No. 10-235

In the Supreme Court of the United States

CSX TRANSPORTATION, INC.,

Petitioner,

v.

ROBERT MCBRIDE,

Respondent.

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

REPLY BRIEF FOR PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES—continued

Page(s)

TABLE OF AUTHORITIES—continued

Page(s)

TABLE OF AUTHORITIES—continued

Page(s)

STATUTES

TABLE OF AUTHORITIES—continued

Page(s)

OTHER AUTHORITIES

REPLY BRIEF FOR PETITIONER[1]

Just weeks ago, this Court again applied the principle that "when Congress creates a federal tort it adopts the background of general tort law." *Staub* v. *Proctor Hosp.*, 131 S. Ct. 1186, 1191 (2011). In particular, the Court held that a statute requiring a causal relationship between the defendant's conduct and the plaintiff's injury "incorporates the traditional tort-law concept of proximate cause." *Id.* at 1193. There is no reason for a different result here.

One of McBride's principal contentions is that FELA does not require proof of proximate cause—and so employees may recover for indirectly or remotely caused injuries—because the statute authorizes recovery for injuries "resulting in whole or *in part*" from the railroad's negligence. That theory has a number of flaws. First and foremost, this Court has already interpreted "in whole or in part" to address multiple causes, not the requisite directness of a cause. Pre-FELA common-law cases, moreover, used "in whole or in part" in conjunction with proximate cause, not in opposition to it. Last but certainly not least, this Court has required proximate causation in more than 20 FELA cases.

McBride's other main argument is that Congress could not have intended to adopt a common-law concept, like proximate cause, that courts have described in varying terms. That reasoning is no less flawed. This Court has routinely interpreted statutes to incorporate common-law concepts that have

[1] The Corporate Disclosure Statement in the opening brief remains accurate.

different formulations, including in cases in which the statute was FELA or the common-law concept was proximate cause. McBride's approach would mean rejecting a settled principle applied in *every* jurisdiction at the time of FELA's enactment. In any event, this Court has long since decided upon the proximate-cause formulation that applies in FELA cases. And McBride offers no meaningful standard with which he would replace it.

Though we made most of these points in our opening brief, McBride ignores a number of them. And his responses to the others are unpersuasive—particularly his astonishing assertion that this Court did not in fact apply proximate cause in nearly two dozen FELA cases but just made "offhand references" to it, a claim with which even the court of appeals disagreed. Nor does McBride provide any other basis for affirming the decision below.

A. Proximate Causation Is Required Under The Established Interpretive Methodology

This Court has squarely held that, "[a]bsent express language to the contrary, the elements of a FELA claim are determined by reference to the common law." *Norfolk S. Ry.* v. *Sorrell*, 549 U.S. 158, 165-166 (2007). "Prior to FELA, it was clear common law that a plaintiff had to prove that a defendant's negligence caused his injury proximately, not indirectly or remotely," and "FELA said nothing *** about the familiar proximate cause standard." *Id.* at 173-174 (Souter, J., joined by Scalia and Alito, JJ., concurring). Under the established interpretive methodology, therefore, FELA requires proof of proximate causation. Nothing that McBride or his *amici* say undermines this straightforward analysis.

1. McBride contends that Congress did not intend to require proximate causation because it used the phrase "resulting in whole or in part" in Section 1 of FELA, RB16-17, and a defendant's negligence "can be 'in part' responsible if it produces the injury *** indirectly," RB19.[2] But this Court adopted a different view in *Sorrell*—that "in whole or in part" concerns multiple causes rather than the necessary directness of a cause. As the decision explains, those words in FELA "make clear that there could be recovery against the railroad even if it were only partially negligent" and "reflect the fact that contributory negligence is no longer a complete bar to recovery." 549 U.S. at 170-171. Though it was highlighted in our opening brief, PB24-25, McBride completely ignores *Sorrell*'s interpretation of the statutory language.

McBride also contends that Congress's use of "contributed" in Section 3 of FELA—the contributory-negligence provision—"confirms" that an employee may recover for indirectly or remotely caused injuries. RB17. But *Sorrell* determined that "Section 3 simply does not address causation"—*i.e.*, the requisite directness of a cause. 549 U.S. at 171. Particularly in a provision dealing with "contributory negligence," the word "contributed"—like the concept of contributory negligence itself (and like the words "in whole or in part")—addresses the issue of multiple causes.

