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

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Whether the Federal Employers' Liability Act, 45 U.S.C. §§ 51-60, requires proof of proximate causation.

CORPORATE DISCLOSURE 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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BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-40a) is reported at 598 F.3d 388. The memorandum and order of the district court denying petitioner's motion for reversal, a new trial, or remittitur (Pet. App. 41a-43a) is unreported but is available at 2008 WL 4185933.

JURISDICTION

The judgment of the court of appeals was entered on March 16, 2010. A timely petition for rehearing en banc was denied on June 3, 2010. Pet. App. 47a. 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 an appendix to this brief. App., *infra*, 1a-6a.

STATEMENT

The Federal Employers' Liability Act (FELA or Act) authorizes a railroad employee to recover for a workplace injury "resulting in whole or in part from the negligence" of the railroad, 45 U.S.C. § 51, with damages reduced in proportion to any contributory negligence by the employee. In *Norfolk Southern Railway* v. *Sorrell*, 549 U.S. 158 (2007), this Court addressed whether a defendant's negligence and a plaintiff's contributory negligence are governed by the same causation standard under the Act. The Court applied the established 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 165-166, and it held, consistent with the common law, that the causation standard is the same for both parties.

The petitioner in *Sorrell* had also asked the Court to decide what the causation standard is, and to hold that both the plaintiff and the defendant must prove proximate causation. The Court declined to address that question, but two separate opinions in *Sorrell* did. In one, Justice Souter, joined by Justices Scalia and Alito, explained that proximate causation was the common-law rule before FELA; that the text of the Act did not change it; that this Court consistently applied the rule in FELA cases throughout the first half of the 20th century; and that, contrary to the view of some lower courts, this Court's decision in *Rogers* v. *Missouri Pacific Railroad*, 352 U.S. 500 (1957), did not adopt a different rule. *Sorrell*, 549 U.S. at 172-177 (Souter, J., concurring). In the other separate opinion, Justice Ginsburg, writing only for herself, disagreed with this analysis. *Id.* at 177-182 (Ginsburg, J., concurring in the judgment).

In this case, the Seventh Circuit acknowledged that the three-Justice concurrence in *Sorrell* has "considerable force," Pet. App. 35a, but ultimately chose not to follow it, believing that it would be inappropriate "to anticipate future actions of the Supreme Court," *id.* at 36a. The court of appeals thus "decline[d] to hold that * * * common-law proximate causation is required to establish liability under the FELA." *Id.* at. 39a.

The three-Justice concurrence in *Sorrell* is correct, and the decision below is wrong. Proximate causation is required under both the settled methodology for interpreting FELA and more than 20 of

this Court's decisions. The Court should so hold and reverse the judgment of the court of appeals.

A. Statutory Background

Enacted in 1908, FELA establishes 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, *Sorrell*, 549 U.S. at 165. State-law remedies are preempted. *Ibid.*

Unlike workers' compensation laws, which typically provide relief without regard to fault, FELA is a negligence statute. In language that has not been amended since its enactment, Section 1 provides:

> Every common carrier by railroad * * * shall be liable in damages to any person suffering injury while he is employed by such carrier * * * for such injury * * * 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. The basic elements of a FELA cause of action are thus "breach of a duty of care (that is, conduct unreasonable in the face of a foreseeable risk of harm), injury, and causation." *Consol. Rail Corp.* v. *Gottshall*, 512 U.S. 532, 538 (1994).[1]

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[1] The elements of duty and breach can be satisfied by a showing that the defendant violated certain safety statutes—for example, the Safety Appliance Act, 49 U.S.C. § 20301 *et seq.* See, *e.g.*, *Norfolk & W. Ry.* v. *Hiles*, 516 U.S. 400, 409 (1996). "Once the violation is established, only causal relation is in issue." *Carter* v. *Atlanta & St. Andrew's Bay Ry.*, 338 U.S. 430, 434 (1949).

"Absent express language to the contrary," these elements, and a railroad's defenses, "are determined by reference to the common law." *Sorrell*, 549 U.S. at 165-166. The Act "did away with several common-law tort defenses that had effectively barred recovery by injured workers." *Gottshall*, 512 U.S. at 542. But "[o]nly to the extent of these explicit statutory alterations is FELA 'an avowed departure from the rules of the common law.'" *Id.* at 544 (quoting *Sinkler* v. *Mo. Pac. R.R.*, 356 U.S. 326, 329 (1958)).

"One notable deviation from the common law," *Sorrell*, 549 U.S. at 166, is FELA's rejection of "the doctrine of contributory negligence in favor of that of comparative negligence," *Gottshall*, 512 U.S. at 542-543. "At common law, of course, a plaintiff's contributory negligence operated as an absolute bar to relief." *Sorrell*, 549 U.S. at 166. Under Section 1 of the Act, in contrast, a railroad is liable even if the injury resulted only "in part" from its negligence, 45 U.S.C. § 51, and under Section 3 "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," 45 U.S.C. § 53.[2]

B. Factual Background

Petitioner CSX Transportation, Inc. (CSXT) operates an interstate system of railroads. In addition

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[2] An employee may not be found contributorily negligent—and thus damages will not be reduced—in a case in which the injury was caused by the railroad's violation of a safety statute. 45 U.S.C. § 53. For these purposes, see 45 U.S.C. § 54a, a safety statute includes a regulation issued under the Federal Railroad Safety Act, 49 U.S.C. § 20101 *et seq.*

to transporting freight over long distances, it makes "local" runs that pick up individual rail cars for long-distance transportation or deliver cars to their final destinations. At each stop on a local run, cars are added to or removed from the train in a process known as "switching," which requires more frequent starts and stops than a long-distance journey. Pet. App. 2a.

Trains use multiple braking systems in slowing to a stop. The "automatic brake" slows the cars of the train, while a separate "independent brake" slows the locomotives. The automatic brake normally activates the independent brake as well, and careless use of the former can cause the locomotives to brake too quickly, leading the rear cars to run into the front ones. To slow a long train, engineers apply the automatic brake while releasing the independent brake, a maneuver known as "actuating" or "bailing off" the independent brake. Standard practice is to actuate the independent brake for four seconds per locomotive. Pet. App. 2a.

On certain models of heavier, "wide-body" locomotives, the independent brake is actuated by pressing a button on the side of the brake handle. On some smaller, "conventional" locomotives, engineers actuate the independent brake by pushing the handle down with one hand. Pet App. 2a-3a.

Respondent McBride was a locomotive engineer for CSXT. On April 12, 2004, he was assigned to a local run on a train with five locomotives, the front two of which were wide bodies and the other three of which were conventional engines. Towards the end of the run, McBride reached to release the independent brake and hit his hand on the brake

handle in the lead wide-body locomotive. The injury produced swelling and pain. McBride sued CSXT under FELA, alleging that the train assigned to him was unsafe for switching and that his repeated pressing and holding of the actuator button had fatigued his hand, causing the injury. Pet. App. 3a-5a.

C. Proceedings In The District Court

1. At trial, McBride's theory of negligence was that the type and number of locomotives on his train increased the risk of derailment or collision. McBride's railroad expert, Paul Byrnes, testified that wide-body locomotives have diminished visibility and more difficulty on curved tracks. JA 13a-15a. Byrnes also expressed the opinion that the use of five locomotives required careful braking; otherwise, he said, the locomotive brakes could be damaged, the cars could "sling-shot out," and there would be "a very good chance of breaking knuckles [between the cars] and even possibly putting something on the ground." JA 12a-13a, 16a. McBride himself testified that he was concerned about the type and number of locomotives because he had not been trained to switch with a wide-body engine and feared that the extra weight of the locomotives could cause the rear cars "to come in and hit the engines and maybe jack-knife them off the track." JA 18a-19a.

There was no derailment or collision in this case, however. McBride's theory of causation, as his lawyer expressed it in his summation, was that the injury to his hand "never would have happened but for the defendant giving him that train." JA 26a. Elaborating on this "but for" theory, McBride's lawyer told the jury that, if he had been "given the right lo-

comotive and the right train setup" (*i.e.*, fewer and narrower locomotives), McBride (1) would "never have had to make these repetitive movements and grips with his right arm" (because he would have needed less time to bail off the brake and would have done so with his whole hand rather than his thumb); (2) would never have fatigued his hand; (3) would "never have hit his hand" on the brake; and (4) would never have experienced swelling and pain. JA 25a.

2. McBride's proffered jury instruction 4, on causation, made no reference to proximate causation. It stated:

> Defendant "caused or contributed to" Plaintiff's injury if Defendant's negligence played a part—no matter how small—in bringing about the injury. The mere fact that an injury occurred does not necessarily mean that the injury was caused by negligence.

Pet. App. 5a; JA 31a.

CSXT objected to the charge, arguing that it was "a misstatement of the causation standard." JA 21a. In response, McBride pointed out that it was "a pattern instruction unmodified from the Seventh Circuit." *Ibid.* The commentary to the pattern instruction cites this Court's decision in *Rogers* for the proposition that "[t]he common law standard of proximate cause does not apply" in FELA actions. 7th Cir. Pattern Civil Jury Instrs. § 9.02 cmt. a. The district court ruled that it was "going to give [the instruction] over objection." JA 21a.

CSXT's proffered jury instruction 15 would have required McBride to prove proximate causation. It stated:

> In order to establish that an injury was caused by the defendant's negligence, the plaintiff must show that (i) the injury resulted "in whole or in part" from the defendant's negligence, and (ii) the defendant's negligence was a proximate cause of the injury.

Pet. App. 6a; JA 34a.

