No.

In the Supreme Court of the United States

CSX TRANSPORTATION, INC.,

Petitioner,

v.

RICHARD RIVENBURGH,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Under the Federal Employers' Liability Act (FELA), 45 U.S.C. §§ 51-60, railroad employees may recover for workplace injury or death "resulting in whole or in part from the negligence" of the railroad. *Id.* § 51. This case presents two related questions on which the lower courts are deeply divided:

1. Whether there is a relaxed standard of causation under FELA.

2. Whether there is a relaxed standard of negligence under FELA.

RULE 29.6 STATEMENT

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

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PETITION FOR A WRIT OF CERTIORARI

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

OPINIONS BELOW

The order of the court of appeals (App., *infra*, 1a-9a) is unreported but is available at 2008 WL 2229018. The decision and order of the district court denying petitioner's motion for judgment as a matter of law or, in the alternative, for a new trial (App., *infra*, 10a-27a) is unreported but is available at 2006 WL 2571018.

JURISDICTION

The judgment of the court of appeals was entered on May 30, 2008. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The provisions of the Federal Employers' Liability Act, 45 U.S.C. §§ 51-60, are reproduced in the Appendix. App., *infra*, 28a-32a.

INTRODUCTION

Under the Federal Employers' Liability Act (FELA or Act), railroad employees may recover for workplace injury or death "resulting in whole or in part from the negligence" of the railroad. 45 U.S.C. § 51. In *Norfolk Southern Railway Co.* v. *Sorrell*, 127 S. Ct. 799 (2007), this Court addressed the question whether the causation standard for a defendant's negligence under FELA is the same as that for a plaintiff's contributory negligence. The Court applied the principle that "the elements of a

FELA claim are determined by reference to the common law" unless the Act contains "express language to the contrary," *id.* at 805, and it held, consistent with the common law, that the causation standard is the same for both parties, *id.* at 805-809. The petitioner in *Sorrell* had also asked the Court to decide what the standard of causation is, and to hold that both the plaintiff and the defendant are required to establish proximate causation. The Court declined to address that question, however, because it had not granted certiorari to do so. *Id.* at 803-805.

Two separate concurring opinions in *Sorrell* did address the standard of causation. In a concurrence joined by Justices Scalia and Alito, Justice Souter noted that there was a conflict among lower courts on whether FELA requires a showing of proximate causation or some lesser showing. 127 S. Ct. at 809 & n.*. Justice Souter's concurrence went on to explain that proximate causation was the common-law rule before FELA; that FELA did not abrogate it; and that, contrary to the view of some lower courts, this Court's decision in *Rogers* v. *Missouri Pacific Railroad Co.*, 352 U.S. 500 (1957), did not adopt a different rule. 127 S. Ct. at 809-812. In a separate opinion concurring in the judgment, Justice Ginsburg, writing only for herself, took the position that there is a relaxed standard of causation under FELA. *Id.* at 812-815.

As the various opinions in *Sorrell* make clear, the question whether the standard of causation under FELA is proximate causation or some less stringent standard is ripe for definitive resolution by this Court. Unlike *Sorrell*, this case squarely presents that question. It also presents the closely related question whether there is a relaxed standard of neg-

ligence under the Act. The Second Circuit held below that FELA "creat[es] a relaxed standard for negligence as well as causation" and that, "[m]easured by these standards," the jury's verdict in respondent's favor was supported by sufficient evidence. App., *infra*, 3a.

This Court should grant certiorari on both questions. *First*, federal courts of appeals and state courts of last resort are deeply divided both on the causation question (as Justice Souter observed in *Sorrell*) and on the negligence question (as the Second Circuit itself acknowledged in a prior case). *Second*, the "relaxed" standards adopted by the Second Circuit cannot be reconciled with the interpretive methodology consistently employed by this Court (including in *Sorrell*)—that FELA incorporates common-law principles unless it expressly provides otherwise—and the Second Circuit's standards are therefore erroneous. *Third*, the standards of causation and negligence have recurring importance, because those elements are potentially at issue in every FELA case, at every stage of the litigation, as well as in every case brought under the Jones Act, which incorporates the judicially developed principles of liability under FELA.

Virtually every day, in federal and state courts across the Nation, similarly situated parties in cases governed by the same federal statute—FELA—are subjected to different rules on two elements of the claims at issue solely because of the happenstance of where the suit was filed. That is an intolerable state of affairs, all the more so because one of the very purposes of FELA was to "create uniformity throughout the Union." *Norfolk & W. Ry. Co.* v. *Liepelt*, 444 U.S. 490, 493 n.5 (1980) (quoting H.R. Rep. No. 1386,

60th Cong., 1st Sess. 3 (1908)). The Court should not allow it to persist.

STATEMENT

A. Statutory Background

Enacted in 1908, FELA provides a compensation scheme for injuries sustained by railroad employees in the workplace. The Act provides for concurrent jurisdiction of state and federal courts, 45 U.S.C. § 56, but substantively FELA actions are governed by federal law, *Norfolk S. Ry. Co.* v. *Sorrell*, 127 S. Ct. 799, 805 (2007). State-law remedies are preempted. *Ibid.*

Unlike workers' compensation laws, which typically provide relief without regard to fault, FELA requires an injured railroad employee to prove negligence. Section 1 of FELA provides that:

> Every common carrier by railroad * * * shall be liable in damages to any person suffering injury while he is employed by such carrier * * * , or, in case of the death of such employee, to his or her personal representative, * * * for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier.

45 U.S.C. § 51. FELA adopts a regime of comparative negligence. Under Section 3 of the Act, "the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee." *Id.* § 53.

B. Factual Background

Respondent worked as a car inspector at petitioner's railroad yard in Selkirk, New York. According to respondent's trial testimony, the following occurred while he was repairing boxcars in the yard on October 12, 2000: Respondent needed an acetylene torch to perform a repair. After inspecting the torch and observing nothing unusual, he turned on the oxygen tank and struck the igniter. The torch made a loud noise. Respondent examined the torch again and noticed that slag—a byproduct of melting metal—was embedded on the tip of the torch. Respondent later claimed that the noise caused hearing loss in his right ear. App., *infra*, 11a-13a; Pet. C.A. App. 919-928.

C. Proceedings in the District Court

Respondent sued petitioner under FELA, alleging that his hearing loss was the result of petitioner's negligence. A jury found that petitioner was negligent and that its negligence was a cause of respondent's injury. It also found that respondent was contributorily negligent and that his negligence was 40 percent responsible for the injury. The jury awarded $600,000 for past pain and suffering and $400,000 for future pain and suffering, for a total damages award of $1,000,000. The award was reduced to $600,000, to account for respondent's comparative negligence, and was further reduced to $553,150, the present value of that amount. Pet. C.A. App. 1-3; Pet. C.A. Exh. App. 194-196; App., *infra*, 8a n.6.