McBride's other arguments cast no doubt on the soundness of *Sorrell*'s interpretation. McBride argues, for example, that FELA does not require

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[2] We cite petitioner's opening brief as "PB__" and respondent's brief as "RB__."

proximate causation because "Congress did not use the phrase 'proximate cause'" or its equivalent in the statute. RB17. This gets things backwards. The governing interpretive rule is that FELA incorporates common-law principles unless its text expressly provides otherwise, PB19-21, not that it *rejects* those principles unless the principle is explicitly *mentioned*. The antitrust, RICO, and securities statutes do not mention proximate cause either, yet this Court, employing a similar methodology, has interpreted them to incorporate the requirement. PB47-48. As in *Sorrell*, the fact that "the statutory text is silent" on the issue, 549 U.S. at 171, means that FELA embodies the common-law rule, not that it abandons it.

McBride also argues that "common-law concepts of 'proximate causation'" "cannot be squared with" the words "in whole or in part." RB18. In fact, the common-law rule is easily squared with the statutory text, so long as one interprets "in whole or in part," as *Sorrell* did, to address multiple causation. The correctness of that interpretation is confirmed by the pre-FELA common-law decisions of state courts (as well as subsequent FELA decisions of this Court) that used the phrase "proximate cause in whole or in part" (or some variation of it). PB25-26 & n.5, 28. Those decisions refute McBride's assertion that the phrase "in whole or in part" has "no common-law antecedent." RB1. More to the point, they refute his assertion that "in part" means "indirectly," RB19, because, if it did, "proximate cause in whole or in part" would be nonsensical.

McBride argues that "in part" was not contemporaneously understood to address multiple causes, citing pre-FELA common-law cases from California and

Massachusetts that used "in whole or in part" "without reference to 'proximate cause.'" RB19n.15. But those decisions cannot support McBride's contention that "in part" allows recovery for indirectly or remotely caused injuries, since proximate cause was part of the common law of those States (as well as every other). See, *e.g.*, *Anderson* v. *Seropian*, 81 P. 521, 527 (Cal. 1905); *Garant* v. *Cashman*, 66 N.E. 599, 600 (Mass. 1903). Nor does McBride identify any other usage of "in whole or in part" in the late nineteenth or early twentieth century (or at any other time) that is inconsistent with proximate causation.

McBride attempts to distinguish this case from others that have construed FELA to incorporate a common-law rule. He contends that, in those cases, unlike in this one, "the Court rooted its incorporation of common-law rules in FELA's codification of the terms 'negligence,' 'injury,' and 'damages.'" RB39. But this case is no different: the common-law rule of proximate causation is incorporated in FELA's codification of the term "resulting *** from," which describes the element of causation. The Court has interpreted the similar phrase "by reason of" in the antitrust and RICO statutes to incorporate proximate causation, 15 U.S.C. § 15(a); 18 U.S.C. §1964(c); PB47-48, and there is no less reason to interpret "resulting *** from" in FELA the same way.

If anything, there is more reason. Contrary to McBride's suggestion, RB39-40, this Court has not interpreted FELA to incorporate common-law principles because Congress used particular words. It has done so because "Congress expressly dispensed with [certain] common-law doctrines" in FELA but "did not deal at all with [other] equally well-

established doctrine[s]," and thus the Court presumes that Congress did not "intend[] to abrogate [the latter] doctrine[s] *sub silentio*." *Monessen Sw. Ry.* v. *Morgan*, 486 U.S. 330, 337-338 (1988). Proximate causation is one such well-established doctrine.

2. McBride also contends that proximate causation is not required because "there was no consensus on the meaning of proximate cause at common law when Congress enacted FELA." RB41. This asserted "uncertainty," according to McBride, "negates any reliable inference *** about what legal concepts Congress incorporated." RB41-42.