CSXT argued that the proffered charge reflected "the proper standard for causation as set forth by the Supreme Court opinions that are cited" in the charge, which hold—like many other decisions of this Court—that FELA requires proximate causation. JA 22a; see JA 34a (citing *Brady* v. *S. Ry.*, 320 U.S. 476, 483-484 (1943); *Tennant* v. *Peoria & Pekin Union Ry.*, 321 U.S. 29, 32 (1944); and *Coray* v. *S. Pac. Co.*, 335 U.S. 520, 523 (1949)). McBride objected, "based on the same reasons" he had previously stated. JA 22a. The district court denied the requested instruction for the "[s]ame reasons." *Ibid.*

The district court also rejected CSXT's instruction 14, on contributory negligence, which likewise would have required a finding of proximate causation, and CSXT's instruction 11, which explained what proximate cause means. JA 21a-22a. CSXT's instruction 14 stated:

> When I use the expression "contributory negligence," I mean negligence on the part of the plaintiff that contributed in whole or in

> part to and proximately caused the alleged injury.

JA 33a. CSXT's instruction 11 stated:

> When I use the expression "proximate cause," I mean any cause which, in natural or probable sequence, produced the injury complained of. It need not be the only cause, nor the last or nearest cause. It is sufficient if it concurs with some other cause acting at the same time, which in combination with it, causes the injury.

Pet. App. 6a; JA 32a.

3. In the charge it delivered, the district court paraphrased Section 1 of FELA, instructing the jury that the Act imposes liability

> where the injury results, in whole or in part, from the negligence of any of the officers, agents or other employees of the railroad.

JA 23a. Dividing that language into FELA's basic elements, the court next told the jury that McBride was required to prove that

> 1, the defendant was negligent, and 2, defendant's negligence caused or contributed to plaintiff's injuries.

Ibid.

The district court then delivered McBride's proffered instruction, approved at the charging conference, on the element of causation. The court informed the jury that

> [d]efendant "caused or contributed to" plaintiff's injury if defendant's negligence played a

> part—no matter how small—in bringing about the injury.

JA 23a. The court did not give CSXT's proffered instruction on proximate causation or otherwise mention that concept during the charge.

4. After a two-day trial, the jury returned a verdict for McBride, finding that CSXT was negligent and that its negligence caused or contributed to his injury. The jury also found McBride to have been contributorily negligent. It awarded damages of $275,000, of which 67 percent was attributed to CSXT's negligence and 33 percent to McBride's. The district court entered judgment in the amount of $184,250. It subsequently denied CSXT's post-trial motion, which argued, among other things, that CSXT was entitled to a new trial because the court failed to give an instruction on proximate cause. Pet. App. 7a, 41a-44a; JA 9a, 17a, 27a-30a.

D. The Court Of Appeals' Decision

CSXT appealed, arguing that FELA requires proof of proximate causation. The court of appeals rejected that argument and affirmed. Pet. App. 1a-40a. Although the court stated that "the question we must resolve is whether Section 1 of the FELA * * * abrogates the common-law rule of proximate cause," *id.* at 7a, the thrust of the court's opinion was not so much that FELA does abrogate the rule as that it would be inappropriate for a lower court to hold that it does not. The court recognized that there was much to be said for the view that proximate causation is an element of a FELA plaintiff's case, but suggested that only this Court could so hold.

The court of appeals acknowledged, for example, that, "[a]bsent express language to the contrary, the elements of a FELA claim are determined by reference to the common law"; that "[p]roximate causation is not explicitly mentioned in the statute"; and that this Court "never has identified proximate causation as among those principles of common law that have been abrogated by the FELA." Pet. App. 35a (quoting *Sorrell*, 549 U.S. at 165-166). The court also acknowledged that this Court's early decisions "required that the [plaintiff's] injury be a direct or proximate result of * * * the negligent act[] in order for liability under the FELA to be imposed" and that those cases "never have been overruled explicitly." *Id.* at 11a-12a. In particular, the court observed, this Court's decision in *Rogers* did not "explicitly overrul[e] earlier FELA cases that had spoken in terms of common-law proximate cause." *Id.* at 18a. And the court identified a reason for *not* reading *Rogers* to have abandoned proximate cause—namely, that *Rogers* "involved multiple causes," not the requisite directness of a cause, and addressed "the issue of when a case with multiple causes must be submitted to a jury." *Id.* at 35a-36a.

The court of appeals thus acknowledged that the three-Justice concurrence in *Sorrell* has "considerable force." Pet. App. 35a. But it nevertheless concluded that four "countervailing considerations" prevented it from holding that FELA requires proof of proximate causation. *Id.* at 36a.

First, the court of appeals pointed out that it "ha[s] been admonished not to anticipate future actions of the Supreme Court." Pet. App. 36a. The court relied on that consideration even though (a) the import of the admonition is that a lower court is

obliged to follow decisions of this Court that have not been "expressly overrule[d]," *United States* v. *Hatter*, 532 U.S. 557, 567 (2001), and (b) the court recognized that this Court's decisions holding that FELA requires proof of proximate causation have not been expressly overruled.

Second, the court of appeals stated that it "must treat with great respect the prior pronouncements of the Supreme Court"—including the statement in *Gottshall* that "a relaxed standard of causation applies under FELA," 512 U.S. at 543—"even if those pronouncements are technically dicta." Pet. App. 37a. The court implicitly rejected CSXT's arguments that earlier holdings of this Court control over later dicta, Pet. C.A. Reply Br. 14 n.3, and that, in any event, *Gottshall*'s "relaxed standard" dictum is best understood as a reference to *Rogers*' holding that FELA allows recovery even when the railroad bears only a small proportion of responsibility for the injury, Pet. C.A. Br. 39.

Third, the court of appeals expressed concern that a holding in CSXT's favor "would cause a conflict with every other [federal] court of appeals," each of which "ha[s] taken the view, based on *Rogers*, that there is a 'relaxed' standard of [causation] under the FELA." Pet. App. 38a. The court relied on that consideration despite the fact that, like *Gottshall*, "many of these cases simply recite 'the general proposition that FELA employs a "relaxed standard" of causation, without discussing (or even mentioning) proximate cause,'" *id.* at 25a n.6 (quoting Pet. C.A. Reply Br. 19), and despite the court's recognition that a number of state courts of last resort "still apply traditional formulations of proximate cause in FELA cases," *id.* at 35a n.7.

Fourth, the court of appeals believed that "[c]ongressional inaction, in the wake of *Rogers* and circuit law broadly interpreting *Rogers*, counsels against adopting a common-law formulation of [proximate] cause in FELA cases." Pet. App. 38a-39a. The court relied on that consideration even though it acknowledged that (a) this Court's only square *holdings* on point are that FELA requires proof of proximate causation and (b) there is no consensus in the lower courts on that issue.

"In light of these considerations," the court of appeals "decline[d] to hold that * * * common-law proximate causation is required to establish liability under the FELA." Pet. App. 39a. It therefore determined that the district court did not "commit[] instructional error in refusing CSX[T]'s proffered instruction" on proximate cause. *Ibid.*

SUMMARY OF ARGUMENT

FELA requires proof that the railroad's negligence was a proximate cause of the employee's injury.

A. Proximate causation is required under the established methodology for interpreting FELA. Under that methodology, which this Court employed most recently in *Norfolk Southern Railway* v. *Sorrell*, 549 U.S. 158 (2007), "the elements of a FELA claim are determined by reference to the common law," unless the Act includes "express language to the contrary." *Id.* at 165-166. Proximate causation was "clear common law" when FELA was enacted, *id.* at 173 (Souter, J., concurring), and it remains the common-law rule today. That leaves just the question whether there is any express statutory language that abrogates it. There is none.

The Act states that an employee may recover for an injury "resulting in whole or in part" from the railroad's negligence. 45 U.S.C. § 51. As the Court explained in *Sorrell*, that language "make[s] clear that there could be recovery against the railroad even if it were only partially negligent," 549 U.S. at 170—*i.e.*, if the railroad's negligence were only *one of the causes* of the injury. The statutory language does not address the requisite *directness* of a cause, which is therefore governed by the common law. By authorizing recovery for an injury "resulting in whole or in part" from the railroad's negligence, while "sa[ying] nothing * * * about the familiar proximate cause standard," *id.* at 174 (Souter, J., concurring), FELA simply provides that an employee may recover when the railroad's negligence is one of the proximate causes of the injury.

B. Proximate causation is also required under this Court's precedents, more than 20 of which have "recognized and applied proximate cause as the proper standard [under] FELA." *Sorrell*, 549 U.S. at 174 (Souter, J., concurring). In these cases, the Court has viewed the proximate-cause standard as so uncontroversial as to "require no reasoning to demonstrate," *St. Louis, Iron Mountain & S. Ry.* v. *McWhirter*, 229 U.S. 265, 280 (1913), and it has stated the standard in the clearest possible 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 also made clear that "but for" causation is insufficient, explicitly contrasting negligence that is the "proximate cause" of an injury with negligence that

"merely creates an incidental condition or situation in which the accident * * * results in such injury," *Davis* v. *Wolfe*, 263 U.S. 239, 243 (1923), and it has repeatedly relied on this distinction in reversing jury verdicts for plaintiffs. Contrary to the suggestion of the court of appeals that *Coray* v. *Southern Pacific Co.*, 335 U.S. 520 (1949), is somehow "inconsistent" with these decisions, Pet. App. 12a (internal quotation marks omitted), *Coray* expressly stated that FELA authorizes recovery when the railroad's negligence "was the sole or a contributory proximate cause" of the employee's injury, and it held that a jury could find proximate causation in that case because the negligence and injury "were inseparably related to one another in time and space." *Coray*, 335 U.S. at 523, 524.

This Court's decision in *Rogers* v. *Missouri Pacific Railroad*, 352 U.S. 500 (1957), did not silently overrule these 20-plus decisions, as a number of lower courts with which the court below aligned itself have mistakenly concluded. *Rogers* simply rejected the view that a railroad's negligence must be the "sole" proximate cause of an employee's injury. *Rogers*, 352 U.S. at 506. It explained that an employee may recover under the Act if the railroad's negligence "played any part, even the slightest," in causing the injury, and that it does not matter that the injury may have had "other causes, including the employee's contributory negligence." *Ibid.* That language addressed "multiplicity of causations," not "the necessary directness of * * * causation." *Sorrell*, 549 U.S. at 175 (Souter, J., concurring). It confirmed that, when the statute says that an employee may recover for an injury resulting "in whole or in part" from the railroad's negligence, 45 U.S.C. § 51, "in

part" means in "any part, even the slightest." As far as "existing law governing the *degree* of causation necessary for redressing negligence" is concerned, *Rogers* "left th[e] law where it was." *Sorrell*, 549 U.S. at 173, 174 (Souter, J., concurring) (emphasis added).