Petitioner filed a motion for judgment as a matter of law or, in the alternative, for a new trial, challenging, among other things, the sufficiency of the evidence supporting the jury's finding of liability.

The district court denied the motion. App., *infra*, 10a-27a. The court explained that "[t]he Second Circuit construes [FELA], 'in light of its broad remedial nature, as creating a relaxed standard for negligence as well as causation.'" *Id.* at 16a (quoting *Williams* v. *Long Island R.R. Co.*, 196 F.3d 402, 406 (2d Cir. 1999)). Applying that "relaxed" standard, the court ruled that "the evidence was sufficient to support the jury's conclusion that CSX was liable for Rivenburgh's injury." *Id.* at 18a-19a.

D. The Court of Appeals' Decision

Petitioner appealed. The court of appeals affirmed the liability component of the district court's judgment but vacated the damages component. App., *infra*, 1a-9a.

1. As to liability, the court of appeals rejected all of petitioner's arguments, including, as relevant here, that there was insufficient evidence to support the jury's findings of negligence and causation. App., *infra*, 2a-4a. Petitioner argued that there was insufficient evidence of foreseeability, and therefore of negligence, because respondent (1) offered no evidence that the slag he observed on the torch *after* he heard the noise had been there for any appreciable time (if at all) *before* he heard it; (2) offered no evidence that there had been any prior instance in which a torch operated by an employee of petitioner made a loud noise; and (3) offered no evidence that there had been any prior instance in which an employee of petitioner sustained hearing loss from the use of a torch. Pet. C.A. Br. 33-40. Petitioner argued that there was insufficient evidence of causation because the jury could only speculate that there was slag on the tip of the torch before respondent heard the loud noise. *Id.* at 21, 25, 30-33.

In rejecting these arguments, the court of appeals relied on the same principle on which the district court had relied: that FELA "creat[es] a relaxed standard for negligence as well as causation." App., *infra*, 3a (quoting *Williams*, 196 F.3d at 406). The court of appeals held that, "[m]easured by these standards," the jury's verdict in favor of respondent was supported by sufficient evidence. *Ibid.*

The court found sufficient evidence of negligence because petitioner "trained its employees to inspect and clean acetylene torches prior to using them" and respondent testified that his supervisors "were pressuring him to expedite his work." App., *infra*, 4a (quoting district court's decision). The court found sufficient evidence of causation because respondent and a co-worker testified about "the dangers of the acetylene torches and the possible consequence of failing to clean and inspect them" and respondent testified that "he saw slag on the tip of the torch after hearing the loud noise." *Id.* at 3a-4a (quoting district court's decision).

2. As to damages, the court of appeals found that the jury's award was excessive. The court concluded that a reasonable award could not exceed $400,000 (consisting of $240,000 for past pain and suffering and $160,000 for future pain and suffering) and then reduced that amount by 40 percent—to $240,000—to account for respondent's comparative negligence. The court remanded for a new trial on damages, while giving respondent the option of forgoing trial if he agreed to remit any damages above $240,000. The court of appeals directed respondent to inform the district court of his intent to remit or retry, and it directed the parties, in the event respondent de-

cided to remit, to agree on an appropriate reduction to present value. App., *infra*, 5a-9a.

Respondent has since informed the district court that (1) he has decided to remit and (2) the parties have agreed on a 2% reduction to present value. Resp. Am. Notice of Intent to Remit 1. As a consequence, the total adjusted damages award is $221,832. *Id.* at 2. As a further consequence, there will be no retrial on damages and the only remaining issue is whether the jury permissibly found in respondent's favor on liability.

REASONS FOR GRANTING THE PETITION

This case presents the question left open in *Norfolk S. Ry. Co.* v. *Sorrell*, 127 S. Ct. 799 (2007), and addressed in two concurring opinions in that case: whether, in an action under FELA, a plaintiff must prove that the defendant's negligence was the proximate cause of the injury, or instead, as the court of appeals held here, need satisfy only a "relaxed" standard of causation. This case also presents the closely related question whether there is a relaxed standard of negligence under the Act. The lower courts are deeply divided on both questions; the court below has resolved both questions incorrectly, in disregard of the settled interpretive principle that FELA incorporates common-law rules unless it expressly provides otherwise; and both questions have recurring importance, because they arise in every FELA (and every Jones Act) case. This Court should grant certiorari to establish uniform standards for the two basic elements of a FELA claim.

A. The Decision Below Conflicts With Decisions Of Other Federal Courts Of Appeals And State Courts Of Last Resort

The basic elements of a FELA cause of action are "(1) negligence, i.e., the standard of care, and (2) causation, i.e., the relation of the negligence to the injury." *Norfolk S. Ry.* v. *Sorrell*, 127 S. Ct. 799, 807 (2007) (quoting *Page* v. *St. Louis Sw Ry. Co.*, 349 F.2d 820, 823 (5th Cir. 1965)).[1] The court below held that FELA "creat[es] a relaxed standard for negligence as well as causation" and that, "[m]easured by these standards," the jury's verdict in favor of respondent was supported by sufficient evidence. App., *infra*, 3a. For the proposition that there is a "relaxed" standard for both elements, the court of appeals relied on its prior decision in *Williams* v. *Long Island R.R. Co.*, 196 F.3d 402, 406 (2d Cir. 1999), which in turn relied on *Ulfik* v. *Metro-North Commuter R.R.*, 77 F.3d 54, 58 n.1 (2d Cir. 1996). App., *infra*, 3a. *Williams* and *Ulfik* stand in a long line of published decisions in which the Second Circuit has held that FELA embodies a relaxed standard of causation, negligence, or both.[2]

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[1] A FELA plaintiff need not prove negligence, and need only prove causation, when the defendant is shown to have violated certain safety statutes (*e.g.*, the Federal Safety Appliance Act, 49 U.S.C. §§ 20301-20306). *Norfolk & W. Ry. Co.* v. *Hiles*, 516 U.S. 400, 409 (1996).

