No. 08-3557

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

ROBERT McBRIDE,

Plaintiff-Appellee,

v.

CSX TRANSPORTATION, INC.,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Illinois
Case No. 3:06-cv-01017-JPG-CJP

The Honorable J. Phil Gilbert

PETITION FOR REHEARING EN BANC

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CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 08-3557

Short Caption: McBride v. CSX Transportation, Inc.

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statement be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

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CSX Transportation, Inc.

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Mayer Brown LLP

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i) Identify all its parent corporations, if any; and

CSX Corporation

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

CSX Corporation

Attorney's Signature: _____ Date: March 26, 2010

Attorney's Printed Name: Dan Himmelfarb

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Cir. Rule 3(d). Yes X No __.

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Attorney's Signature: Evan M Tager Date: March 26, 2010

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CSX Corporation

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Attorney's Printed Name: James A. Bax

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Cir. Rule 3(d). Yes __ No __X__.

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

CASES **Page(s)**

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

STATUTES AND RULES

MISCELLANEOUS

REQUIRED STATEMENT FOR REQUEST FOR REHEARING EN BANC

The Federal Employers' Liability Act ("FELA" or "Act"), 45 U.S.C. §§ 51-60, authorizes railroad employees to recover for workplace injuries "resulting in whole or in part from the negligence" of the railroad, with damages reduced in proportion to any contributory negligence by the employee. *Id.* §§ 51, 53. In *Norfolk Southern Railway v. Sorrell*, 549 U.S. 158 (2007), the Supreme 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 there is express statutory language to the contrary, and it held, consistent with the common law, that the causation standard is the same for both parties. *Id.* at 165-71. The petitioner in *Sorrell* had also asked the Court to decide what the standard of causation is, and to hold that FELA requires proof of proximate cause. But the Court did not reach that question. *Id.* at 163-165.

Two concurring opinions in *Sorrell* did address the standard of causation. In one, Justice Souter, joined by Justices Scalia and Alito, noted that there was a conflict among lower courts on whether FELA requires proof of proximate causation. *Sorrell*, 549 U.S. at 173 & n.*. Justice Souter went on to explain that proximate cause was the common-law rule before FELA; that FELA did not abrogate it; that the Supreme Court consistently applied the rule for half a century after FELA's enactment; and that, contrary to the view of some lower courts, *Rogers v. Missouri Pacific Railroad*, 352 U.S. 500 (1957), involved *multiple* causation, not the requisite *directness* of a cause, and thus did not adopt a different rule. *Sorrell*, 549 U.S. at 173-77.

Whether FELA requires proof of proximate causation is the question in this case. The panel held that it does not. The Court should grant rehearing en banc and hold that it does, not only for the reasons set forth in the comprehensive three-Justice concurrence in *Sorrell*, but also

because, consistent with the settled interpretive methodology and Supreme Court precedent, this Court itself has repeatedly held—both before and after *Rogers*—that FELA requires proof of proximate cause.

In holding that FELA does not require such proof, the panel did not disagree with Justice Souter's reasoning; on the contrary, it acknowledged that the reasoning has "considerable force." Slip op. 36. The panel instead believed that its hands were tied by four "considerations": (i) the prohibition against "anticipat[ing] future actions of the Supreme Court"; (ii) the "great respect" to which post-*Rogers* Supreme Court dicta are entitled; (iii) a desire to avoid "a division of authority among the circuits"; and (iv) "[c]ongressional inaction" subsequent to *Rogers* and to lower-court decisions interpreting *Rogers* to have abandoned the proximate-cause requirement. *Id.* at 37-41. But these considerations do not support the panel's conclusion; in fact, they point in the opposite direction. First, the panel was obligated to follow the Supreme Court's *holdings*, not subsequent dicta that the panel thought may have called the holdings into question. Second, the later dicta in any event are reconcilable with the earlier holdings. Third, by seeking to avoid a conflict with other federal courts of appeals, the panel deepened a conflict with state courts of last resort. Fourth, insofar as congressional inaction is a legitimate tool of statutory construction, the only *holdings* of the Supreme Court that Congress has chosen not to alter are that FELA requires plaintiffs to prove proximate cause.

This case involves a question of exceptional importance, warranting en banc review. *See* Fed. R. App. 35(b)(1). First, the panel decision conflicts with pre-*Rogers* decisions of the Supreme Court, pre- *and* post-*Rogers* decisions of this Court, and post-*Rogers* decisions of state courts of last resort, including a post-*Sorrell* decision of the Utah Supreme Court. Second, the issue of the proper standard of causation is a recurring one: nearly 400 FELA cases have been

filed in this Circuit alone in the last five years, and causation is an indispensable element in each of those cases. Third, there are many cases—including this one—in which a jury could find that the railroad's negligence was a "but for" but not a proximate cause of the plaintiff's injury and thus find for the plaintiff under the panel's standard but not under the correct one.

STATEMENT OF FACTS

1. Defendant-appellant CSX Transportation, Inc. ("CSXT") operates an interstate system of railroads. In addition to transporting long-distance freight, 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 or removed from the train in a process known as "switching." Switching requires more frequent starts and stops than a long-distance journey. Slip op. 2.

Trains use multiple brake systems in slowing to a stop. The "automatic brake" acts to slow the train's cars, 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. Slip op. 2-3.