Far from having rejected proximate cause, *Rogers* assumed that FELA requires it. *First*, the trial court's jury instructions in *Rogers*, with which this Court "took no issue," *Sorrell*, 549 U.S. at 176 (Souter, J., concurring), and to which the Court assumed the "verdict was obedient," *Rogers*, 352 U.S. at 505, "covered the requirement to show proximate cause," *Sorrell*, 549 U.S. at 176 (Souter, J., concurring). *Second*, the plaintiff-petitioner in *Rogers* did not ask this Court to abandon proximate cause, but argued merely that the evidence permitted a jury finding that the railroad's negligence was "the proximate cause of [his] injury." Brief for Petitioner at 12, *Rogers* v. *Mo. Pac. R.R.*, 352 U.S. 500 (1957) (No. 28), *available at* 1956 WL 89025. *Third*, no fewer than three of "the prior cases on which *Rogers* relied" to support the proposition that the railroad's negligence need only have played "any part" in the employee's injury "unambiguously recognized proximate cause as the standard applicable in FELA suits." *Sorrell*, 549 U.S. at 175-176 (Souter, J., concurring). *Fourth*, the dissenting Justices in *Rogers* did not understand the Court to have established any new principle of causation, but argued merely that the Court had improperly substituted its view of the evidence for that of the lower court. See *Ferguson* v. *Moore-McCormack Lines, Inc.*, 352 U.S. 521, 532-533, 536-537, 540-541 (1957) (Frankfurter, J., dissenting); *id.* at 562-563 (opinion of Harlan, J.).

The court of appeals interpreted two of this Court's post-*Rogers* decisions—*Crane* v. *Cedar Rapids & Iowa City Railway*, 395 U.S. 164 (1969), and *Consolidated Rail Corp.* v. *Gottshall*, 512 U.S. 532 (1994)—to have adopted a standard "less stringent than proximate cause." Pet. App. 19a. *Crane* 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, and *Gottshall* cited *Rogers* for the proposition that "a relaxed standard of causation applies under FELA," 512 U.S. at 543. But as the court of appeals recognized, Pet. App. 37a, these statements are dicta, and thus they cannot control over the *holdings* of this Court that FELA requires proof of proximate causation. In any event, the dicta are properly understood to mean only that—as *Rogers* held—proximate cause under FELA is not "*exclusive* proximate cause," *Sorrell*, 549 U.S. at 175 (Souter, J., concurring) (emphasis added), and thus the Court's later dicta can be reconciled with its earlier holdings. The view that post-*Rogers* decisions of this Court somehow abandoned proximate causation in FELA cases is particularly indefensible given that, over the last three decades, the Court has explicitly held that *other* statutes that authorize private parties to recover for injuries resulting from tortious conduct incorporate the common-law requirement of proximate cause. See *Associated Gen. Contractors of Cal., Inc.* v. *Cal. State Council of Carpenters*, 459 U.S. 519, 532-533 (1983) (antitrust); *Holmes* v. *Sec. Investor Prot. Corp.*, 503 U.S. 258, 267-268 (1992) (RICO); *Dura Pharm., Inc.* v. *Broudo*, 544 U.S. 336, 344 (2005) (securities fraud).

C. The court of appeals also relied on FELA's remedial purpose and post-*Rogers* congressional inaction, but neither supports that court's holding that FELA does not require proximate cause. As to the former, this Court rejected the same theory in *Sorrell*, explaining that "the statute's remedial purpose cannot compensate for the lack of a statutory basis" for liability. 549 U.S. at 171. As to the latter, "congressional inaction * * * deserve[s] little weight in the interpretive process," *Alexander* v. *Sandoval*, 532 U.S. 275, 292 (2001) (internal quotation marks omitted), and, in any event, this Court's only square holdings on point are that FELA requires proximate causation. If anything is to be inferred from congressional inaction, therefore, it is that Congress does not disapprove of this Court's *holdings*.

ARGUMENT

FELA REQUIRES PROOF OF PROXIMATE CAUSATION

FELA requires proof of proximate causation—*i.e.*, proof "that the injury was the natural and probable consequence of the negligence," *Brady* v. *S. Ry.*, 320 U.S. 476, 483 (1943) (quoting *Milwaukee & St. Paul Ry.* v. *Kellogg*, 94 U.S. 469, 475 (1876))—for two related reasons. *First*, proximate causation is required under the established methodology for interpreting FELA. *Second*, proximate causation is required under this Court's precedents, more than 20 of which have applied the rule in FELA cases. Neither the remedial purpose of the Act nor congressional inaction—two of the grounds on which the

court of appeals relied—supports its contrary conclusion.[3]

A. Proximate Causation Is Required Under The Established Methodology For Interpreting FELA

As *Norfolk Southern Railway* v. *Sorrell*, 549 U.S. 158 (2007), and many other decisions of this Court make clear, FELA presumptively incorporates common-law principles. Proximate causation is one of the most fundamental of those principles, and nothing in the Act abrogates it.

1. FELA incorporates common-law principles unless its text expressly provides otherwise

FELA "is founded on common-law concepts of negligence and injury, subject to such qualifications as Congress has imported into those terms." *Urie* v. *Thompson*, 337 U.S. 163, 182 (1949). As this Court observed in *Sorrell*, the elements of a FELA claim,

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[3] McBride has never challenged CSXT's proposed jury instructions, see Pet. App. 6a; JA 32a-34a, on the ground that they do not accurately describe proximate causation, and neither the district court nor the court of appeals rejected them on that basis. Instead, McBride and the lower courts took the position that the instructions were improper because proximate causation is not an element of a FELA claim, and the only question before this Court is whether FELA does in fact require proof of proximate causation. While it is unnecessary for the Court to dictate the particular language used in proximate-cause instructions, the Court should make clear that, whatever its precise formulation, proximate causation under FELA has the same basic meaning that it had at common law. That conclusion is compelled both by the Court's interpretive methodology and by its precedents, which articulate the standard in familiar common-law terms, see *infra*, pp. 27-30.

and the defenses to such a claim, are therefore determined "by reference to the common law," unless the Act includes "express language to the contrary." *Sorrell*, 549 U.S. at 165-166; accord *Consol. Rail Corp.* v. *Gottshall*, 512 U.S. 532, 544 (1994) (unless "common-law principles * * * are expressly rejected in the text of the statute, they are entitled to great weight").

Express language in FELA abrogates several "common-law tort defenses that had effectively barred recovery by injured workers," *Gottshall*, 512 U.S. at 542-543—namely, the fellow-servant rule, contributory negligence, assumption of risk, and exemption from the Act through contract, see 45 U.S.C. §§ 51, 53-55. With the exception of these "explicit statutory alterations," *Norfolk & W. Ry.* v. *Ayers*, 538 U.S. 135, 145 (2003) (quoting *Gottshall*, 512 U.S. at 544), however, FELA was meant to incorporate the common law. Accordingly, when the Act "d[oes] not deal" with a "well-established [common-law] doctrine," this Court infers that Congress did not "intend[] to abrogate that doctrine *sub silentio*." *Monessen Sw. Ry.* v. *Morgan*, 486 U.S. 330, 337-338 (1988).

Finding no clear contrary indication in the statutory text, the Court has followed the common law in holding that a right of action for personal injury is extinguished by the death of the injured party, *Mich. Cent. R.R.* v. *Vreeland*, 227 U.S. 59, 67-68 (1913); that FELA authorizes recovery for occupational disease, *Urie*, 337 U.S. at 182, negligent infliction of emotional distress, *Gottshall*, 512 U.S. at 549-550, and fear of cancer, *Ayers*, 538 U.S. at 149; that FELA does not allow pre-judgment interest, *Monessen Sw. Ry.*, 486 U.S. at 337-338; and that

FELA provides for joint and several liability, *Ayers*, 538 U.S. at 163-165. Most recently, in *Sorrell*, the Court concluded that "[t]he fact that the common law applied the same causation standard to defendant and plaintiff negligence, and FELA did not expressly depart from that approach, is strong evidence against [applying] disparate standards." 549 U.S. at 168.

2. Proximate causation is a fundamental common-law principle, which the text of the Act does not abrogate

a. "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." *Sorrell*, 549 U.S. at 173 (Souter, J., concurring); see, *e.g.*, 3 John D. Lawson, *Rights, Remedies & Practice* § 1028, at 1740 (1890) ("[n]atural, proximate, and legal results are all that damages can be recovered for"); 1 Thomas G. Shearman & Amasa A. Redfield, *A Treatise on the Law of Negligence* § 26, at 27 (5th ed. 1898) ("The breach of duty, upon which an action is brought, must be not only the cause, but the proximate cause, of the damage to the plaintiff."). As Justice Holmes put it in an opinion of the Court issued shortly after FELA's enactment: "The general tendency of the law, in regard to damages at least, is not to go beyond the first step. As it does not attribute remote consequences to a defendant so it holds him liable if proximately the plaintiff has suffered a loss." *S. Pac. Co.* v. *Darnell-Taezner Lumber Co.*, 245 U.S. 531, 533-534 (1918).

