.

CSX is just as wrong about Ohio. It cites *Reed v. Pennsylvania Railroad,* 171 N.E.2d 718 (Ohio 1961), as authority for a proximate cause standard under FELA. (Pet. Cert. at 24 n.6.) The current state of FELA causation in Ohio was summarized in *Martin v. CSX Transportation, Inc.,* 922 N.E.2d 1022 (Ohio App. 2009). The Court of Appeals stated:

> Ohio courts have recognized that in FELA cases, "the traditional concept of proximate cause is supplanted by the less stringent standard that there be some causal relation, no matter how slight, between the injury and the railroad's breach of duty.

Id. at 1033-34.

D. The decisions of this Court, all of the federal Circuit Courts, and most state appellate courts have the persuasive force of *stare decisis*

The decisions of this Court and the lower courts that have followed those opinions are entitled to the particular deference accorded rulings based on the interpretation of statutes. "[C]onsiderations of *stare decisis* weigh heavily in the area of statutory construction, where Congress is free to change this Court's interpretation of its legislation." *Illinois Brick Co. v. Illinois,* 431 U.S. 720, 736 (1977). The doctrine of *stare decisis* "carries such persuasive force that [this Court has] always required a departure from precedent to be supported by some 'special justification.'" *United States v. International Business Machines Corp.,* 517 U.S. 843, 856 (1996) (quoting *Payne v. Tennessee,* 501 U.S. 808, 842 (1991) (Souter, J., concurring)).

Stare decisis is most compelling in a pure question of statutory construction. *Hilton v. South Carolina Public Railways Commission*, 502 U.S. 197, 205 (1991). It is particularly forceful when the interpretation of a statute has been accepted as settled law for several decades. *SBP, Inc. v. Alvarez,* 546 U.S. 21, 32 (2005); *see also Neal v. United States*, 516 U.S. 284, 295 (1996) (recognizing that absent exceptional intervening circumstances "our system demands that we adhere to our prior interpretations of statutes"). Justice Breyer has lately explained:

> [T]he Court has said that the principle of stare decisis applies more rigorously when a statute, rather than a constitutional provision, is at issue. That is because Congress can easily change a statutory decision, but neither Congress nor anyone else can easily amend the Constitution.

Stephen Breyer, Making Our Democracy Work: A Judge's View 151-52 (2010).

The petition presently before the Court urges the Court to abandon a statutory interpretation that it adopted more than 50 years ago, that it has reiterated several times since without equivocation, and that federal and state appellate and trial courts have followed with rare exception throughout that time. In issuing that invitation the petitioner necessarily has made light of *stare decisis*. Despite the care that the Court took in *Rogers* to explain its analysis of Congress' intent with respect to the causation element of a FELA claim and without meaningful regard for the Court's reiteration of the standard in subsequent opinions, CSX suggests however obliquely that the analysis was sloppy and the exegesis worse. (Pet. Cert. at 16-22.) The demand for abandonment of precedent requires a gravity that the railroad has failed to muster.

The Court has recognized that "the very concept of the rule of law underlying our own Constitution requires such continuity over time that a respect for precedent is, by definition, indispensable." *Planned Parenthood of Southeastern Pennsylvania v. Casey,*

505 U.S. 833, 854 (1992). There the Court proceeded to say "a decision to overrule should rest on some special reason over and above the belief that a prior case was wrongly decided." *Id.* at 864. The Court's analysis of the causation standard intended by Congress for FELA claims was clear and prudent. The attack on precedent staged by CSX in this case should find no better reception here and now than it has received from this Court and other federal courts in the railroads' continuous attempts to avoid the language of the Act and this Court's interpretation of that language in *Rogers*.

E. The railroad's reliance on Justice Souter's concurring opinion in *Sorrell* is misplaced

Nothing in the principal opinion in *Sorrell* suggests that the Court intended to undermine or dislodge decades of jurisprudence recognizing a significantly relaxed causation standard for plaintiffs in FELA cases. Justice Ginsburg began her separate opinion in that case with the following observation:

> It should be recalled . . . that the Court has several times stated what a plaintiff must prove to warrant submission of a FELA case to a jury. That question is long settled, we have no cause to reexamine it, and I do not read the Court's decision to cast a shadow of doubt on the matter.