[2] See also *Tufariello* v. *Long Island R.R. Co.*, 458 F.3d 80, 87 (2d Cir. 2006) (causation and negligence standards are "lighter"); *Wills* v. *Amerada Hess Corp.*, 379 F.3d 32, 47 (2d Cir. 2004) (causation standard is "relaxed"); *Higgins* v. *Metro-North R.R. Co.*, 318 F.3d 422, 426-427 (2d Cir. 2003) (negligence standard is "relaxed"); *Marchica* v. *Long Island R.R. Co.*, 31 F.3d 1197, 1207 (2d Cir. 1994) (causation standard is "less strin-

What does it mean to say that the standards of causation and negligence in FELA cases are "relaxed"? The Second Circuit has answered that question in prior cases. As to causation, the court has said that, "to impose liability on the defendant, the negligence need not be the proximate cause of the injury," *Nicholson* v. *Erie R.R. Co.*, 253 F.2d 939, 940 (2d Cir. 1958), and that "the traditional [common-law] concept of proximate cause [has been] supplanted," *Marchica* v. *Long Island R.R. Co.*, 31 F.3d 1197, 1207 (2d Cir. 1994). As to negligence, the court has said that the employer "is potentially responsible for risks that would be too remote to support liability under common law," *Syverson* v. *Consol. Rail* Corp., 19 F.3d 824, 826 (2d Cir. 1994); accord *Ulfik*, 77 F.3d at 58; *Williams*, 196 F.3d at 407; *Tufariello* v. *Long Island R.R. Co.*, 458 F.3d 80, 87 (2d Cir. 2006), and that, although negligence under FELA is governed by the principle of foreseeability, which "determine[s] whether or not a defendant is required to guard against a particular risk," foreseeability is "construed somewhat more liberally in FELA cases," *Ulfik*, 77 F.3d at 58 n.1.

Under the Second Circuit's "relaxed" standards of negligence and causation, therefore, a FELA defendant's duty of care extends to risks more remote than those reached by the common law, and a FELA defendant that breaches its duty of care is liable even when the breach is not the direct cause of the plaintiff's injury. As explained below, those "relaxed"

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gent"); *Syverson* v. *Consol. Rail* Corp., 19 F.3d 824, 825-826 (2d Cir. 1994) (causation standard is "substantially diluted" and negligence standard is "relaxed"); *Nicholson* v. *Erie R.R. Co.*, 253 F.2d 939, 941 (2d Cir. 1958) (causation standard is "modest").

standards have been adopted by several lower courts in addition to the Second Circuit, but they have been squarely rejected by many others, which apply ordinary common-law principles of negligence and causation.

1. The lower courts are divided on whether there is a relaxed standard of causation under FELA

As Justice Souter noted in his *Sorrell* concurrence, a number of federal courts of appeals and state courts of last resort "have taken * * * proximate cause out of the concept of defendant liability under FELA." 127 S. Ct. at 809 n.*; see also *id.* at 804 (opinion of the Court). In addition to the Second Circuit, the Fifth, Sixth, Ninth, and Tenth Circuits, and the Supreme Courts of Alabama, Florida, and Texas, have determined that proximate causation is not required.[3] At the same time, as Justice Souter also

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[3] See *Page* v. *St. Louis Sw Ry. Co.*, 312 F.2d 84, 89 (5th Cir. 1963) (there has been "[a] definite departure from traditional common-law tests of proximate causation as applied to [FELA]"); *Churchwell* v. *Bluegrass Marine, Inc.*, 444 F.3d 898, 907 (6th Cir. 2006) (plaintiff "need not establish proximate causation"); *Ogelsby* v. *S. Pac. Transp. Co.*, 6 F.3d 603, 609 (9th Cir. 1993) ("'proximate cause' is not required to establish causation under the FELA"); *Summers* v. *Missouri Pac. R.R. Sys.*, 132 F.3d 599, 606 (10th Cir. 1997) ("analyz[ing] liability under the FELA in terms of proximate causation" has been "definitively abandoned"); *Glass v. Birmingham S. R.R. Co.*. 905 So.2d 789, 796 (Ala. 2004) ("Eschewing a traditional proximate-cause analysis, the FELA embraces an extremely broad standard of causation."); *McCalley* v. *Seaboard Coast Line R.R. Co.*, 265 So.2d 11, 15 (Fla. 1972) ("the concept of proximate cause no longer has any place in an action under [FELA for a violation of] the Federal Safety Appliance Act"); *Dutton* v. *S. Pac. Transp.*, 576 S.W.2d 782, 785 (Tex. 1978) ("common law 'proxi-

noted, "several State Supreme Courts have explicitly or implicitly espoused the opposite view." *Id.* at 809 n.*; see also *id.* at 804 (opinion of the Court). The Supreme Courts of Iowa, Minnesota, Montana, Nebraska, and Ohio, and the Supreme Court of Appeals of West Virginia, have all determined that proximate causation *is* required.[4]

Federal district courts in other circuits and intermediate state appellate courts in other States are likewise divided on the question.[5] Indeed, as the

mate cause' is not a proper test of the evidence in F.E.L.A. cases").

[4] See *Snipes* v. *Chicago, Cent. & Pac. R.R. Co.*, 484 N.W.2d 162, 164 (Iowa 1992) ("Recovery under the FELA requires an injured employee to prove that the defendant employer was negligent and that the negligence proximately caused, in whole or in part, the accident."); *Brabeck* v. *Chicago & Nw Ry. Co.*, 117 N.W.2d 921, 923 (Minn. 1962) ("violation of an operating rule may impose liability on an employer if it is the proximate cause of the accident"); *Marazzato* v. *Burlington N. R.R. Co.*, 817 P.2d 672, 675 (Mont. 1991) ("The plaintiff [in a FELA case] has the burden of proving that defendant's negligence was the proximate cause in whole or in part of plaintiff's [death]."); *Chapman* v. *Union Pac. R.R.*, 467 N.W.2d 388, 395 (Neb. 1991) ("To recover under the [FELA], an employee must prove the employer's negligence and that the alleged negligence is a proximate cause of the employee's injury."); *Reed* v. *Pennsylvania Rd. Co.*, 171 N.E.2d 718, 721 n.3 (Ohio 1961) ("In order to support recovery [under FELA] for an injury claimed to have been caused by a violation of the Federal Safety Appliance Act, such violation must amount to *a* proximate cause of such injury, although it need not be *the* proximate cause thereof."); *Gardner* v. *CSX Transp., Inc.*, 498 S.E.2d 473, 483 (W. Va. 1997) ("[T]o prevail on a claim under [FELA], a plaintiff employee must establish that the defendant employer acted negligently and that such negligence contributed proximately, in whole or in part, to plaintiff's injury.").

[5] Compare, *e.g.*, *Grothusen* v. *Nat'l R.R. Passenger Corp.*, 603 F. Supp. 486, 488 n.4 (E.D. Pa. 1984) (proximate cause not re-

concurrences in *Sorrell* demonstrate, disagreement about the standard of causation extends to members of this Court. Compare 127 S. Ct. at 809-812 (Souter, J., joined by Scalia and Alito, JJ., concurring), with *id.* at 812-815 (Ginsburg, J., concurring in the judgment). So widespread is the conflict that different causation standards are applied in FELA cases, not only *across* States, but also *within* certain States—Ohio and Montana, for example—depending on whether the suit is filed in state or federal court.