That, of course, remains the law today. See*, e.g.,* 1 Dan B. Dobbs, *The Law of Torts* § 180, at 443 (2001) ("To prevail in a negligence action, the plain-

tiff must * * * show[] that the defendant's negligent conduct was not only a cause in fact of the plaintiff's harm, but also a proximate or legal cause."); W. Page Keeton et al., *Prosser & Keeton on the Law of Torts* § 41, at 263 (5th ed. 1984) (proximate cause is "[a]n essential element of the plaintiff's cause of action for negligence"). "While 'the common law' is anything but monolithic, there are some principles that are universal, and the requirement that a negligence plaintiff show proximate cause—in the sense of a legally sufficient connection beyond simple cause in fact—is part of the common law of torts in all jurisdictions." *Raab* v. *Utah Ry.*, 221 P.3d 219, 230 (Utah 2009).

The requirement of proximate causation is "a necessary limitation on liability." *Exxon Co., U.S.A.* v. *Sofec, Inc.*, 517 U.S. 830, 838 (1996). It reflects the recognition that, "[i]n a philosophical sense, the consequences of an act go forward to eternity, and the causes of an event go back to the dawn of human events, and beyond." *Holmes* v. *Sec. Investor Prot. Corp.*, 503 U.S. 258, 266 n.10 (1992) (quoting Keeton, *supra*, § 41, at 264). The "chief and sufficient reason" for the rule is thus "the impossibility of tracing consequences through successive steps to the remote cause" and "the necessity of pausing in the investigation of the chain of events at the point beyond which experience and observation convince us we cannot press our inquiries with safety." *Associated Gen. Contractors of Cal., Inc.* v. *Cal. State Council of Carpenters*, 459 U.S. 519, 532 n.24 (1983) (quoting Thomas M. Cooley, *Law of Torts* 73 (2d ed. 1888)). When the link between the defendant's negligence and the plaintiff's injury is "too tenuous"—when "what is claimed to be consequence is only fortuity"—the

proximate-cause rule precludes recovery. *Sofec*, 517 U.S. at 838 (quoting *Petition of Kinsman Transit Co.*, 328 F.2d 708, 725 (2d Cir. 1964)).

Thus, for example, "if the [negligent] destruction of the Michigan Avenue Bridge had delayed the arrival of a doctor, with consequent loss of a patient's life," the defendant's negligence would be a "but for" cause of the death but not a proximate cause. *Sofec*, 517 U.S. at 838-839 (quoting *Kinsman Transit*, 328 F.2d at 725). The same would be true in a case in which "the defendant drives through the state of New Jersey at an excessive speed, and arrives in Philadelphia in time for the car to be struck by lightning" that injures the passenger. Keeton, *supra*, § 41, at 264.

b. There is no language in FELA, much less any *express* language, that dispenses with the common-law requirement of proximate cause. On the contrary, "FELA sa[ys] nothing * * * about the familiar proximate cause standard." *Sorrell*, 549 U.S. at 174 (Souter, J., concurring). The court of appeals acknowledged as much, observing that "[p]roximate causation is not explicitly mentioned in the statute." Pet. App. 35a. Under the established interpretive methodology, therefore, proximate causation is a required element of a FELA cause of action.

The only language in the Act that addresses causation appears in Section 1, which provides that an employee may recover for an injury "resulting in whole or in part" from the railroad's negligence. 45 U.S.C. § 51.[4] That language authorizes recovery

[4] Section 3, FELA's comparative-negligence provision, "does not address causation." *Sorrell*, 549 U.S. at 171.

when the railroad's negligence is *one of the causes* of the employee's injury, but it says nothing about the requisite *directness* of a cause, a subject that is consequently governed by the common law. The necessary directness of a cause and multiplicity of causes are distinct concepts in the law of torts; "a given proximate cause," in particular, "need not be, and frequently is not, the exclusive proximate cause of harm." *Sosa* v. *Alvarez-Machain*, 542 U.S. 692, 704 (2004). Thus, for example, a railroad's negligence and an employee's negligence can both be proximate causes of an injury when the employee "walk[s] on the tracks" and the railroad "fail[s] to display a light on the train or to give a signal by bell or whistle." Daunis McBride, *Richey's Federal Employers' Liability, Safety Appliance, and Hours of Service Acts* § 66, at 160 (2d ed. 1916). By authorizing an employee to recover for an injury "resulting in whole or in part" from the railroad's negligence, while saying "nothing * * * that expressly alters the standard common law requirement that a negligence plaintiff prove proximate cause," *Raab*, 221 P.3d at 230, FELA simply makes clear that recovery is allowed when the railroad's negligence is "*a* proximate cause of [the] injury," as opposed to "*the* proximate cause thereof," *Reed* v. *Pa. R.R.*, 171 N.E.2d 718, 721 n.3 (Ohio 1961).

Indeed, this Court has already interpreted FELA's "in whole or in part" language as addressing the subject of multiple causes. As the Court explained in *Sorrell*, the words "make clear that there could be recovery against the railroad even if it were only partially negligent" and "reflect the fact that [the employee's] contributory negligence is no longer a complete bar to recovery." *Sorrell*, 549 U.S. at 170-171. Judge Posner said much the same thing

in paraphrasing the three-Justice *Sorrell* concurrence: "Congress's * * * purpose in specifying 'in whole or in part' was to make clear that a railroad would be liable if it was negligent even if the injured worker had been much more negligent"—or if there were "joint tortfeasors of unequal responsibility." *Coffey* v. *Ne. Ill. Reg'l Commuter R.R.*, 479 F.3d 472, 476 (7th Cir. 2007).

That reading of FELA follows from the ordinary meaning of the statutory language, which governs when, as here, a term is not defined in the statute. See, *e.g.*, *Hamilton* v. *Lanning*, 130 S. Ct. 2464, 2471 (2010). One need not consult a dictionary to know that the ordinary meaning of the phrases "resulting in whole" and "resulting in * * * part" is just what they say: a "whole" and a "part[ial]" cause. The language does not speak to whether the whole or partial cause must be a direct one.

Sorrell's construction of "in whole or in part" also follows from "the contemporaneous understanding of the term," *Roadway Express, Inc.* v. *Piper*, 447 U.S. 752, 759 (1980), which is relevant when, as here, the statute at issue was enacted in an earlier era. At the time of FELA's enactment, common-law courts in negligence cases routinely used the formulation "in whole or in part" in tandem with "proximate cause" (typically, though not always, in describing the defense of contributory negligence).[5] That common

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[5] See, *e.g.*, *St. Louis, Iron Mountain & S. Ry.* v. *Coolidge*, 83 S.W. 333, 334 (Ark. 1904) ("[t]he concurring negligence of two parties makes both liable to a third party injured thereby," unless one shows that "its negligence did not produce, in whole or in part, that result which follows naturally and proximately from the negligent act" (internal quotation marks omitted)); *Schneider* v. *Mkt. St. Ry.*, 66 P. 734, 736 (Cal. 1901) (contribu-

usage shows that the term "in whole or in part" in negligence cases was contemporaneously understood to address multiple causation, not the requisite directness of a cause. For if "in whole or in part" had been understood to encompass remote causes, the term could not intelligibly have been used in conjunction with a requirement of "proximate cause."

Any lingering doubt on the point would have to be resolved in favor of the common-law rule, which

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tory negligence is established if "the negligence of the plaintiff was, in whole or in part, the proximate cause of the injury"); *Denver & Rio Grande R.R.* v. *Peterson*, 69 P. 578, 579 (Colo. 1902) (plaintiff alleged that defendant's "negligence, either in whole or in part, was the direct and proximate cause of the injury"); *N.Y., Chicago & St. Louis R.R.* v. *Perigeuy*, 37 N.E. 976, 977 (Ind. 1894) ("Negligence is contributory when, and only when, it directly and proximately induces the injury, in whole or in part." (internal quotation marks omitted)); *Rietveld* v. *Wabash R.R.*, 105 N.W. 515, 517 (Iowa 1906) ("the plaintiff's negligence must be such as contributes proximately to his injury; but, if it does so in whole or in part, in any manner or to any degree, there can be no recovery"); *Bostwick* v. *Minneapolis & Pac. Ry.*, 51 N.W. 781, 785 (N.D. 1892) ("Negligence is contributory when, and only when, it directly and proximately induces the injury, in whole or in part."); *Rosevear* v. *Borough of Osceola Mills*, 32 A. 548, 552 (Pa. 1895) (plaintiff "can recover if her present condition, either in whole or in part, is the proximate result of th[e] injury"); *Cooper* v. *Georgia, Carolina & N. Ry.*, 39 S.E. 543, 545 (S.C. 1901) ("contributory negligence must have in it the element of being a proximate cause,—not a remote cause, but a proximate cause from which the accident or injury, in whole or in part, directly and immediately resulted"); *Mayor of City of Knoxville* v. *Cox*, 53 S.W. 734, 735 (Tenn. 1899) (contributory negligence is established if plaintiff's negligence "in the whole or in part proximately occasions the injury"); *Bolin* v. *Chicago, St. Paul, Minneapolis & Omaha Ry.*, 84 N.W. 446, 448 (Wis. 1900) ("a party cannot recover for an injury of which his own negligence was in whole or in part the proximate cause" (internal quotation marks omitted)).

can be abrogated only by "express language" in the Act. *Sorrell*, 549 U.S. at 165-166. Whatever else one might think about "in whole or in part," it cannot possibly be said that the language "expressly reject[s]" proximate causation. *Gottshall*, 512 U.S. at 544.

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

Consistent with the established interpretive methodology, this Court has repeatedly held that proximate causation is an element of a FELA claim. As the three-Justice concurrence in *Sorrell* explained, moreover, the Court's decision in *Rogers* v. *Missouri Pacific Railroad*, 352 U.S. 500 (1957), did not hold otherwise. Nor has any post-*Rogers* decision of this Court.