Sorrell, 549 U.S. at 177 (Ginsburg, J., concurring). The railroad's argument to the contrary should find no purchase in this Court now.

In *Gottshall* the Court recognized that "a relaxed standard of causation applies under FELA." 512 U.S. at 543. In *Crane* the Court said that a FELA plaintiff need prove "only that his injury resulted in whole or in part from the railroad's violation." 395 U.S. at 155. Both of those decisions referred to *Rogers*, which had declared: "Under [FELA] the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought." 352 U.S. at 506.

Rogers in turn drew upon *Coray v. Southern Pacific Co.,* 335 U.S. 520 (1949), in which the Court had observed: "Congress . . . imposed extraordinary safety obligations upon railroads and has commanded that if a breach of these obligations contributes in part to an employee's death, the railroad must pay damages." *Id.* at 524. Those decisions – not a concurring opinion of three Justices in a single case – are the salutory foundation for the rule that the causation standard applicable to FELA cases is more "relaxed" than the common law standard applicable in tort litigation generally.

1. The "In Whole or In Part" Liability of Railroads Cannot Be Limited to Multi-Cause FELA Claims

Under Justice Souter's analysis, at least as interpreted by CSX, both the plaintiff and the defendant would have to allege multiple causes for an injury before the jury can be instructed about the FELA mandate that railroads are liable for injuries caused "in whole or in part" by their negligence. *See Sorrell,* 549 U.S. at 175 (Souter, J., concurring) (stating that *Rogers* "did not address and should not be read as affecting the necessary directness of cognizable causation, as distinct from the occasional multiplicity of causations"). Limiting FELA's declaration of liability for injuries caused "in whole or in part" by railroad negligence to the occasional multiple-cause case would eviscerate the Congressional mandate.

The standard that the railroad purports to derive from Justice Souter's concurring opinion in *Sorrell,* dependent as it is upon the notion that the "relaxed" standard recognized for the past several decades actually has application only to cases in which an injury is shown to have had more than one possible cause, would not be workable in the context of FELA litigation. The railroad has advanced a paradigm under which the plaintiff and the defendant would have to allege a multiplicity of "causes" before the trial court could instruct jurors about the Act's liability-defining phrase "in whole or in part." The causation language chosen by Congress – that a railroad is to be liable whenever its negligence is responsible

"in whole or in part" for a worker's injury – would be disabled whenever the parties to a FELA case did not allege a total of at least two causes for the plaintiff's injury.

2. Congress Clearly Addressed Causation Under FELA

Justice Souter apparently could not find a Congressional intent regarding an instruction for the submission of causation in a FELA case. *Id.* at 176-77 (stating that "[w]hether FELA is properly read today as requiring proof of proximate causation before recognizing negligence is up to the Missouri Court of Appeals to determine in the first instance"). Having specified that railroads were to be liable when their negligence caused injury or death "in whole or in part," Congress defined causation under the Act and had no need to include the specifics of a causation instruction in the statute or in its legislative history.

3. Justice Souter's Concurrence Conflicts With Congressional Intent that FELA Be Afforded a Liberal Construction

The entire history of the FELA reflects the Congressional purpose of protecting railroad employees, and the Supreme Court always has accommodated that legislative intent by affording the Act a liberal construction. For example, in 1938 and 1939 the railroads sought without success to have the phrase "proximate cause" inserted into § 54 of the Act. *See*

H.R. Rep. 2153, 75th Cong., 3d Sess 1 (1938); 42 Cong. Rec. at 10,709-10 (1939); Act of Cong., Aug. 11, 1939, Ch. 685, 53 Stat. 1404. Justice Souter's concurrence would curtail employee protection under the law and is in conflict with that intent.

4. A Proximate Cause Instruction Would Alter The Statutory Definition of FELA Causation

Railroads have a non-delegable duty to provide their employees with a safe place to work. *See, Sinkler v. Missouri Pacific R.R.*, 356 U.S. 326330, 331-32 (1958); *Shenker v. Baltimore & Ohio R.R.*, 374 U.S. 1, 7 (1963). The proximate cause instruction sought by the railroads and apparently envisioned by Justice Souter would transmogrify "in whole or in part" FELA causation, requiring proof instead that railroad negligence was a substantial, as well as actual, factor in causing the injury or death. Under such a standard an employee could not recover against a railroad when it was the least negligent of several negligent parties.