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quired); *Zarecki* v. *Nat'l R.R. Passenger Corp.*, 914 F. Supp. 1566, 1571 (N.D. Ill. 1996) (Castillo, J.) (same); *Beeber* v. *Norfolk S. Corp.*, 754 F. Supp. 1364, 1372 (N.D. Ind. 1990) (same); *Staley* v. *Iowa Interstate R.R., Ltd.*, No. Civ. 3-99-CV-80169, 2001 WL 1678769 at *2 (S.D. Iowa Aug. 15, 2001) (same); *Magelky* v. *BNSF Ry. Co.*, 491 F. Supp. 2d 882, 887 (D.N.D. 2007) (same); *Hall* v. *Norfolk S. Ry. Co.*, 829 F. Supp. 1571, 1578 (N.D. Ga. 1993) (same); *Fontaine* v. *Nat'l R.R. Passenger Corp.*, 54 Cal. App. 4th 1519, 1525 (1997) (same); *Leveck* v. *Consol. Rail Corp.*, 498 N.E.2d 529, 535 (Ill. App. 1st Dist. 1986) (same); *Albin* v. *Illinois Cent. R.R. Co.*, 660 N.E.2d 994, 999 (Ill. App. 4th Dist. 1995) (same); *Hamilton* v. *CSX Transp.*, 208 S.W.3d 272, 278 (Ky. App. 2006) (same); *Jackson* v. *Kansas City S. Ry.*, 619 So.2d 851, 858 (La. App. 1993) (same); *Boyt* v. *Grand Trunk W. R.R.*, 592 N.W.2d 426, 431 (Mich. App. 1998) (same); *Whitley* v. *S. Pac. Transp. Co.*, 902 P.2d 1196, 1201 (Or. App. 1995) (same), with, *e.g.*, *Lynch* v. *Decker*, No. CIV L-91-1864, 1994 WL 902363 at *3 (D. Md. Aug. 19, 1994) (proximate cause required); *Moore* v. *Chesapeake & Ohio Ry. Co.*, 493 F. Supp. 1252, 1265 (S.D. W. Va. 1980) (same); *Wier* v. *Soo Line R.R. Co.*, No. 96 C 2094, 1997 WL 733909 at *2 (N.D. Ill. Nov. 18, 1997) (Hart, J.) (same); *Dickerson* v. *Staten Trucking, Inc.*, 428 F. Supp. 2d 909, 915 (E.D. Ark. 2006) (same); *Kelson* v. *Central of Ga. R.R. Co.*, 505 S.E.2d 803, 808 (Ga. App. 1998) (same); *Brooks* v. *Brennan*, 625 N.E.2d 1188, 1193 (Ill. App. 5th Dist. 1994) (same); *Lehman* v. *Nat'l R.R. Passenger Corp.*, 661 A.2d 17, 19 (Pa. Super. 1995) (same).

2. *The lower courts are divided on whether there is a relaxed standard of negligence under FELA*

There is also disagreement about whether there is a relaxed standard of negligence under FELA. In addition to the Second Circuit, the Third, Fourth, and Ninth Circuits, and the Supreme Court of Washington, have determined that there is.[6] In contrast, the Fifth and Sixth Circuits, and the Louisiana and South Carolina Supreme Courts, have held that there is not.[7] Federal district courts and intermediate state appellate courts are likewise divided on whether FELA's negligence standard is relaxed.[8]

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[6] See *Hines v. Consol. Rail Corp.*, 926 F.2d 262, 267 (3d Cir. 1991) (FELA has "more lenient standard for determining negligence"); *Estate of Larkins v. Farrell Lines, Inc.*, 806 F.2d 510, 512 (4th Cir. 1986) (FELA imposes "light burden of proof on negligence"); *Mullahon v. Union Pac. R.R.*, 64 F.3d 1358, 1364 (9th Cir. 1995) ("relaxed standard applies to * * * negligence"); *Seeberger v. Burlington N. R.R. Co.*, 982 P.2d 1149, 1152 (Wash. 1999) ("relaxed standard * * * applies to breach of duty").

[7] See G*autreaux v. Scurlock Marine, Inc.*, 107 F.3d 331, 335 (5th Cir. 1997) (en banc) ("The duty of care owed * * * retains the usual and familiar definition of ordinary prudence."); *Van Gorder v. Grand Trunk W. R.R., Inc.*, 509 F.3d 265, 269 (6th Cir. 2007) ("FELA does not lessen a plaintiff's burden to prove the elements of negligence."); *Vendetto v. Sonat Offshore Drilling Co.*, 725 So. 2d 474, 478 (La. 1999) ("nothing in FELA * * * suggests a variation from the ordinary standard of care used in evaluating negligence in ordinary tort cases"); *Montgomery v. CSX Transp., Inc.*, 656 S.E.2d 20, 27-28 (S.C. 2008) ("federal law has not * * * established a relaxed standard of negligence (i.e., duty/breach) in FELA cases").

[8] Compare, *e.g.*, *Pry* v. *Alton & S. Ry. Co.*, 598 N.E.2d 484, 499 (Ill. App. 1992) (relaxed standard of negligence); *Briggs* v. *Kansas City S. Ry. Co.*, 925 S.W.2d 908, 913 (Mo. App. 1996) (same); *Robinson* v. *CSX Transp.*, 40 A.D.3d 1384, 1386 (N.Y. App.

The division of authority has been acknowledged by courts on both sides of the conflict, including the Second Circuit itself. See *Williams*, 196 F.3d at 406; *Montgomery v. CSX Transp., Inc.*, 656 S.E.2d 20, 26-27 (S.C. 2008).

B. The Decision Below Is Incorrect

Under long-settled precedent of this Court, including its recent decision in *Sorrell*, the elements of a FELA claim, and the defenses to such a claim, are determined "by reference to the common law," unless the Act includes "express language to the contrary." *Sorrell*, 127 S. Ct. at 805; *accord, e.g., Norfolk & W. Ry. Co.* v. *Ayers*, 538 U.S. 135, 145 (2003); *Consol. Rail Corp.* v. *Gottshall*, 512 U.S. 532, 543-544 (1994). Express language in FELA abrogates several "common-law tort defenses that had effectively barred recovery by injured workers," *Gottshall*, 512 U.S. at 542: the fellow-servant rule; contributory negligence; assumption of risk; and exemption from the Act through contract. 45 U.S.C. §§ 51, 53-55. Otherwise, however, FELA is "founded on common-law concepts." *Urie* v. *Thompson*, 337 U.S. 163, 182 (1949). Thus, finding no clear contrary indication in the statutory text, the Court has followed the common law in holding that FELA authorizes recovery of certain types of damages for occupational disease, *id.* at 182, negligent infliction of emotional distress, *Gottshall*, 512 U.S. at 549-550, and genuine and serious fear of developing cancer, *Ayers*, 538 U.S. at 149; in holding that FELA provides for joint and several liability, *id.* at 163-165; and in holding that

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2007) (same), with, *e.g.*, *Bavaro* v. *Grand Victoria Casino*, No. 97 C 7921, 2001 WL 289782 at *2 (N.D. Ill. Mar. 15, 2001) (no relaxed standard of negligence); *Phillips* v. *Illinois Cent. R.R. Co.*, 797 So.2d 231, 239 (Miss. App. 2000) (same).