1. This Court has repeatedly held that proximate causation is required

a. "[T]hroughout the half-century between FELA's enactment and the decision in *Rogers*," this Court "consistently recognized and applied proximate cause as the proper standard in FELA suits." *Sorrell*, 549 U.S. at 174 (Souter, J., concurring). The Court not only has recognized and applied the standard, but has stated it in the clearest possible terms. "In order to recover under the Federal Employers' Liability Act," 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.*, 321 U.S. 29, 32 (1944). The Court has viewed this requirement as entirely uncontroversial. That "the alleged negligence" must

have been "the proximate cause of the damage," the Court has observed, is "the general rule" and "requires no reasoning to demonstrate." *St. Louis, Iron Mountain & S. Ry.* v. *McWhirter*, 229 U.S. 265, 280 (1913). By using the formulation "proximate cause in whole or in part," *Tennant*, 321 U.S. at 32, moreover, the Court has left no doubt that the statutory term "in whole or in part" refers to multiple causation, not the requisite directness of a cause. See also *Del., Lackawanna & W. R.R.* v. *Koske*, 279 U.S. 7, 11 (1929) ("The burden was on plaintiff to * * * show a breach of duty owed by defendant to him * * *, and that in whole or in part his injuries resulted proximately therefrom."); *Reynolds* v. *Atl. Coast Line R.R.*, 336 U.S. 207, 208-209 (1949) (per curiam) (employee must "show that the accident resulted proximately, in whole or in part, from [the railroad's] negligence").

The Court has applied proximate causation in its traditional form, explaining that "negligence * * * is the proximate cause of an injury" when the injury was "the natural and probable consequence of the negligence." *Brady*, 320 U.S. at 483 (quoting *Kellogg*, 94 U.S. at 475). The Court has also made clear that mere "but for" causation (or causation "in fact") is not enough. Summarizing "[t]he rule clearly deducible" from four prior FELA cases, the Court has explicitly contrasted negligence that is the "proximate cause" of an injury (for which an employee "can recover") with negligence that "merely creates an incidental condition or situation in which the accident * * * results in such injury" (for which an employee "cannot recover"). *Davis* v. *Wolfe*, 263 U.S. 239, 243 (1923).

The Court has relied on this distinction between but-for and proximate causation in reversing jury verdicts for FELA plaintiffs. In *Lang* v. *New York Central Railroad*, 255 U.S. 455 (1921), for example, the Court held that an injured employee could not recover for the railroad's failure to equip a rail car with automatic couplers, in violation of the Safety Appliance Act. "[T]he collision was not the proximate result of the defect," the Court explained, "or, in other words, * * * the collision under the evidence cannot be attributable to a violation of the provisions of the law," even though, "had they been complied with, * * * the collision would not have resulted in injury." *Id.* at 461 (internal quotation marks and brackets omitted). Similarly, in *Brady* the Court held that there was insufficient evidence that a defective rail was a proximate cause of the employee's death, explaining: "The mere fact that with a sound rail the accident might not have happened is not enough. The carrier's negligence must be a link in an unbroken chain of reasonably foreseeable events." 320 U.S. 484. And there are still other FELA cases in which the Court has reversed jury verdicts because of a failure to prove proximate cause.[6]

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[6] See, *e.g.*, *St. Louis-San Francisco Ry.* 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."); *N.Y. Cent. R.R.* v. *Ambrose*, 280 U.S. 486, 489 (1930) (plaintiff "failed to prove that the accident was proximately due to the negligence of the company"); *Nw. Pac. R.R.* 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."); see also *Reynolds*, 336 U.S. at 208-209 ("the facts alleged did not show that the accident resulted proximately, in whole or in part, from [the railroad's] negligence").

Altogether, the Court has applied the proximate-cause standard in more than 20 FELA cases.[7]

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[7] In addition to the cases already cited, see *Norfolk & W. Ry.* 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"); *Spokane & Inland Empire R.R.* v. *Campbell*, 241 U.S. 497, 510 (1916) ("where * * * plaintiff's contributory negligence and defendant's violation of * * * the Safety Appliance Act are concurring proximate causes, it is plain that [FELA] requires the former to be disregarded"); *Louisville & Nashville R.R.* v. *Layton*, 243 U.S. 617, 621 (1917) ("carriers are liable to employees in damages whenever the failure to obey these Safety Appliance Laws is the proximate cause of injury"); *Minneapolis, St. Paul & Sault Ste. Marie Ry.* 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 * * *."); *Swinson* v. *Chicago, St. Paul, Minneapolis & Omaha Ry.*, 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."); *Brady* v. *Terminal R.R. Ass'n of St. Louis*, 303 U.S. 10, 16 (1938) (plaintiff may recover for violation of Safety Appliance Act "provided the defective equipment is the proximate cause of the injury"); *Tiller* v. *Atl. Coast Line R.R.*, 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"); *Tiller* v. *Atl. Coast Line R.R.*, 323 U.S. 574, 578 (1945) ("It was for the jury to determine whether the [violation of the Boiler Inspection Act] proximately contributed to the deceased's death."); *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*, 337 U.S. at 177 (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.*, 338 U.S. 384, 390 (1949) ("a

b. 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 "the Court required that the injury be a direct or proximate result of * * * the negligent act[] in order for liability under the FELA to be imposed." Pet. App. 9a, 11a-12a. The court of appeals nevertheless quoted, with apparent approval, a statement in a 1953 law-review article that "such cases are definitely inconsistent with later decisions" of this Court. *Id.* at 12a (quoting William H. DeParcq, *A Decade of Progress Under the Federal Employers' Liability Act*, 18 LAW & CONTEMP. PROBS. 257, 268 (1953)). That statement is simply incorrect.

The decision on which the court of appeals placed particular emphasis is *Coray* v. *Southern Pacific Co.*, 335 U.S. 520 (1949). See Pet. App. 12a-13a, 37a-38a. The plaintiff in that case sought recovery on behalf of an employee killed when a one-man flat-top track car on which he was riding crashed into the back of a freight train that stopped suddenly because of a defective brake. *Coray*, 335 U.S. at 521. The trial court directed a verdict for the defendant, and the Utah Supreme Court affirmed. *Id.* at 522. This Court reversed, holding that there was sufficient evidence for the jury to return a verdict for the plaintiff. *Id.* at 533-524.

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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]"); and *Carter* v. *Atlanta & St. Andrew's Bay Ry.*, 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").

It is very difficult to see how *Coray* could be viewed as a departure from earlier decisions of this Court. Indeed, it cited two of them—*Spokane & Inland Empire Railroad* v. *Campbell*, 241 U.S. 497 (1916), and *Davis* v. *Wolfe*—for the very proposition that the court of appeals ultimately rejected: that FELA authorizes recovery if the railroad's negligence "was the sole or a contributory proximate cause" of the employee's injury or death. *Coray*, 335 U.S. at 523.

Nor is there any basis for the court of appeals' suggestion that, although *Coray* "employed language of 'proximate cause,' that term did not have the same teeth" that it had in earlier decisions. Pet. App. 15a. *Coray* simply held that a jury could have found proximate causation because the railroad's negligence and the employee's death "were inseparably related to one another in time and space." *Coray*, 335 U.S. at 524. It required no "broaden[ing]" of the concept of proximate cause, Pet. App. 14a, for a jury to find the element satisfied in those circumstances.

In the same discussion, the court of appeals cited this Court's decisions in *Tennant* and *Tiller* v. *Atlantic Coast Line Railroad*, 323 U.S. 574 (1945), apparently because in each case the Court reinstated a jury verdict for the plaintiff. Pet. App. 13a-14a. As in *Coray*, however, the Court did so, not because it believed that proximate causation was unnecessary, but because there was sufficient evidence for the jury to find that element satisfied. See *Tennant*, 321 U.S. at 33 ("The court below erred * * * in holding that there was not sufficient proof to support the charge that [the railroad's] negligence * * * was the proximate cause of Tenant's death."); *Tiller*, 323 U.S. at

578 ("It was for the jury to determine whether the failure to provide this required light on the rear of the locomotive proximately contributed to the deceased's death."). It is particularly odd to suggest that this Court somehow moved away from proximate causation in *Tennant*, since, as we have already observed, that case unequivocally stated that, to recover under the Act, it was "incumbent" upon the employee to prove that the railroad's negligence was "the proximate cause in whole or in part" of the accident. *Tennant*, 321 U.S. at 32.

2. *Rogers* did not abandon proximate causation

Other federal courts of appeals agree with the court below that this Court's proximate-cause decisions are no longer good law, but take the position that it was *Rogers* that effected the change. According to the Tenth Circuit, for example, while it was once "customary for courts to analyze liability under the FELA in terms of proximate causation," this Court "definitively abandoned this approach in *Rogers*." *Summers* v. *Mo. Pac. R.R.*, 132 F.3d 599, 606 (10th Cir. 1997). The Fifth and Ninth Circuits have reached the same conclusion. See *Page* v. *St. Louis Sw. Ry.*, 312 F.2d 84, 89 (5th Cir. 1963) ("[A] definite departure from traditional common-law tests of proximate causation as applied to the Federal Employers' Liability Act came in *Rogers*."); *Oglesby* v. *S. Pac. Transp. Co.*, 6 F.3d 603, 607 (9th Cir. 1993) ("in *Rogers* * * * the Supreme Court indicated that the standard of causation required under the FELA differs from common-law proximate cause"). In this case, the Seventh Circuit was more ambivalent about how *Rogers* should be interpreted—it acknowledged, for example, that "Justice Souter's critique of [this] case

law" has "considerable force," Pet. App. 35a—but ultimately it joined its "sister circuits," *id.* at 38a, in holding that common-law proximate causation did not survive *Rogers*.