5. *Rogers* Did Clearly State the FELA Causation Standard

Justice Souter's concurring opinion suggests that *Rogers* was unclear in articulating its causation standard for FELA cases:

> True, I would have to stipulate that clarity was not well served by the statement in Rogers that a case must go to a jury where "the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought."

Sorrell, 549 U.S. at 175 (Souter, J., concurring). That suggestion cannot be squared with the facility demonstrated by this Court and lower courts in discussing and applying that standard through the ensuing 50-plus years. The *Rogers* opinion itself restated the standard with ample clarity:

> Judicial appraisal of the proofs to determine whether a jury question is presented is narrowly limited to the single inquiry whether, with reason, the conclusion may be drawn that negligence of the employer played any part at all in the injury or death.

352 U.S. at 506-07. As Justice Ginsburg wrote in her *Sorrell* concurrence: "[I]n Rogers we held that a FELA plaintiff can get to a jury if he can show that his employer's negligence was even the slightest cause of his injury." 549 U.S. at 179.

6. This Court Would Depart From Overwhelming Authority If It Embraced Justice Souter's FELA Causation Analysis

Adopting Justice Souter's analysis would require this Court to abandon or ignore (a) the Supreme Court's historic and often-stated recognition that

Congress intended FELA to be given the liberal interpretation commonly afforded remedial legislation, (b) the plain meaning of the words "in whole or in part," (c) *stare decisis,* and (d) the railroads' concession in *Rogers, Sorrell*, and *Ayers* that the causation standard for FELA claims is something less than common law proximate cause.

CSX purports to isolate Justice Ginsburg's concurrence and "[t]he lower courts" that have followed *Rogers'* interpretation of the FELA causation language as some sort of judicial brigade that has gone rogue and "interpreted [Rogers] to abrogate traditional proximate causation." (Pet. Cert. at 13-14.) First, "traditional proximate causation" has not been abrogated: the standard of proof that must be met to make a submissible showing of causation in a railroad worker's statutory injury claim merely was relaxed in the service of a clear Congressional purpose and in accordance with specific statutory language. *See, e.g., Rogers,* 352 U.S. at 507; *Gottshall,* 512 U.S. at 543. More to the point, it was Congress – not Justice Ginsburg and some smattering of upstart "lower courts" – that effected the relaxation. There is no guerilla campaign or gonzo posse of outlier judges robbing the railroads of a civil entitlement. The relaxed causation standard that Congress wrote into the FELA has been the law of the land for a long time.

For decades neither this Court nor any federal appellate court – and virtually no other court anywhere, excepting the handful cited by the railroad –

has required plaintiffs in FELA cases to satisfy a common law proximate cause standard. The establishment of a more demanding burden of proof for cases brought by injured railroad workers would be singularly out of step with the unbroken line of decisions recognizing the FELA as remedial legislation deserving of liberal construction in order to effectuate its clear purpose. *See, e.g., Gottshall,* 512 U.S. at 542-43.

Such a change in the interpretation and application of the Act also would be impossible to square with more than a century of legislative history, marked consistently by the recognition of railroad worker needs, the creation of statutory rights and remedies tailored to those needs, and the unambiguous rejection of efforts to augment the evidentiary burden of FELA plaintiffs with respect to causation. The causation standard intended by Congress for FELA claims has been well and accurately interpreted. There is no need for this Court to reconsider that standard or consider this appeal further.

CSX concludes that the issue of FELA causation is a matter of exceptional importance. (Pet. Cert. at 28-29.) It is. But the issue today is no more important than it was when this Court resolved it in *Rogers,* or each time thereafter that the Court, every federal appellate circuit, and most state appellate courts reiterated the standard that was recognized in *Rogers.* The FELA establishes a standard of "in whole or in part" causation that replaced the conventional formulation of proximate causation for the negligence

claims of injured railroad workers. That proposition has stood since this Court announced it more than 50 years ago. It does not require "resolution, once and for all," at this time.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted by:

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