FELA applies the same causation standard to the defendant's negligence and the plaintiff's contributory negligence, *Sorrell*, 127 S. Ct. at 805-809.

FELA likewise incorporates ordinary, not "relaxed," standards of causation and negligence, because there is no language in the statute abrogating the general common-law principles that govern those elements. As explained below, the Second Circuit erred in holding otherwise, thereby upsetting the balance struck by Congress in the Act.

1. The court below erred in holding that there is a relaxed standard of causation under FELA

a. As Justice Souter noted in his *Sorrell* concurrence, "[p]rior 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." 127 S. Ct. at 810; *see, e.g.,* 3 John D. Lawson, *Rights, Remedies & Practice* § 1028, at 1740 (1890); 1 Thomas G. Shearman & Amasa A. Redfield, *A Treatise on the Law of Negligence* § 26, at 27 (5th ed. 1898). That remains the common-law rule today. See*, e.g.,* 1 Dan B. Dobbs, *The Law of Torts* § 180, at 443 (2001); W. Page Keeton et al., *Prosser & Keeton on the Law of Torts* § 41, at 263 (5th ed. 1984). The proximate-cause requirement reflects the recognition that, "[i]n a philosophical sense, * * * the causes of an event go back to the dawn of human events, and beyond"; that "any attempt to impose responsibility upon such a basis would result in infinite liability for all wrongful acts"; and that a "boundary must [therefore] be set to liability for the consequences of any act." Keeton, *supra*, § 41, at 264.

There is no language in FELA, much less any *express* language, that dispenses with the common-law requirement of proximate causation. On the contrary, "FELA said nothing * * * about the familiar proximate cause standard." 127 S. Ct. at 810 (Souter, J., concurring). Accordingly, under a straightforward application of the established interpretive methodology, proximate causation is an element of a FELA claim.

Consistent with that view, this Court has "recognized and applied proximate cause as the proper standard in FELA suits" virtually from the time of the law's enactment. 127 S. Ct. at 810 (Souter, J., concurring). Indeed, it has done so in more than 15 cases.[9] The Court not only has recognized and ap-

[9] *See, e.g., Norfolk & W. Ry. Co.* v. *Earnest*, 229 U.S. 114, 118-119 (1913) (jury was "rightly" instructed that, "if the said engineer did not exercise * * * reasonable care and caution and * * * his failure so to do was the proximate cause of the accident, then [you] must find for the plaintiff"); *St. Louis, Iron Mountain & S. Ry. Co.* v. *McWhirter*, 229 U.S. 265, 280 (1913) ("it must be shown that the alleged negligence was the proximate cause of the damage"); *Lang v. New York Cent. R.R. Co.*, 255 U.S. 455, 461 (1921) (jury's verdict must be reversed because "the collision was not the proximate result of the defect"); *Davis* v. *Wolfe*, 263 U.S. 239, 243 (1923) ("an employee cannot recover under [FELA for a violation of] the Safety Appliance Act if the failure to comply with its requirements is not a proximate cause of the accident which results in his injury"); *Minneapolis, St. Paul & Sault Ste. Marie Ry. Co.* v. *Goneau*, 269 U.S. 406, 410-411 (1926) ("As there was substantial evidence tending to show that the defective coupler was a proximate cause of the accident * * * , the case was rightly submitted to the jury"); *St. Louis-S.F. Ry. Co.* v. *Mills*, 271 U.S. 344, 347 (1926) ("Nor is there evidence from which the jury might infer that petitioner's [negligence] was the proximate cause of decedent's death."); *New York Cent. R.R. Co.* v. *Ambrose*, 280 U.S. 486, 489 (1930) (plaintiff "failed to prove that the accident was proximately due

plied the requirement, but has stated it in the clearest possible terms. "In order to recover under [FELA]," the Court has said, "it [i]s incumbent upon [the plaintiff] to prove that [the defendant] was negligent and that such negligence was the proximate cause in whole or in part of the * * * accident." *Tennant* v. *Peoria & Pekin Union Ry. Co.*, 321 U.S. 29, 32 (1944).

b. In adopting a "relaxed" standard of causation in FELA cases, one less demanding than the com-

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to the negligence of the company"); *Northwestern Pac. R.R. Co.* v. *Bobo*, 290 U.S. 499, 503 (1934) ("If petitioner was negligent * * * , there is nothing whatsoever to show that this was the proximate cause of the unfortunate death."); *Swinson* v. *Chicago, St. Paul, Minneapolis & Omaha Ry. Co.*, 294 U.S. 529, 531 (1935) ("The Safety Appliance Act * * * give[s] a right of recovery [under FELA] for every injury the proximate cause of which was a failure to comply with a requirement of the act."); *Tiller* v. *Atl. Coast Line R.R. Co.*, 318 U.S. 54, 67 (1943) (FELA "leave[s] for practical purposes only the question of whether the carrier was negligent and whether that negligence was the proximate cause of the injury"); *Brady* v. *S. Ry. Co.*, 320 U.S. 476, 483 (1943) ("evidence of the unsuitablity of the rail for ordinary use * * * would justify a finding for [the plaintiffs], if the defective rail was the proximate cause of the derailment"); *Coray* v. *S. Pac. Co.*, 335 U.S. 520, 523 (1949) (plaintiff "was entitled to recover if this defective equipment was the sole or a contributory proximate cause of the decedent employee's death"); *Urie* v. *Thompson*, 337 U.S. 163, 177 (1949) (complaint stated claim under FELA because "[a]ll the usual elements [we]re comprehended, including want of due or ordinary care, proximate causation of the injury, and injury"); *O'Donnell* v. *Elgin, Joliet & E. Ry. Co.*, 338 U.S. 384, 390 (1949) ("a failure of equipment to perform as required by the Safety Appliance Act is * * * an actionable wrong, * * * for the proximate results of which there is liability [under FELA]"); *Carter* v. *Atlanta & St. Andrew's Bay Ry. Co.*, 338 U.S. 430, 435 (1949) ("if the jury determines that the defendant's breach is 'a contributory proximate cause' of injury, it may find for the plaintiff").

mon-law rule of proximate causation, the Second Circuit has relied on this Court's decision in *Rogers* v. *Missouri Pacific Railroad Co.*, 352 U.S. 500 (1957). See, *e.g.*, *Tufariello* v. *Long Island R.R. Co.*, 458 F.3d 80, 87 (2d Cir. 2006); *Williams* v. *Long Island R.R. Co.*, 196 F.3d 402, 406 (2d Cir. 1999); *Marchica* v. *Long Island R.R. Co.*, 31 F.3d 1197, 1207 (2d Cir. 1994). Indeed, virtually every court that has adopted a relaxed standard of causation has done so in reliance on *Rogers*. See *Sorrell*, 127 S. Ct. at 809 n.* (Souter, J., concurring); note 3, *supra*. As the three-Justice concurrence in *Sorrell* explained, however, "*Rogers* did not address, much less alter, existing law governing the degree of causation necessary for redressing negligence as the cause of negligently inflicted harm." *Id.* at 809-10 (Souter, J., concurring). Instead, "the case merely instructed courts how to proceed when there are multiple cognizable causes of an injury." *Id.* at 810.