But common-law courts routinely employ somewhat different formulations in applying particular negligence concepts. If the existence of multiple formulations of a concept were a reason to reject the presumption that a statute incorporates common-law principles, the presumption would cease to function as a meaningful interpretive rule. If McBride's position were correct, for example, it would mean that this Court erred in holding that the antitrust, RICO, and securities statutes require proximate cause. PB47-48. It also would mean that, even though "[a] right to recover for negligently inflicted emotional distress was recognized *in some form* by many American jurisdictions at the time FELA was enacted," *Consol. Rail Corp.* v. *Gottshall*, 512 U.S. 532, 550 (1994) (emphasis added), the Court was wrong to hold in *Gottshall* that "claims for damages for negligent infliction of emotional distress are cognizable under FELA," *ibid.*, because no fewer than "[t]hree [different] major limiting tests for evaluating claims alleging negligent infliction of emotional distress ha[d] developed in the common law," *id.* at 546.

McBride contends that it is especially "implausible that Congress *** incorporated into FELA *** a *** concept that *limits* a defendant's liability given the clear statutory purpose to *broaden* railroads' liability for negligence to workers." RB42. But Congress's incorporation of proximate causation is not implausible at all, inasmuch as FELA is "an avowed departure from the rules of the common law" "*[o]nly* to the extent of the[] explicit statutory alterations" that "did away with [the] common-law tort defenses that had effectively barred recovery by injured workers." *Norfolk & W. Ry.* v. *Ayers*, 538 U.S. 135, 145 (2003) (quoting *Gottshall*, 512 U.S. at 542, 544, in turn quoting *Sinkler* v. *Mo. Pac. R.R.*, 356 U.S. 326, 329 (1958)) (emphasis added).

McBride chides us for supposedly failing to offer "guidance about the content" of the proximate-cause standard in FELA cases. RB42. But there is no need for *us* to provide that guidance, because this Court has already done so, explaining in *Brady* v. *Southern Railway*, 320 U.S. 476 (1943), that "negligence *** is the proximate cause of an injury" under FELA when the injury is "the natural and probable consequence of the negligence." *Id.* at 483 (quoting *Milwaukee & St. Paul Ry.* v. *Kellogg*, 94 U.S. 469, 475 (1876)). Remarkably, while seeking to persuade this Court that there is "pervasive disagreement and uncertainty over 'proximate causation' requirements," RB41, and indeed that a ruling in CSXT's favor "would open thousands of cases to appellate litigation over which proximate-cause instruction best comports with Congress's intent," RB2, McBride ignores this language in *Brady*—even though we quoted it twice in our opening brief, PB18, 28. McBride's *amici* make similar arguments, but do not cite *Brady* at all.

This case is thus even more straightforward than *Gottshall*, where the Court was required to decide whether negligent infliction of emotional distress is actionable under FELA and then to choose a particular test. Here, the Court need only reaffirm what it has already said, about both the need to prove proximate causation and its meaning.

It is particularly odd for McBride to protest that common-law proximate causation—a bedrock principle of Anglo-American negligence law with which judges and juries have centuries of experience—somehow affords inadequate guidance. For McBride refuses to specify the standard with which he would replace it.

The law of torts recognizes two types of causation: "but for" and proximate. McBride asserts that common-law proximate causation is not necessary under FELA, but he does not go so far as to say that "but for" causation is sufficient, apparently appreciating that such a position would be revolutionary. He seems to advocate an intermediate standard: one that is "more *** lenient *** than those prevalent in common-law negligence cases," RB17n.14, but nevertheless does not "equate[] to 'but for' cause," RB31n.19. Yet he does not explain what that standard is; where it comes from; how it would be formulated or administered; or why, uniquely among common-law and statutory negligence regimes, FELA should be interpreted to reject not only traditional proximate causation but also "but for" causation. Nor does he explain either how a standard more lenient than common-law proximate causation can be reconciled with *Brady* or how one stricter than "but for" causation can be reconciled with his own position that the statutory

language "in part" allows recovery for indirectly or remotely caused injuries.

All that McBride is willing to say is that his "more relaxed" standard will allow judges and juries to find in "extreme cases" that the causal connection between the defendant's negligence and the plaintiff's injury is "so attenuated" that recovery should be denied. RB31n.19. That is no standard at all. And it is yet another reason to conclude that, consistent with the established interpretive methodology and this Court's precedents, FELA incorporates the common-law principle of proximate cause.