Justice Souter's understanding of *Rogers* is correct, and that of the court of appeals is wrong. *Rogers* did not "smuggle[] proximate cause out of * * * FELA." *Sorrell*, 549 U.S. at 173 n.* (Souter, J., concurring). It "did not address, much less alter, existing law governing the degree of causation necessary for redressing negligence," but simply "left this law where it was." *Id.* at 173, 174 (Souter, J., concurring). The contrary view reflects a fundamental "misreading of *Rogers*." *Id.* at 177 (Souter, J., concurring).

a. Even before one undertakes an analysis of what *Rogers* actually said, it bears emphasis that, if the case had in fact held that FELA does not require proof of proximate causation, it would mean that *Rogers* had not only overruled more than 20 of this Court's prior decisions, but had done so *sub silentio*. For as the court of appeals recognized, *Rogers* did not "*explicitly* overrul[e] [the] earlier FELA cases that had spoken in terms of common-law proximate cause." Pet. App. 18a (emphasis added). But "[t]his Court does not normally overturn, or so dramatically limit, earlier authority *sub silentio*." *Shalala* v. *Ill. Council on Long Term Case, Inc.*, 529 U.S. 1, 18 (2000). That is especially true when, as here, the precedent is long-settled, has been repeatedly reaffirmed, and involves an issue of statutory interpretation, where *stare decisis* considerations are strongest. See, *e.g., IBP, Inc.* v. *Alvarez*, 546 U.S. 21, 32 (2005). An implicit overruling is even more unlikely when, as here, the Court cited with approval a number of

the decisions it was supposedly discarding. See *infra*, pp. 40-41. And it is more unlikely still when, as here, the Court could silently overrule more than a score of precedents only by "violat[ing] its own interpretive rules" in FELA cases. *Raab*, 221 P.3d at 230.

In analyzing *Rogers*, therefore, one should employ the strongest possible presumption that the case did *not* abandon proximate causation, and the decision should be interpreted, as long as there is any reasonable way to do so, in a manner consistent with the Court's earlier decisions. As explained below, an interpretation of *Rogers* that is consistent with prior decisions on proximate causation—and, not coincidentally, with the established methodology for interpreting FELA—is not only reasonable but manifestly correct. *Cf. Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 98 (1998) (finding it "clear" that a decision "was not meant to overrule, *sub silentio*, two centuries of jurisprudence").

b. "At common law, of course, a plaintiff's contributory negligence operated as an absolute bar to relief." *Sorrell*, 549 U.S. at 166. FELA abolished that defense, replacing it with the doctrine of comparative negligence. See 45 U.S.C. §§ 51, 53. *Rogers* concerned that doctrine, and—as the court of appeals itself acknowledged—"multiple causes" more generally, Pet. App. 35a-36a; see also *Marazzato* v. *Burlington N. R.R.*, 817 P.2d 672, 674 (Mont. 1991) ("the *Rogers* case was addressing the issues of multiple causes and contributory negligence"). *Rogers* did not address the requisite directness of a cause.

At the time he was injured, the plaintiff in *Rogers* was burning vegetation along a railroad track with a torch. *Rogers*, 352 U.S. at 502. When a train

approached, he turned off the torch and ran away from the train, up a path to a location near a culvert. *Ibid.* As the train passed, it fanned the flames of the burning vegetation, and the plaintiff became enveloped in them. *Ibid.* Retreating backwards, he slipped and fell from the top of the culvert, suffering the injuries for which he sued. *Ibid.* The jury returned a verdict for the plaintiff, but the Supreme Court of Missouri reversed, on the ground that the evidence did not support the verdict. *Id.* at 501. This Court in turn reversed, holding that "the evidence was sufficient to support the jury finding." *Id.* at 503.

This Court understood the Missouri Supreme Court to have ruled that, as a matter of law, the plaintiff"s negligence was the "sole cause" of his injury. *Rogers*, 352 U.S. at 504. In rejecting that ruling, this Court determined that, while it might be that "the jury could properly have reached [that] conclusion," the evidence "also supported with reason [a] verdict favorable to the [plaintiff]," and so "the decision was exclusively for the jury to make." *Ibid.* The Court explained that, because the jury was instructed to return a verdict for the defendant if it found that the plaintiff's negligence was the "sole cause" of his injury, and because it returned a verdict for the plaintiff, the jury must have found "that such was not the case but that [the plaintiff's] injury resulted *at least in part* from the [defendant's] negligence." *Id.* at 504-505 (emphasis added). By explicitly contrasting an injury of which the plaintiff's negligence was the "sole" cause with one of which the railroad's negligence was a cause "in part," the Court was necessarily saying that the plaintiff was entitled to recover because there was sufficient evidence that

the railroad's negligence was *one of the causes* of his injury—not that recovery was permitted because a jury could find that it was at least a *remote* (as opposed to a direct) cause.

The Court thought that it was also possible to read the Missouri Supreme Court's decision another way—as saying that the railroad was entitled to judgment, not because its negligence was *no* cause of Rogers' injury, but because its negligence was only a *partial* cause. The lower court implied the latter view, this Court said, by using "language of proximate causation which makes a jury question dependent upon whether the jury may find that the defendant's negligence was the *sole*, efficient, producing cause of injury." *Rogers*, 352 U.S. at 506 (emphasis added). As Justice Souter explained in *Sorrell*, the Court rejected this language, not because it was language of proximate cause, but because it was language of "*exclusive* proximate cause," a concept that "undermined Congress's chosen scheme of comparative negligence by effectively reviving the old rule of contributory negligence as barring any relief." *Sorrell*, 549 U.S. at 175 (Souter, J., concurring) (emphasis added).

In explaining why that concept is wrong, the Court in *Rogers* employed a phrase that, more than any other language in the opinion, has led some lower courts to conclude that *Rogers* discarded proximate causation. Under FELA, the Court said, "the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played *any part, even the slightest*, in producing the injury or death for which damages are sought." *Rogers*, 352 U.S. at 506 (emphasis added).

But that language "spoke to apportioning liability among parties, each of whom * * * had some hand in causing damage," such that "there are multiple cognizable causes of [the] injury." *Sorrell*, 549 U.S. at 175, 173 (Souter, J., concurring). It did not address "the necessary directness of cognizable causation." *Id.* at 175 (Souter, J., concurring). This understanding of *Rogers*' language is confirmed by the sentence that immediately follows: "It does not matter that * * * the jury may also * * * attribute the result to *other causes, including the employee's contributory negligence*." *Rogers*, 352 U.S. at 506 (emphasis added).

The Court's opinion in *Rogers* went on to employ a number of variants of the "any part, even the slightest" formulation. It said that an employee may recover under FELA if the railroad's negligence played "any part," "any part at all," or "any part, however small," in the employee's injury. *Rogers*, 352 U.S. at 509, 507, 508. Each of the variants, like the formulation itself, is ultimately an interpretation of the statutory language, which *Rogers* quoted in discussing why "sole" proximate causation is not the correct standard: "The statute expressly imposes liability upon the employer to pay damages for injury or death due 'in whole or *in part*' to its negligence." *Id.* at 507 (quoting 45 U.S.C. § 51). All that *Rogers* did was confirm that the statutory language italicized in the opinion—"in part"—means in "*any* part." The language in the statute addresses multiple causation, not proximate causation, see *supra*, pp. 23-27, and so does the language in *Rogers* that construes it.

In her opinion concurring in the judgment in *Sorrell*, Justice Ginsburg expressed the view that,

while "it is sometimes said that *Rogers* eliminated proximate cause in FELA actions[,] * * * [i]t would be more accurate * * * to recognize that *Rogers* describes the test for proximate causation applicable in FELA suits." *Sorrell*, 549 U.S. at 178 (Ginsburg, J., concurring in the judgment). "That test," Justice Ginsburg said, "is whether 'employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought.'" *Ibid.* (quoting *Rogers*, 352 U.S. at 506). The court of appeals apparently endorsed this position, when it said that *Rogers* adopted a "new conception of proximate cause." Pet. App. 15a. But the oft-quoted language in *Rogers*—"any part, even the slightest"—cannot be the test of proximate causation. For the reasons explained above, that phrase simply does not address the requisite directness of a cause. *Rogers*' language, moreover, could not plausibly be understood as a *description* of proximate cause, because it would not differ in any respect from but-for cause—and therefore would wholly eliminate the concept of proximate cause from the statute.

c. Far from having rejected traditional proximate causation, *Rogers* assumed that FELA requires it. That is true in at least four respects.

First, the trial court's charge in *Rogers* "covered the requirement to show proximate cause connecting negligence and harm." *Sorrell*, 549 U.S. at 176 (Souter, J., concurring). In language quoted by this Court, the trial court instructed the jury to return a verdict for the railroad if the employee's negligence was the "sole proximate cause" of his injuries and the injuries were not "directly contributed to or caused" by the railroad's negligence. *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*, 549 U.S. at 176 (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.

Second, the plaintiff in *Rogers* did not ask this Court to abandon proximate causation. On the contrary, Rogers sought reversal of the Missouri Supreme Court's decision, and reinstatement of the jury's verdict, on the ground that he had "sustained injuries as a proximate result of [the railroad's] negligence" and that its negligence "was clearly the proximate cause of [his] injury." Brief for Petitioner at 19, 12, *Rogers* v. *Mo. Pac. R.R.*, 352 U.S. 500 (1957) (No. 28), *available at* 1956 WL 89025. Indeed, one of the points in the Argument section of Rogers' brief was headed "Respondent's Negligence Was the Proximate Cause of Petitioner's Injury Under the Federal Employers' Liability Act." *Id.* at 24. And the complaint that Rogers filed in the trial court, which he quoted in his brief, alleged that his injury had "directly and proximately resulted, in whole or in part, from the negligence of the defendant." *Id.* at 9. That is the same formulation that appears in common-law decisions of state courts and FELA decisions of this Court. It recognizes that the Act authorizes recovery when the railroad's negligence was only one of the causes of the employee's injury ("in whole or in part") but that that cause must be a proximate one ("directly and proximately").