(i) At common law, a plaintiff's contributory negligence "operated as an absolute bar to relief." *Sorrell*, 127 S. Ct. at 805. FELA abolished that defense, replacing it with the doctrine of comparative negligence. *Gottshall*, 512 U.S. at 542. Under the Act, a defendant is liable for the plaintiff's injury or death "resulting in whole *or in part*" from the defendant's negligence, 45 U.S.C. § 51 (emphasis added), and the plaintiff's damages are reduced "in proportion to the amount of negligence attributable to [the defendant]," *id.* § 53.

Rogers concerned those principles. The Court "granted certiorari * * * to establish the test for submitting a case to a jury when the evidence would permit a finding that an injury had multiple causes." *Sorrell*, 127 S. Ct. at 810 (Souter, J., concurring).

Quoting FELA's comparative-negligence provisions, *Rogers*, 352 U.S. at 506 n.12, 507 & n.14, the Court explained that a railroad is liable if its negligence "played any part, even the slightest," in producing the employee's injury, regardless of whether the injury also had "other causes, including the employee's contributory negligence," *id.* at 506. The Court ultimately held that the evidence in the case was sufficient to support a finding that the defendant's negligence "played a part" in the plaintiff's injury. *Id.* at 503.[10]

As Justice Souter observed in *Sorrell*, *Rogers* thus addressed only "the occasional multiplicity of causations." 127 S. Ct. at 811. It did not address "the necessary directness of cognizable causation." *Ibid.* The two concepts are distinct. "[A] given proximate cause need not be, and frequently is not, the exclusive proximate cause of harm." *Sosa* v. *Alvarez-Machain*, 542 U.S. 692, 704 (2004).

(ii) Far from having rejected proximate causation, the Court in *Rogers* assumed that proximate cause is an element of a FELA claim. For example, the jury instructions in the case required a determination that the defendant's negligence was the "proximate cause" of the plaintiff's injuries. *Rogers*, 352 U.S. at 505 n.9. That aspect of the instruction was "free of controversy" and one with which the Court "took no issue." *Sorrell*, 127 S. Ct. at 811

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[10] See also *Rogers*, 352 U.S. at 507-508 (issue is whether defendant's negligence "played any part, however small," in plaintiff's injury and jury question is presented if conclusion may reasonably be drawn that defendant's negligence "played any part at all" in plaintiff's injury); *id.* at 508-510 (repeatedly stating that Congress intended juries to decide whether defendant's negligence "played any part" in plaintiff's injury).

(Souter, J., concurring). Indeed, in sustaining the jury's finding of liability, the Court assumed that "the verdict was obedient to the trial judge's charge." *Rogers*, 352 U.S. at 505.

"The absence of any intent to water down the common law requirement of proximate cause is [also] evident from the prior cases on which *Rogers* relied." *Sorrell*, 127 S. Ct. at 811 (Souter, J., concurring). Those cases hold that a FELA plaintiff must establish proximate causation. Thus, for the proposition that the test under FELA is whether the defendant's negligence "played any part, even the slightest," in producing the plaintiff's injury (352 U.S. at 506), the Court cited *Coray* v. *S. Pac. Co.*, 335 U.S. 520, 523 (1949), which holds that a FELA plaintiff may recover if the defendant's negligence was "the sole or a contributory proximate cause" of the injury. *See Rogers*, 352 U.S. at 506 n.11. And for the proposition that the question in a FELA case is whether a jury may reasonably conclude that the defendant's negligence "played any part at all" in the plaintiff's injury (*id.* at 507), the Court cited *Carter* v. *Atlanta & St. Andrews Bay Ry. Co.*, 338 U.S. 430, 435 (1949), which holds that a jury may find for a FELA plaintiff if it determines that the defendant's negligence is "a contributory proximate cause" of the injury. *See Rogers*, 352 U.S. at 507 n.13.

The Court's decision in *Rogers* is thus "no authority for anything less than proximate causation in an action under FELA." 127 S. Ct. 812 (Souter, J., concurring). The holding of the case is not that a FELA defendant's negligence need not be the proximate cause of the injury, but that it need not be the *sole* proximate cause. After more than half a century of

pervasive confusion on the point, there is a pressing need for this Court to clarify *Rogers*' meaning.

c. It has been suggested that, whether or not this Court held that FELA plaintiffs need not prove proximate causation in *Rogers*, it so held in two cases decided after *Rogers*. See *Sorrell*, 127 S. Ct. at 812, 813 n.1 (Ginsburg, J., concurring in the judgment) (citing *Crane* v. *Cedar Rapids & Iowa City Ry. Co.*, 395 U.S. 314 (1969), and *Consolidated Rail Corp.* v. *Gottshall*, 512 U.S. 532 (1994)). In fact, neither of those decisions held that FELA abrogates the requirement of proximate cause.

In *Crane*, the Court cited *Rogers* for the proposition that a FELA plaintiff "is not required to prove common-law proximate causation but only that his injury resulted 'in whole or in part' from the railroad's [negligence]." 395 U.S. at 166. That statement is dictum, because the suit against the railroad in *Crane* was filed by a *non*employee, and thus the issue of causation was governed by state law rather than FELA. *Id.* at 167. In any event, the statement is properly read to mean only that FELA does not embody the common-law concept of *sole* proximate causation, as the Court's quotation of the Act's "in whole or in part" language confirms. If the dictum was intended to mean something more, however, it was simply incorrect, because it conflated the question of how direct a cause of an injury must be with the question of how to proceed when the injury has multiple causes. Certainly the dictum in *Crane* cannot be thought to have overruled the long line of decisions explicitly *holding* that proximate causation is required by FELA, see note 9, *supra*, particularly in light of this Court's recent reaffirmation of the principle that, "[a]bsent express language to the con-

trary, the elements of a FELA claim are determined by reference to the common law," *Sorrell*, 127 S. Ct. at 805.