B. Proximate Causation Is Required Under This Court's Precedents

1. Pre-*Rogers* decisions

a. In more than 20 cases decided between FELA's enactment and the decision in *Rogers* v. *Missouri Pacific Railroad*, 352 U.S. 500 (1957), this Court "consistently recognized and applied proximate cause as the proper standard in FELA suits." *Sorrell*, 549 U.S. at 174 (Souter, J., joined by Scalia and Alito, JJ., concurring). The Court has viewed the need to prove proximate cause as so obvious that it "require[s] no reasoning to demonstrate," *St. Louis, Iron Mountain & S. Ry.* v. *McWhirter*, 229 U.S. 265, 280 (1913), and has articulated the standard in no uncertain terms, explaining that it is "incumbent" upon a FELA plaintiff to prove that the defendant's "negligence was the proximate cause in whole or in part of the *** accident," *Tennant* v. *Peoria & Pekin Union Ry.*, 321 U.S. 29, 32 (1944). The Court has said that negligence is "the proximate cause of an injury" under FELA when the injury is "the natural and

probable consequence of the negligence," *Brady*, 320 U.S. at 483, and has contrasted such actionable negligence with negligence that "merely creates an incidental condition or situation in which the accident *** results in [the] injury," *Davis* v. *Wolfe*, 263 U.S. 239, 243 (1923).

According to McBride, none of the cases on which we rely "contain [any] sustained analysis of proximate cause," RB47, or employ anything more than "passing *dicta*," RB49. But even the court of appeals recognized that this Court's "[e]arly FELA cases" held that plaintiffs must satisfy "the common-law requirement of proximate cause." Pet.App.9a. Likewise, while some other circuits have held that FELA *no longer* requires proof of proximate cause (because of *Rogers*), they have conceded that early decisions of this Court interpreted FELA to require such proof. See, *e.g.*, *Page* v. *St. Louis Sw. Ry.*, 312 F.2d 84, 88 & n.2 (5th Cir. 1963); *Summers* v. *Mo. Pac. R.R.*, 132 F.3d 599, 606 (10th Cir. 1997). Those acknowledgments are understandable, since even the most cursory perusal of the decisions cited above refutes McBride's assertion.

The same is true of the other decisions cited in our opening brief. PB27-33 & nn.6-7. To take just four representative examples: *Lang* v. *New York Central Railroad*, 255 U.S. 455, 461 (1921), held that the employee could not recover because "the collision was not the proximate result of" the defect (even though the collision "would not have resulted in the injury" if the Safety Appliance Act had "been complied with"). *Urie* v. *Thompson*, 337 U.S. 163, 177 (1949), held that the employee's complaint "stat[ed] a cause of action" under FELA because "[a]ll the usual elements [we]re comprehended," including "prox-

imate causation." *O'Donnell* v. *Elgin, Joliet & Eastern Railway*, 338 U.S. 384, 394 (1949), held that the employee was "entitled" to a jury instruction that the railroad was liable for "injuries proximately resulting" from a violation of the Safety Appliance Act. And *Carter* v. *Atlanta & St. Andrews Bay Railway*, 338 U.S. 430, 433, 435 (1949), reversed the lower court's decision that the railroad's negligence was "the remote, not the proximate, cause of plaintiff's injuries" on the ground that there was sufficient evidence that the negligence was "a contributory proximate cause" of the injuries. No reasonable reader of these decisions—or of the others—could conclude that they merely "reflect offhand references" to proximate cause. RB14.

b. McBride does not just deny that this Court's decisions "applied proximate cause as the proper standard in FELA suits." *Sorrell*, 549 U.S. at 174 (three-Justice concurrence). He argues that "pre-*Rogers* cases that focused on the issue interpreted FELA to adopt a causation standard that does *not* include common-law notions of proximate cause." RB47. But the cases he cites, RB22-26, provide no support for that view.

The first, *Spokane & Inland Empire Railroad* v. *Campbell*, 241 U.S. 497, 510 (1916), said that a FELA plaintiff may recover when "plaintiff's contributory negligence and defendant's violation of a provision of the safety appliance act are concurring proximate causes." As McBride acknowledges, that simply reflects a recognition that "FELA abandoned the common-law 'sole proximate cause' rule," RB23, and allows recovery when the railroad's negligence is *a* proximate cause of the employee's injury (even if there is another proximate cause). *Campbell* thus

supports our position, not McBride's. The same is true of *Union Pacific Railroad* v. *Hadley*, 246 U.S. 330, 333 (1918), which merely rejected the argument that "the only proximate cause of [the employee's] death was his own neglect of duty," concluding, instead, that a jury could find that the railroad's negligence was a proximate cause as well.