Third, "[t]he absence of any intent to water down the common law requirement of proximate cause is

evident from the prior cases on which *Rogers* relied." *Sorrell*, 549 U.S. at 175 (Souter, J., concurring). No fewer than three of the cases that *Rogers* cited in support of the principle that the railroad's negligence need only have played "any part" in the employee's injury "unambiguously recognized proximate cause as the standard applicable in FELA suits." *Id.* at 175-176 (Souter, J., concurring). Thus, for the proposition that the test under the Act is whether the railroad's negligence "played any part, even the slightest," in producing the injury, the Court cited *Coray*, which states that an employee may recover if the railroad's negligence was "the sole or a contributory proximate cause" of the injury. *Rogers*, 352 U.S. at 506 & n.11; *Coray*, 335 U.S. at 523. For the proposition that the inquiry in a FELA case is whether a jury may reasonably find that the railroad's negligence "played any part at all" in the injury, the Court cited *Carter* v. *Atlanta & St. Andrews Bay Railway*, 338 U.S. 430 (1949), which states that a jury may find for the employee if it determines that the railroad's negligence is "a contributory proximate cause" of the injury. *Rogers*, 352 U.S. at 507 & n.13; *Carter*, 338 U.S. at 435. And for the proposition that, "for practical purposes," the only question in a FELA case is whether the railroad's negligence "played any part, however small," in the injury, the Court cited *Tiller* v. *Atlantic Coast Line Railroad*, 318 U.S. 54 (1943), which states that the Act "leave[s] for practical purposes" only the question whether the railroad's negligence was "the proximate cause" of the injury. *Rogers*, 352 U.S. at 508 & n.16; *Tiller*, 318 U.S. at 67.

Fourth, the dissenting Justices in *Rogers* understood the case as one in which the Court

applied settled legal principles to a unique set of facts, not one in which the Court established a new rule of causation. Adhering to his usual practice in fact-bound FELA cases, Justice Frankfurter would have dismissed the writ of certiorari as improvidently granted, because "the sole issue" in *Rogers* was "the sufficiency of the evidence," the Court "merely reviewed evidence that had already been reviewed by two lower courts," and the Missouri Supreme Court simply "found that there was not evidence to bring the[] case[] within the recognized rules for submitting a case to the jury." *Ferguson* v. *Moore-McCormack Lines, Inc.*, 352 U.S. 521, 525, 537, 541 (1957) (Frankfurter, J., dissenting). Justice Harlan, one of the other two dissenters, would have affirmed on the merits, but for a reason similar to that expressed by Justice Frankfurter: that "all this Court has done" in *Rogers* "is to substitute its views on the evidence for those of the Missouri Supreme Court." *Id.* at 562 (opinion of Harlan, J.).[8] The dissenting Justices' view of *Rogers* as a fact-bound case applying settled law is consistent with the Court's own explanation of why it granted certiorari: "to consider * * * whether the decision [below] invaded the jury's function." *Rogers*, 352 U.S. at 501.

For these reasons, *Rogers* is "no authority for anything less than proximate causation in an action under FELA." *Sorrell*, 549 U.S. at 177 (Souter, J., concurring). Consistent with common-law principles as qualified by the statutory language ("in whole or in part"), the holding of the case is not that the

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[8] The third dissenter, Justice Reed, did not explain the reasons for his vote. See *Rogers*, 352 U.S. at 511 (Reed, J., dissenting).

railroad's negligence need not be a proximate cause of the employee's injury, but that it need not be the *sole* proximate cause.

3. None of this Court's post-*Rogers* decisions abandoned proximate causation

a. In holding that FELA does not require proximate cause, the court of appeals relied on post-*Rogers* decisions of this Court that, according to the court of appeals, "attributed to *Rogers* the idea that the FELA incorporates a causation standard less stringent than proximate cause." Pet. App. 19a. The court of appeals believed that it was "not free to ignore" these decisions, *id.* at 37a, and placed particular emphasis on two of them: *Crane* v. *Cedar Rapids & Iowa City Railway*, 395 U.S. 164 (1969), and *Gottshall*. See Pet. App. 19a-21a, 37a-38a. But neither *Crane* nor *Gottshall* held that FELA abandoned 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 was filed by a non-employee, and thus the issue of causation was governed by state law rather than FELA. *Id.* at 166-167. In any event, the statement is properly read to mean only that FELA rejects "[t]he notion that proximate cause must be *exclusive* proximate cause" and does not embody "the old rule of contributory negligence," *Sorrell*, 549 U.S. at 175 (Souter, J., concurring) (emphasis added), as *Rogers* held and as *Crane*'s quotation of the statute's "in whole or in part" language confirms.

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 causation. In any event, the illustrative language that immediately followed the "relaxed standard" statement—the quotation from *Rogers* that the employer's negligence need only have "played any part, even the slightest, in producing the injury," *ibid.* (quoting 352 U.S. at 506)—shows that the statement is consistent with the proper understanding of *Rogers* (*i.e.*, that it is a case about multiple causes).

Gottshall is especially dubious authority for the argument that FELA does not require proof of proximate cause given that the decision, as the court of appeals recognized, "reiterates the importance of common-law principles in interpreting the FELA." Pet. App. 20a-21a. In particular, *Gottshall* says that, unless "common-law principles * * * are expressly rejected in the text of the statute, they are entitled to great weight" and that, "[b]ecause FELA is silent on the issue of negligent infliction of emotional distress, common-law principles must play a significant role in [the Court's] decision." *Gottshall*, 512 U.S. at 544. Precisely the same is true of proximate causation.

The court of appeals recognized that the statements in *Crane* and *Gottshall* are dicta, but believed that they are nevertheless entitled to "great respect." Pet. App. 37a. Earlier *holdings* that FELA requires proof of proximate cause, however, control over later dicta, see *Honda Motor Co.* v. *Oberg*, 512 U.S. 415, 428 (1994), and, in any event, the dicta can

be reconciled with the holdings, for the reasons explained above.

b. This Court has not had occasion to apply the proximate-cause standard in any post-*Rogers* case, presumably because it has abandoned its practice of granting certiorari in large numbers of fact-bound FELA cases. See *Ferguson*, 352 U.S. at 548-558 (Frankfurter, J., dissenting) (listing Court's "decisions relating to sufficiency of the evidence" under FELA between 1911 and 1956). In keeping with this Court's pre-*Rogers* decisions, however, at least eight state courts of last resort have concluded in post-*Rogers* cases that FELA requires proximate cause.[9]

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[9] See *CSX Transp., Inc.* v. *Miller*, 46 So. 3d 434, 450 (Ala. 2010) ("the jury in this case was properly instructed by the trial court that Miller could not be compensated for any injury not proximately caused by CSX's negligence"); *Snipes* v. *Chicago, Cent. & Pac. R.R.*, 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." (citing *Tennant*)); *Brabeck* v. *Chicago & Nw. Ry.*, 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" (citing *Tennant*)); *Marazzato*, 817 P.2d at 675 ("The plaintiff has the burden of proving that defendant's negligence was the proximate cause in whole or in part of plaintiff's [death]."); *Ballard* v. *Union Pac. R.R.*, 781 N.W.2d 47, 53 (Neb. 2010) ("to recover under FELA, an employee must prove the employer's negligence and that the alleged negligence is a proximate cause of the employee's injury"); *Reed*, 171 N.E.2d at 721 n.3 ("In order to support recovery [under FELA] * * *, a violation of the Federal Safety Appliance Act * * * must amount to *a* proximate cause of [the] injury although it need not be *the* proximate cause thereof." (citing *Carter* and *Davis* v. *Wolfe*)); *Raab*, 221 P.3d at 225 (declining to "read[] *Rogers* as eliminating the

The court below believed that "every [federal] court of appeals" has reached the contrary conclusion post-*Rogers*, Pet. App. 23a, but that is not correct. To begin with, the First Circuit determined that FELA requires proximate causation in a post-*Rogers* case. See *Boston & Me. R.R.* v. *Talbert*, 360 F.2d 286, 288 (1st Cir. 1966) ("the plaintiff has the burden of proving negligence and proximate cause"). In addition, many of the court of appeals decisions cited by the court below, like this Court's decision in *Gottshall*, merely stated that FELA employs a "relaxed" standard of causation, without discussing (or even mentioning) proximate cause. See Pet. App. 23a-25a. Like *Gottshall*, those decisions are best understood as referring to *Rogers*' holding that FELA allows recovery even when the railroad bears only a small proportion of responsibility for the employee's injury. If they meant to say that FELA does not require proof of proximate cause, however, the decisions—like those of the federal courts of appeals that clearly *did* say that, see *id.* at 25a-26a—are inconsistent with the settled interpretive methodology and this Court's precedents, and are therefore incorrect. In that connection, it bears emphasis that none of the federal court of appeals decisions cited by the court below considered the possibility that *Rogers* addressed multiple rather than proximate causation, and that none went any deeper in its analysis of *Rogers* than quoting that

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common law proximate cause requirement"); *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.").

decision's somewhat opaque "any part, even the slightest" language.

c. Some who argue that FELA should not be interpreted to require proof of proximate causation take the position that the concept has somehow become "obsolete," DeParcq, *supra*, at 270, a relic of a bygone era. That position is unsustainable.

For one thing, in the absence of amendment by Congress, the meaning of a statute cannot change over time. Soon after FELA's enactment, and for the next several decades, this Court unequivocally interpreted the Act to require proof of proximate causation. For another, while this Court has not directly addressed the issue of proximate causation in any recent FELA case, over the last three decades it has squarely held that *other* statutes that authorize private parties to recover for injuries resulting from tortious conduct—the antitrust, RICO, and securities statutes—require proof of proximate cause. As with FELA, none of those statutes explicitly mentions proximate causation. See 15 U.S.C. § 15(a) (antitrust); 18 U.S.C. § 1964(c) (RICO); 15 U.S.C. § 78j(b) (securities). Yet as with FELA, this Court has construed the statutes to incorporate common-law principles.

Thus, in interpreting the Clayton Act, the Court has held that Congress "assumed that antitrust damages litigation would be subject to constraints comparable to well-accepted common-law rules applied in comparable litigation," including "proximate cause." *Associated Gen. Contractors*, 459 U.S. at 532-533. In interpreting RICO, the Court has held that Congress "modeled" RICO's civil-action provision "on the civil-action provision * * * of the Clayton Act"; that "a plaintiff's right to sue under [the latter] re-

quire[s] a showing that the defendant's violation not only was a 'but for' cause of his injury, but was the proximate cause as well"; and that "[p]roximate cause is thus required" under RICO too. *Holmes*, 503 U.S. at 267-268. And in interpreting the Securities Exchange Act of 1934, the Court has held that, "[g]iven the common-law roots of the securities fraud action," a plaintiff "need[s] to prove proximate causation." *Dura Pharm., Inc.* v. *Broudo*, 544 U.S. 336, 344 (2005). Even if the Court had not already resolved the question, there would be no basis for a different result under FELA.