In *Gottshall*, the Court cited *Rogers* for the proposition that "a relaxed standard of causation applies under FELA." 512 U.S. at 543. That statement, too, is dictum, because *Gottshall* involved an issue—the standard for negligent infliction of emotional distress—that did not require the Court to express a view on FELA causation generally. In any event, the illustrative language that immediately followed the Court's statement—a quotation from *Rogers* to the effect that the employer's negligence need only have "played any part, even the slightest, in producing the injury or death for which damages are sought," *ibid.* (quoting 352 U.S. at 506)—is entirely consistent with the proper understanding of *Rogers (i.e.*, that it is a case about multiple causes). *Gottshall*'s dictum concerning the "relaxed standard of causation"—which does not mention proximate cause—thus appears to be a reference to the fact that, unlike the common law, FELA allows a plaintiff to recover even when the railroad bears only a small proportion of the responsibility for the injury.

2. The court below erred in holding that there is a relaxed standard of negligence under FELA

a. The common-law definition of negligence is a failure to exercise the care necessary under the circumstances to protect others against an unreasonable risk of harm. That was the rule at the time of FELA's enactment, see, *e.g.,* 1 Thomas G. Shearman & Amasa A. Redfield, *A Treatise on the Law of Negligence* § 3, at 3 (5th ed. 1898), and it remains the rule today, see, *e.g.*, W. Page Keeton et al., *Prosser &*

Keeton on the Law of Torts § 31, at 169-170 (5th ed. 1984). The common-law concept recognizes that "[n]o person can be expected to guard against harm from events which are not reasonably to be anticipated at all, or are so unlikely to occur that the risk, although recognizable, would commonly be disregarded." *Id.* § 31, at 170.

According to the established interpretive methodology, the ordinary common-law standard of negligence applies in FELA cases unless there is "express language to the contrary" in the statute. *Sorrell*, 127 S. Ct. at 805. As the en banc Fifth Circuit has explained, there is "nothing in the text" of FELA—or even in its "structure"—to indicate that "the standard of care * * * is anything different than ordinary prudence under the circumstances." *Gautreaux* v. *Scurlock Marine, Inc.*, 107 F.3d 331, 338 (5th Cir. 1997) (en banc). On the contrary, FELA provides simply that a railroad is liable for injuries caused by its "negligence," 45 U.S.C. § 51, and "one must assume that Congress intended its words to mean what they ordinarily are taken to mean—a person is negligent if he or she fails to act as an ordinarily prudent person would act in similar circumstances," *Gautreaux*, 107 F.3d at 338 (quoting *Fashauer* v. *New Jersey Transit Rail Operations*, 57 F.3d 1269, 1283 (3d Cir. 1995)).

Consistent with that view, this Court has explicitly stated that the definition of "negligence" in FELA is determined by "common law principles," *Urie* v. *Thompson*, 337 U.S. 163, 174 (1949)—and, in particular that an employer's liability is determined "under the general rule which defines negligence as the lack of due care under the circumstances," *Tiller* v. *Atl. Coast Line R.R. Co.*, 318 U.S. 54, 67 (1943);

accord *Anderson* v. *Atchison, Topeka & Santa Fe Ry. Co.*, 333 U.S. 821, 823 (1948) (per curiam). Indeed, in *Sorrell* itself, the Court confirmed that the standard of negligence, for both the railroad and the employee, is "ordinary prudence." 127 S. Ct. at 807 (quoting *Page* v. *St. Louis Sw Ry. Co.,* 349 F.2d 820, 823 (5th Cir. 1965)).

b. The Second Circuit has not suggested that there is any language in FELA—much less any *express* language—that supports that court's departure from the common law. In interpreting FELA to create a "relaxed" standard of negligence, one making railroads potentially responsible for risks too remote to support liability under the common law, the Second Circuit has instead relied on the statute's "broad remedial nature." App., *infra*, 3a (quoting *Williams*, 196 F.3d at 406, in turn quoting *Ulfik* v. *Metro-North Commuter R.R.*, 77 F.3d 54, 58 n.1 (2d Cir. 1996)). That rationale, however, was explicitly rejected in *Sorrell*.

In arguing that FELA creates a less stringent standard of causation for the defendant's negligence than for the plaintiff's contributory negligence, the plaintiff in *Sorrell* likewise invoked FELA's "remedial purpose." 127 S. Ct. at 808. The Court was "not persuaded." *Ibid.* While acknowledging that FELA "was indeed enacted to benefit railroad employees"—"as the express abrogation of [certain] common-law defenses * * * make[s] clear"—the Court explained that it nevertheless "does not follow * * * that this remedial purpose requires [the Court] to interpret every uncertainty in the Act in favor of employees." *Ibid.* The Court went on to say that "FELA's text does not support the proposition that Congress meant to take the unusual step of applying different

causation standards" and that "the statute's remedial purpose cannot compensate for the lack of a statutory basis." *Ibid.* The Court therefore held that "FELA does not abrogate the common-law approach." *Ibid.* The Court's reasoning in *Sorrell* is no less dispositive here.

c. The Second Circuit has also suggested that its "relaxed" standard of negligence follows from this Court's statement in *Kernan* v. *American Dredging Co.*, 355 U.S. 426 (1958), that "the theory of FELA is that where the employer's conduct falls short of the high standard required of him by the Act and his fault, in whole or in part, causes injury, liability ensues." *Tufariello* v. *Long Island R.R. Co.*, 458 F.3d 80, 87 (2d Cir. 2006) (quoting 355 U.S. at 438-439). *Kernan* cannot justify the Second Circuit's relaxed standard, because, in that case, the Court was not addressing the definition of "negligence" in FELA. On the contrary, the Court was addressing a circumstance in which a defendant can be liable under the Act "without regard to negligence" (*Kernan*, 355 U.S. at 431)—namely, when the defendant has violated a safety statute. See note 1, *supra*.

The Court in *Kernan* did say that the "high standard" of conduct applies "whether the fault is a violation of a statutory duty or the more general duty of acting with care." 355 U.S. at 439. A "high standard" of care may suggest a "relaxed standard" of negligence. But the Court's statement is dictum, because the meaning of "negligence" in FELA was not at issue in the case. The statement is also ill-considered, because it is inconsistent with the established interpretive principle that FELA presumptively incorporates common-law concepts, with the absence of any language in FELA expressly abrogat-

ing the common-law understanding of negligence, and with this Court's prior statements—including in *Sorrell*—that FELA incorporates ordinary rules of negligence. *Tiller*, 318 U.S. at 67.