McBride's insistence that *Coray* v. *Southern Pacific Co.*, 335 U.S. 520 (1949), "rejected incorporation of common-law proximate-cause requirements into FELA," RB25, is equally puzzling, because *Coray* involved a straightforward application of those requirements, PB31-32. It expressly stated that FELA authorizes recovery when the railroad's negligence "was the sole or a contributory proximate cause" of the employee's injury; it cited two of this Court's early proximate-cause decisions; and it held that the jury could find proximate cause because the negligence and injury "were inseparably related to one another in time and space." 335 U.S. at 523-524. McBride's strained efforts to explain how *Coray* actually applied a standard *different* from traditional proximate cause, RB25-26, depend on the same sort of "dialectical subtleties" of which the Court disapproved in that case, 335 U.S. at 524.

McBride and one of his *amici* also cite a number of pre-*Rogers* decisions that did not explicitly mention proximate cause. RB24 & n.16; ARLA Br. 7-8. But those cases did not say, or even suggest, that FELA adopted a different standard. On the contrary, all but one of them cited decisions that applied the proximate-cause requirement.[3]

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[3] See *Baltimore & Ohio R.R.* v. *Groeger*, 266 U.S. 521, 528 (1925) (citing *Louisville & Nashville R.R.* v. *Layton*, 243 U.S.

In the end, McBride's position seems to be that, when this Court said—over and over, and as clearly as possible—that a FELA cause of action, like a common-law cause of action, requires proof of proximate causation, it did not really mean what it said. But of course the Court meant what it said. On the question whether pre-*Rogers* FELA decisions "recognized and applied" common-law proximate causation, McBride is wrong, and Justices Souter, Scalia, and Alito are right. *Sorrell*, 549 U.S. at 174 (concurring opinion).

2. *Rogers*

a. "*Rogers* left this law where it was." *Sorrell*, 549 U.S. at 174 (Souter, J., joined by Scalia and Alito, JJ., concurring). It "did not address *** the necessary directness of cognizable causation, as distinct from the occasional multiplicity of causations." *Id.* at 175 (three-Justice concurrence). *Rogers* "spoke to apportioning liability among parties, each of whom *** had some hand in causing damage directly enough to be what the law traditionally called a proximate cause." *Ibid.*

Disagreeing with this understanding of the case, McBride contends that "*Rogers*' holding was not limited to the issue of contributory negligence or 'multiple causes.'" RB30. The sum total of his support for that contention is a single sentence in *Rogers*'

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617 (1917)); *Chicago, Milwaukee & St. Paul Ry.* v. *Coogan*, 271 U.S. 472, 474, 478 (1926) (citing *McWhirter* and *St. Louis-San Francisco Ry.* v. *Mills*, 271 U.S. 344 (1926)); *Atchison, Topeka & Santa Fe Ry.* v. *Toops*, 281 U.S. 351, 355 (1930) (citing *Mills* and *N.Y. Cent. R.R.* v. *Ambrose*, 280 U.S. 486 (1930)); *Bailey* v. *Cent. Vt. Ry.*, 319 U.S. 350, 352-353 (1943) (citing *Tiller* v. *Atl. Coast Line R.R.*, 318 U.S. 54 (1943)); *Moore* v. *Chesapeake & Ohio Ry.*, 340 U.S. 573, 575 (1951) (citing *Tennant*).

one-paragraph explanation of why "the evidence was sufficient to support the jury finding for the petitioner." *Rogers*, 352 U.S. at 503. That sentence reads as follows: "In this view, it was an irrelevant consideration whether the immediate reason for [petitioner's] slipping off the culvert was the presence of gravel negligently allowed by respondent to remain on the surface, or was some cause not identified from the evidence." *Ibid.* According to McBride, "[t]he Court's statement that it was 'irrelevant' *** whether the negligently maintained gravel or some other factor was the 'immediate' cause of Rogers' injuries plainly relaxed the common-law standard regarding the directness of the cause." RB30-31 (citation omitted).