C. Neither FELA's Remedial Purpose Nor Post-*Rogers* Congressional Inaction Supports The View That FELA Does Not Require Proximate Causation

In holding that FELA does not require proof of proximate causation, the court of appeals relied, in part, on the Act's remedial purpose and on post-*Rogers* congressional inaction. Neither supports the court's holding.

1. FELA's remedial purpose does not support the court of appeals' decision

In aligning itself with lower courts that interpret *Rogers* to have "relaxed the proximate cause requirement," Pet. App. 23a, the court of appeals adverted to FELA's remedial purpose. The court stated that it had "employed language" in prior decisions that "strongly suggests that traditional formulations of proximate cause have no role in FELA cases." *Id.* at 22a. The language the court quoted from those decisions includes the observations that the Act was meant "to provide a

broad remedial framework for railroad workers" and "to offer [them] broad remedial relief." *Id.* at 22a-23a (quoting *Lisek* v. *Norfolk & W. Ry.*, 30 F.3d 823, 831 (7th Cir. 1994), and *Holbrook* v. *Norfolk S. Ry.*, 414 F.3d 739, 741 (7th Cir. 2005)). Others have likewise justified their conclusion that FELA does not require a plaintiff to prove traditional proximate causation by invoking the statute's remedial purpose. See, *e.g.*, *Sorrell*, 549 U.S. at 178-179 (Ginsburg, J., concurring in the judgment); Charles H. Traeger, III, *Legal Cause, Proximate Cause, and Comparative Negligence in the FELA*, 18 STAN. L. REV. 929, 932-933 (1966), cited in Pet. App. 15a (decision below).

This Court, however, rejected the very same theory 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." 549 U.S. at 171. 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.*

So too here. Indeed, this Court has held that RICO requires proof of proximate cause despite "the congressional admonition that RICO be 'liberally construed to effectuate its remedial purposes.'" *Holmes*, 503 U.S. at 274 (quoting Racketeer Influenced and Corrupt Organizations Act, Pub. L. No. 91-452, tit. IX, § 904(a), 84 Stat. 941, 947 (1970)). It has held that the Clayton Act requires proof of proximate cause over the objection that that statute's civil-enforcement provision "reflects Congress' 'expansive remedial purpose.'" *Associated Gen. Contractors,* 459 U.S. at 546 (Marshall, J., dissenting) (quoting *Blue Shield of Va.* v. *McCready*, 457 U.S. 465, 472 (1982)). And it has held that the Securities Exchange Act of 1934 requires proof of proximate cause even though the Court previously recognized the securities laws' "broad remedial purposes." *Herman & MacLean* v. *Huddleston*, 459 U.S. 375, 386 (1983). Especially in light of *Sorrell*, FELA cannot be interpreted differently.

It would be particularly odd to reject a rule of proximate causation on the basis of FELA's remedial purpose, inasmuch as the rule does not invariably favor the railroad. Because FELA adopts a regime of comparative negligence, and because *Sorrell* holds that the causation standard for the employee's contributory negligence is the same as that for the railroad's negligence, requiring proximate causation means that damages will be reduced only when the employee's negligence is a proximate cause of the injury. Under the court of appeals' rule, in contrast, damages will be reduced whenever the employee's negligence is a mere but-for cause of the injury. In this respect (though not, of course, in all respects), a rule of proximate causation actually *furthers* FELA's remedial purpose.

2. Congressional inaction does not support the court of appeals' decision

The court of appeals also believed that "[c]ongressional inaction, in the wake of *Rogers* and circuit law broadly interpreting *Rogers*, counsels against adopting a common-law formulation of [proximate] cause in FELA cases." Pet. App. 38a-39a. But "congressional inaction * * * 'deserve[s] little weight in the interpretive process,'" particularly "when, as here, Congress has not comprehensively revised [the] statutory scheme." *Alexander* v. *Sandoval*, 532 U.S. 275, 292 (2001) (quoting *Cent. Bank of Denver, N.A.* v. *First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 187 (1994)). In any event, this Court's only square holdings on point are that FELA requires proof of proximate cause, and there is no consensus in the lower courts on that issue. If anything is to be inferred from the fact that Congress "has not seen fit to amend the FELA to clarify or correct the standard of causation," Pet. App. 39a, therefore, it is that Congress does not disapprove of this Court's *holdings*.

The more relevant question is what the Congress that *enacted* FELA intended. Insofar as any legislative history bears upon *that* question, it shows that that Congress intended to abrogate only the four common-law rules that are specifically abolished in the statute. See 45 U.S.C. §§ 51, 53-55. The Senate Report states that "[t]he proposed measure * * * revises the law as now administered in the courts of the United States in four important particulars": by abandoning the "doctrine of fellow-servants," the "rule of law which presumes that a workman * * *

assume[s] the risks incident to * * * his employment," and "contributory negligence"; and by prohibiting "contracts made by a workman limiting or relieving the employer's liability for negligence." S. Rep. No. 60-460, at 1-3 (1908). The House Report likewise states that "[t]he purpose of this bill is to change the common-law liability of employers * * * in these particulars." H.R. Rep. No. 60-1386, at 1 (1908). The entirety of each report is devoted to a discussion of the four changes. See S. Rep. No. 60-460, at 1-3; H.R. Rep. No. 60-1386, at 1-8.[10] The fact that "Congress did not deal at all with the equally well-established doctrine" of proximate causation—either in the legislative reports or in the statute itself—shows that it did not "intend[] to abrogate that doctrine *sub silentio*." *Monessen Sw. Ry.*, 486 U.S. at 337-338.

The legislative history is thus consistent with the established interpretive methodology and this Court's precedents, both of which compel the conclusion that FELA requires proof of proximate causation.

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[10] When FELA was enacted in 1908, it abolished the defense of assumption of risk only in cases in which the railroad's negligence was established by a violation of a safety statute. A 1939 amendment abolished the defense in all cases. See *Tiller*, 318 U.S. at 70-71 (Frankfurter, J., concurring).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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APPENDIX

The Federal Employer's Liability Act, 45 U.S.C. §§ 51-60, provides as follows:

§ 51. Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence; employee defined

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, 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, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter.

§ 52. Carriers in Territories or other possessions of United States

Every common carrier by railroad in the Territories, the District of Columbia, the Panama Canal Zone, or other possessions of the United States shall be liable in damages to any person suffering injury while he is employed by such carrier in any of said jurisdictions, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, 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, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

§ 53. Contributory negligence; diminution of damages

In all actions on and after April 22, 1908 brought against any such common carrier by railroad under or by virtue of any of the provisions of this chapter to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, 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: *Provided*, That no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of

any statute enacted for the safety of employees contributed to the injury or death of such employee.

§ 54. Assumption of risks of employment

In any action brought against any common carrier under or by virtue of any of the provisions of this chapter to recover damages for injuries to, or the death of, any of its employees, such employee shall not be held to have assumed the risks of his employment in any case where such injury or death resulted in whole or in part from the negligence of any of the officers, agents, or employees of such carrier; and no employee shall be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.

§ 54a. Certain Federal and State regulations deemed statutory authority

A regulation, standard, or requirement in force, or prescribed by the Secretary of Transportation under chapter 201 of Title 49, or by a State agency that is participating in investigative and surveillance activities under section 20105 of Title 49 is deemed to be a statute under sections 53 and 54 of this title.

§ 55. Contract, rule, regulation, or device exempting from liability; set-off

Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void: *Provided*, That in any action brought against any such common carrier under or by virtue of any of the provisions of this chapter, such common carrier may set off therein any sum it has contri-

buted or paid to any insurance, relief benefit, or indemnity that may have been paid to the injured employee or the person entitled thereto on account of the injury or death for which said action was brought.

§ 56. Actions; limitation; concurrent jurisdiction of courts

No action shall be maintained under this chapter unless commenced within three years from the day the cause of action accrued.

Under this chapter an action may be brought in a district court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several States.

§ 57. Who included in term "common carrier"

The term "common carrier" as used in this chapter shall include the receiver or receivers or other persons or corporations charged with the duty of the management and operation of the business of a common carrier.

§ 58. Duty or liability of common carriers and rights of employees under other acts not impaired

Nothing in this chapter shall be held to limit the duty or liability of common carriers or to impair the rights of their employees under any other Act or Acts of Congress.

§ 59. Survival of right of action of person injured

Any right of action given by this chapter to a person suffering injury shall survive to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee, and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, but in such cases there shall be only one recovery for the same injury.

§ 60. Penalty for suppression of voluntary information incident to accidents; separability

Any contract, rule, regulation, or device whatsoever, the purpose, intent, or effect of which shall be to prevent employees of any common carrier from furnishing voluntarily information to a person in interest as to the facts incident to the injury or death of any employee, shall be void, and whoever, by threat, intimidation, order, rule, contract, regulation, or device whatsoever, shall attempt to prevent any person from furnishing voluntarily such information to a person in interest, or whoever discharges or otherwise disciplines or attempts to discipline any employee for furnishing voluntarily such information to a person in interest, shall, upon conviction thereof, be punished by a fine of not more than $1,000 or imprisoned for not more than one year, or by both such fine and imprisonment, for each offense: *Provided,* That nothing herein contained shall be construed to void any contract, rule, or regulation with respect to any information contained in the files of the carrier, or other privileged or confidential reports.

If any provision of this chapter is declared unconstitutional or the applicability thereof to any per-

son or circumstances is held invalid, the validity of the remainder of the chapter and the applicability of such provision to other persons and circumstances shall not be affected thereby.