C. The Questions Presented Are Recurring Ones Of Exceptional Importance

1. Because FELA "pre-empt[s] state tort remedies," *Sorrell*, 127 S. Ct. at 805, it is the exclusive remedy for injuries sustained by railroad employees in the workplace. And the remedy is frequently invoked. According to statistics compiled by the Administrative Office of the U.S. Courts, nearly 4,000 FELA actions were commenced in U.S. District Court alone in the five-year period from 2003 through 2007. *Annual Report of the Director: Judicial Business of the United States Courts*, Table C-2A at 1 (2007), *available at* http://www.uscourts.gov/judbus2007/appendices/CO2ASep07.pdf. That number is merely a fraction of the total number of FELA actions commenced in *all* courts (federal and state). According to statistics compiled by the Association of American Railroads (AAR), approximately 25,000 such suits were filed during the five-year period from 1998 through 2002. Br. of AAR as *Amicus Curiae* in *Jones* v. *CSX Transp., Inc.*, No. 03-16231-A (11th Cir. Jan. 27, 2004). The AAR has informed petitioner that approximately 10,000 additional FELA suits were filed during the two-year period from 2003 through 2004.

Because negligence and causation are the basic elements of a FELA claim, moreover, the questions presented in the petition—whether there are "relaxed" or ordinary common-law standards of negligence and causation—can arise in every case brought under FELA. And they can arise at every phase of the litigation: before trial, at the summary-judgment

stage; during trial, when the defendant moves for judgment as a matter of law; at the end of trial, when the jury is instructed; after trial, when the defendant renews its motion for judgment as a matter of law following a verdict in the plaintiff's favor; and on appeal, when challenges to jury instructions and the sufficiency of the evidence can be raised again.

The questions presented here can also arise in every case brought under the Jones Act, 46 U.S.C. § 30104(a), the law that governs liability for injuries sustained in the workplace by seamen. In actions brought under the Jones Act, courts are obliged to apply the "[l]aws of the United States regulating recovery for personal injury to, or death of, a railway employee." *Ibid.* This Court has held that the Jones Act thus "adopts 'the entire judicially developed doctrine of liability' under [FELA]." *American Dredging Co.* v. *Miller*, 510 U.S. 443, 456 (1994) (quoting *Kernan* v. *American Dredging Co.*, 355 U.S. 426, 439 (1958)). As a consequence, judicial interpretations of FELA's negligence and causation elements apply both in FELA suits by railroad employees and in Jones Act suits by seamen. Compare, *e.g.*, *Wills* v. *Amerada Hess Corp.*, 379 F.3d 32, 47 n.8 (2d Cir. 2004) (relaxed standard of causation under FELA and Jones Act), with, *e.g.*, *Gautreaux v. Scurlock Marine, Inc.*, 107 F.3d 331, 338 (5th Cir. 1997) (en banc) (no relaxed standard of negligence under FELA or Jones Act).

2. The conflicting standards applied by the lower courts do not differ merely in their formulations; they can affect the outcome of cases. In upholding the jury's verdict in this case, for example, the Second Circuit "[m]easured" the sufficiency of the evidence by the "relaxed" standards established in its

prior decisions. App., *infra*, 3a. And it is likely that the verdict would *not* have been upheld if the Second Circuit had applied ordinary common-law principles. The court found the evidence sufficient, in part, because petitioner "trained its employees to inspect and clean acetylene torches prior to using them" and respondent testified that his supervisors "were pressuring him to expedite his work." *Id.* at 4a. Under ordinary (as opposed to "relaxed") principles of foreseeability, however, an employer could not reasonably anticipate that an employee would fail to conduct a thorough (but uncomplicated) inspection he had been trained to conduct for his own safety, *id.* at 11a-12a, 18a; Pet. C.A. Exh. App. 50-51, of equipment "he had thirty years experience using," *id.* at 12a, merely because the employee had been told to "expedite his work," *id.* at 4a, a routine occurrence in virtually any workplace.

Prior decisions of the Second Circuit confirm that the "relaxed" standards allow plaintiffs to prevail in cases in which they would not have prevailed if the suits had been filed in other courts. In *Syverson* v. *Consolidated Rail Corp.*, 19 F.3d 824 (2d Cir. 1994), for example, the employee was "attacked by a knife-wielding stranger" in the employer's railyard. *Id.* at 825. The district court granted summary judgment to the railroad, reasoning that "a sudden violent attack by a crazed trespasser was inherently unforeseeable" and that the railroad therefore "could not be deemed negligent." *Ibid.* The Second Circuit acknowledged that the attack was "essentially freakish," that the evidence of negligence was "slight" and "[t]hin," and that the railroad would have been entitled to summary judgment "had this been a negligence action at common law." *Id.* at 825-828. The Second Circuit nevertheless reversed, relying on the

principle that the standard of negligence under FELA is "substantially diluted" and "relaxed," such that an employer can be "responsible for risks that would be too remote to support liability under common law." *Id.* at 825-826. The court relied, in part, on its prior decision in *Gallose* v. *Long Island R.R. Co.*, 878 F.2d 80, 84-86 (2d Cir. 1989), which held that, under FELA, a railroad's negligence could be established when an employee was bitten by a large dog the employer knew or should have known was on the premises, even though, under the common-law rule, negligence could not be established unless the defendant knew or should have known that the dog on its premises was vicious. *Syverson*, 19 F.3d at 827-828.

In another case, *Zimmerman* v. *Long Island R.R.*, 2 Fed. Appx. 172 (2d Cir. 2001), the employee was directed "to cut down a tree that was fouling a track" and did so "by himself with some difficulty"; his foot then "became entangled in brush near the track," and he "tripped and injured his right knee." *Id.* at 173. A jury returned a verdict in favor of the employee. The Second Circuit affirmed, holding, among other things, that there was sufficient evidence of causation. Applying the principle that "the standard under the FELA is relaxed" and that "the plaintiff is not required to prove common-law proximate causation," the court concluded that a jury "easily" could have found that the employee's injury was caused by the railroad's violation of regulations governing a "lone worker." *Id.* at 175-176 (internal quotation marks omitted). The court reasoned that, if the employee's supervisor "had been aware that the [employee] was not qualified as a lone worker," the employee "would presumably not have been dispatched" on the night of the injury. *Id.* at 176. That

is classic "but for" causation—the violation of the regulations "merely create[d] an incidental condition or situation in which the accident, otherwise caused, result[e]d in [an] injury," *Davis* v. *Wolfe*, 263 U.S. 239, 243 (1923)—and it is therefore insufficient under the common law. Indeed, a trial court in Ohio—where proximate causation *is* required—recently granted summary judgment for the railroad in a FELA case with similar facts. See *Sievert* v. *CSX Transp., Inc.*, No. CI0200504624, 2008 WL 3819782 (Ohio Ct. Com. Pl. June 22, 2008) (theory of causation was that injury would not have occurred if locomotive on which plaintiff was injured had been taken out of service because of defective handbrake, which otherwise bore no relation to injury).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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