As this Court has held, Congress "does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes." *Whitman* v. *Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001). The same can be said of this Court's decisions. Before *Rogers*, the Court "consistently recognized and applied proximate cause as the proper standard in FELA suits." *Sorrell*, 549 U.S. at 174 (three-Justice concurrence). That a single, rather opaque, sentence in a paragraph describing the evidence that permitted a jury finding for the plaintiff could have had the effect of overruling more than 20 decisions on that point is far-fetched, to put it mildly.

But it is not just far-fetched; McBride's theory fails on its own terms. Because "it is common for injuries to have multiple proximate causes," *Staub*, 131 S. Ct. at 1192, a proximate cause cannot be limited to the "immediate" cause, of which there is necessarily "only one," *Clinton* v. *Gunn-Willis Lumber Co.*, 49 S.E.2d 143, 149 (Ga. Ct. App. 1948). That is doubt-

less one reason why, while there may have been "confusion about this in the distant past," courts "have long since ceased to pay attention to" the "immediate cause" formulation. W. Page Keeton et al., *Prosser & Keeton on the Law of Torts* § 42, at 276-277 (5th ed. 1984). Indeed, CSXT's proffered instructions in this case would have informed the jury that a proximate cause "need not be *** the last or nearest cause." JA32a. Even if *Rogers* rejected "immediate" causation, therefore, that does not establish that it rejected proximate causation. And McBride identifies no other basis for concluding that it did.

b. Far from having abandoned proximate cause, *Rogers* assumed that FELA requires it. As our opening brief explains, that is true for four reasons. PB39-43. McBride takes issue with each of them, RB43-46, but his arguments are unpersuasive

First, the jury charge in *Rogers* "covered the requirement to show proximate cause." *Sorrell*, 549 U.S. at 176 (three-Justice concurrence). McBride argues that "*Rogers* signaled no approval of th[e] quoted instruction." RB43. But the point is not that the Court affirmatively *approved* the instruction. The point is that, if *Rogers* had in fact rejected common-law proximate causation, as McBride maintains, it is highly unlikely that the Court would have quoted an instruction on that very element without in some way *disapproving* it. It is all the more unlikely because, as McBride points out, the Court *did* "fault[] the trial court" for failing to instruct on a related issue. RB43n.23.

Second, the plaintiff-petitioner in *Rogers* did not ask this Court to abandon proximate cause, but contended that the evidence permitted a jury finding that the railroad's negligence was a proximate cause

of his injury. PB40. McBride argues that Rogers' brief advocated a "broadened" concept of proximate cause. RB44. But the "broadened" concept to which Rogers referred was a rejection of *sole* proximate causation, not of proximate causation generally. As Rogers' brief put it, "[t]he words 'in part' *** suggest that there may be a plurality of causes," and thus FELA "makes the employer liable for his negligence, even though some other factor may logically be said to be more influential in producing the injury." Brief for Petitioner at 25, 27, *Rogers* v. *Mo. Pac. R.R.*, 352 U.S. 500 (1957) (No. 28), 1956 WL 89025, at *25, *27 (internal quotation marks omitted).

Third, three of "the prior cases on which *Rogers* relied *** unambiguously recognized proximate cause as the standard applicable in FELA suits." *Sorrell*, 549 U.S. at 175-176 (three-Justice concurrence). McBride argues that one of those cases—*Coray*—"rejected incorporation of common-law proximate-cause requirements into FELA." RB25. As we have already explained, however, McBride's understanding of *Coray* is mistaken. McBride argues that the other two cases—*Carter* and *Tiller*—"were cited for holdings unrelated to causation." RB45. But that is incorrect. The Court cited *Carter* for the proposition that, when a railroad is shown to have violated certain safety statutes, "[t]he only issue then remaining is causation," *Rogers*, 352 U.S. at 507 n.13, and it cited *Tiller* for the proposition that the question in FELA cases is "whether negligence of the employer played any part, however small, in the injury or death which is the subject of the suit," *id.* at 508.

Fourth, the dissenting Justices in *Rogers* did not understand the Court to have established any new

principle of causation, but contended that the Court had improperly substituted its view of the evidence for that of the lower court. PB41-42. McBride argues that Justice Harlan's dissent took the position that the Court had "'departed from' 'common-law rules.'" RB45-46. But the "rules" to which Justice Harlan referred concerned sufficiency-of-the-evidence review, not the standard of causation. See *Ferguson* v. *Moore-McCormack Lines, Inc.*, 352 U.S. 521, 564 (1957) (opinion of Harlan, J.) ("jury verdicts *** [must] be arrived at by reason and not by will or sheer speculation"). McBride also argues that Justice Frankfurter's dissent recognized that FELA rejects common-law proximate causation. RB46. In fact, what Justice Frankfurter said is that, by using the language "in whole or in part," FELA "avoid[s] issues about '*sole* proximate cause.'" *Ferguson*, 352 U.S. at 538 n.7 (Frankfurter, J., dissenting) (emphasis added). That supports our position, not McBride's.[4]

3. Post-*Rogers* decisions

McBride contends that this Court has "reaffirmed" post-*Rogers* that a FELA plaintiff "need not demonstrate common-law proximate causation." RB32. But the cases on which he relies, RB32-35, are consistent with the decisions applying proximate cause.

Most of the cases McBride cites did not involve causation at all. Contrary to the argument of some

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[4] Contrary to McBride's suggestion, RB46, the Association of American Railroads' *amicus* brief supporting rehearing in *Rogers* made the same point. See Brief of the Association of American Railroads at 11, *Rogers* v. *Mo. Pac. R.R.*, 352 U.S. 500 (1957) (No. 28), 1957 WL 86996, at *11.

of his *amici* that the issue of causation "was squarely before the Court" in *Ferguson*, Campagno Br. 12, that case held only that "there was sufficient evidence to take to the jury the question whether respondent was negligent," 352 U.S. at 522 (opinion of Douglas, J.). As for *Kernan* v. *American Dredging Co.*, 355 U.S. 426 (1958), that case did not reject any "definition of proximate cause," as one of his *amici* claims, AAJ Br. 26, but merely held that, under the doctrine of negligence *per se*, the plaintiff's injury need not be one that "the [safety] statute sought to prevent," 355 U.S. at 433; *Kernan* in fact quoted the statement in *Davis* v. *Wolfe* that FELA authorizes recovery if a violation of the Safety Appliance Act "is a proximate cause of the accident," *id.* at 434 (quoting 263 U.S. at 243). As for the other cases: *Crane* v. *Cedar Rapids & Iowa City Railway*, 395 U.S. 164 (1969), held that a State can make the defense of contributory negligence available to a railroad sued by a non-employee under the common law. *Atchison, Topeka & Santa Fe Railway* v. *Buell*, 480 U.S. 557 (1987), held that the possibility of filing a labor grievance under the Railway Labor Act does not deprive an employee of the right to bring a FELA action. *Gottshall* concerned negligent infliction of emotional distress. And *Ayers* addressed whether FELA permits recovery for fear of cancer and authorizes joint and several liability.[5]

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[5] *Ferguson* and *Kernan* are Jones Act cases, to which FELA principles apply. McBride and some of his *amici* cite briefs filed in the Fifth, Ninth, and Eleventh Circuits in which the United States acknowledged that Jones Act causation is "relaxed." RB33n.20; Campagno Br. 20-22. But those briefs prove nothing, because, at the time the cases were litigated, that was the long-settled law in the Fifth and Ninth Circuits, Pet.23n.5, and

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). McBride's assertion that *Gallick* "rejected *** common-law proximate-cause standards," RB33-34, is both unsupported and incorrect.

In discussing *Crane* and *Gottshall*, McBride highlights their dicta on causation. RB34 & n.21. But the dicta are consistent with the proper understanding of *Rogers*—*i.e.*, that FELA rejects any requirement of *sole* proximate causation. PB43-44. In any event, earlier holdings control over later dicta. PB44.

In this connection, it is curious, to say the least, that McBride concludes his brief with several pages on the virtues of statutory *stare decisis*. RB51-55. Even the court of appeals recognized that this Court's "[e]arly FELA cases did not interpret the language 'resulting in whole or in part' as altering the common-law requirement of proximate cause" and that these cases "never have been overruled explicitly" by any decision, including *Rogers*. Pet.App.9a, 12a, 18a. Despite McBride's claims to the contrary, moreover, RB51-52, the lower courts

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the Eleventh Circuit was bound by the relevant Fifth Circuit decisions.

have been divided, since *Rogers*, on whether FELA requires proximate causation, Pet.22-27 & nn.5-8; PB45-47 & n.9. That is presumably one of the reasons why the Court granted certiorari in this case. If anything is to be inferred from Congress's failure to "express its disapproval" of the decisions in this area, RB55, therefore, it is that Congress does not disapprove of this Court's only square holdings on point.

In addition to having held repeatedly that FELA requires proximate causation, this Court has held that the antitrust, RICO, and securities statutes embody the same requirement. PB47-48. McBride does not deny this. Instead, he seeks to draw artificial distinctions between the other statutes and FELA. RB49-50. But he cannot overcome the relevant characteristic that they share—namely, that the Congress that enacted each statute intended that it would encompass basic common-law principles, of which proximate causation is self-evidently one. PB47-48.

C. Neither FELA's Legislative History Nor Its Remedial Purpose Supports McBride's Position

1. According to McBride, the legislative history "reveals no evidence that Congress *** meant to incorporate the *** 'proximate cause' limitations *** imposed in [common-law] negligence cases." RB20. In fact, the legislative history reveals precisely that. Quoting the House Report, McBride says that "Congress's core purpose in FELA was 'to *change* the common-law liability of employers ... for personal injuries received by employees.'" *Ibid.* (quoting H.R. Rep. No. 60-1386, at 1 (1908)). What he fails to mention is that, immediately after the quoted sentence, the House Report listed the ways in which the bill

changed the common law. Altering the requirement of proximate causation was not one of them. Instead, consistent with the statutory text, both the House and Senate Reports explained that FELA revised the common law in four "particulars": by abolishing the fellow-servant rule, contributory negligence, and assumption of risk, and prohibiting exemption from the Act through contract. PB51-52. That is compelling evidence that Congress did not intend to abrogate other common-law doctrines.

McBride also argues that the 75th Congress's rejection, in 1939, of an amendment that would have employed the term "proximately contributed" in Section 4 of FELA shows that the 60th Congress did not intend proximate cause to be the standard when it enacted Section 1 of FELA in 1908. RB21. The short answer to this argument is that "[p]ost-enactment legislative history (a contradiction in terms) is not a legitimate tool of statutory interpretation." *Bruesewitz* v. *Wyeth LLC*, 131 S. Ct. 1068, 1081 (2011). The slightly longer answer is that "failed legislative proposals are a particularly dangerous ground on which to rest an interpretation," because "several equally tenable inferences may be drawn from [them], including 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, PB27-30 & nn.6-7, the most likely explanation for Congress's decision not to use proximate-cause language 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).

2. McBride devotes nearly three pages of his brief to the argument that requiring proximate causation would be inconsistent with FELA's remedial purpose. RB36-38. He nowhere acknowledges, however, that this Court rejected that very theory in *Sorrell*—a point we made in our opening brief, PB49.

In the same section of his brief, McBride argues that it is unnecessary to require proximate causation because Congress achieved the "purposes of the common-law 'proximate cause' doctrine through other statutory means"—namely, by "restrict[ing] the statutory cause of action to rail workers or their families." RB37. There is thus "no danger," according to McBride, that "railroads will be exposed to suit by an open-ended class of unknown plaintiffs." *Ibid.*

Restricting the class of plaintiffs, however, does not obviate the need for a proximate-cause limitation on suits that can be brought under FELA. Section 10(b) of the Securities Exchange Act of 1934, for example, restricts the cause of action to purchasers and sellers, *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723 (1975), yet this Court has held that purchasers and sellers must prove proximate causation, PB48. Without that firmly established limitation, and contrary to McBride's assertion, there self-evidently *is* a danger that defendants in FELA cases, like those in securities, antitrust, and RICO cases, "will be held liable for 'remote consequences'" of their

wrongdoing, RB37. That is why the common law imposes the limitation. PB21-23.[6]

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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[6] One of McBride's *amici* (though not McBride) makes the alternative argument that, even if FELA requires proximate causation, juries should not be instructed on that element. AAJ Br. 30-35. But trial courts have an obligation "to instruct the jury on the proper legal standard" in FELA cases. *CSX Transp., Inc.* v. *Hensley*, 129 S. Ct. 2139, 2141 (2009) (per curiam). Indeed, *amicus*'s argument is fundamentally at odds with *Sorrell*. That case holds that courts must "instruct a jury to apply the same causation standard to railroad negligence and employee contributory negligence." 549 U.S. at 172. If the Court holds in this case that the standard is proximate causation, then juries must be instructed on it.

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