On certain models of heavier, "wide-body" locomotives, the independent brake is actuated by pressing a button on the side of the brake handle, which is located in front of the engineer's seat. On some smaller, "conventional" locomotives, engineers actuate the independent brake by pushing the handle down with one hand. Slip op. 3.

Plaintiff-appellee Robert McBride was a locomotive engineer for CSXT. On April 12, 2004, he was assigned to a local run on a train with five locomotives, including a wide-body

locomotive in the lead. Towards the end of the run, McBride reached to release the independent brake and hit the back of his hand on the brake handle. The injury produced swelling and pain. Slip op. 3-5.

2. McBride sued CSXT under FELA. His theory of negligence at trial was that the number, width, and configuration of the locomotives with which he was required to conduct switching operations increased the risk of derailment or collision. McBride's theory of *causation* was that his repeated pressing and holding of the actuator button had fatigued his hand, causing his injury, and that, if he had been given fewer and narrower locomotives, he would not have had to make these repetitive movements and thus would not have sustained the injury. Slip op. 5; SA78, 82, 85-87, 92, 97-98, 111, 115, 234-36.

McBride proffered the following jury charge on causation, which was based on this Court's recently adopted pattern instruction:

> 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.

Slip op. 6. The commentary to the pattern instruction cites *Rogers* for the proposition that "[t]he common law standard of proximate cause does not apply" in FELA cases. 7th Cir. Pattern Civil Jury Instrs. § 9.02 cmt. a. CSXT proffered the following charge on causation, which was based on FELA's text and a number of decisions of the Supreme Court:

> 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.

Slip op. 6. The decisions that CSXT cited in support of the instruction hold that FELA requires proof of proximate causation. SA301. The district court rejected CSXT's instruction and delivered McBride's. Slip op. 7.

The jury returned a verdict for McBride, but found him 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. A26, 28, 30-32.

3. CSXT appealed, arguing that FELA requires proof of proximate causation. The panel rejected that argument and affirmed.

ARGUMENT

A. FELA Requires Proof Of Proximate Causation

1. Proximate cause is required by the settled interpretive methodology

Under long-settled precedent of the Supreme Court, the elements of a FELA claim, and the defenses to such a claim, are determined "by reference to the common law," unless the Act includes "express language to the contrary." *Sorrell*, 549 U.S. at 165-66. Express language in FELA abrogates several "common-law tort defenses," *Consol. Rail Corp. v. Gottshall*, 512 U.S. 532, 542 (1994)—namely, the fellow-servant rule, contributory negligence, assumption of risk, and exemption from the Act through contract, 45 U.S.C. §§ 51, 53-55. Otherwise, however, FELA is "founded on common-law concepts." *Urie v. Thompson*, 337 U.S. 163, 182 (1949). Finding no clear contrary indication in the statutory text, the Supreme Court has followed the common law in a variety of FELA cases.[1] This Court has done the same.[2]

"Prior to FELA, it was clear common law that a plaintiff had to prove that a defendant's

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[1] *See Sorrell*, 549 U.S. at 165-72 (same causation standard for defendant's negligence and plaintiff's contributory negligence); *Norfolk & W. Ry. v. Ayers*, 538 U.S. 135, 149, 163-65 (2003) (recovery for genuine and serious fear of cancer and joint and several liability); *Gottshall*, 512 U.S. at 549-50 (recovery for negligent infliction of emotional distress); *Monessen Sw. Ry. v. Morgan*, 486 U.S. 330, 337-38 (1988) (no pre-judgment interest); *Urie*, 337 U.S. at 182 (recovery of certain types of damages for occupational disease); *Mich. Cent. R.R. v. Vreeland*, 227 U.S. 59, 67-68 (1913) (right of action for personal injury extinguished by death of injured party).

[2] *See Coffey v. Ne. Ill. Reg'l Commuter R.R.*, 479 F.3d 472, 476 (7th Cir. 2007) (no relaxed standard of negligence); *Sobieski v. Ispat Island, Inc.*, 413 F.3d 628, 632 (7th Cir. 2005) (negligent employee must have been acting in furtherance of employer's business for employer to be vicariously liable).

negligence caused his injury proximately, not indirectly or remotely." *Sorrell*, 549 U.S. at 173 (Souter, J., concurring). 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." *Id.* at 174 (Souter, J., concurring).

As far as causation is concerned, FELA provides only that an employee may recover for an injury "resulting in whole or in part" from the railroad's negligence. 45 U.S.C. § 51. That language authorizes recovery when the railroad's negligence is merely *one of the causes* of the injury, but says nothing about the requisite *directness* of any cause. As this Court has paraphrased Justice Souter's concurrence in *Sorrell*, "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). The Supreme Court itself in *Sorrell* observed that "in whole or in part" was included in FELA "to make clear that there could be recovery against the railroad even if it were only partially negligent." 549 U.S. at 170.

2. Proximate cause is required by precedent

In the period "between FELA's enactment and the decision in *Rogers*," the Supreme 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 recognized and applied the standard, but stated it in the clearest possible terms. "In order to recover under [FELA]," the Court 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 made clear that "but for" causation was 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, otherwise caused, results in such injury." *Davis v. Wolfe*, 263 U.S. 239, 243 (1923). Altogether, the Court applied the proximate-cause standard in more than 15 FELA cases through the middle of the twentieth century.[3]

During the same period, in case after case, this Court likewise recognized and applied proximate causation as the proper standard under FELA. Like the Supreme Court, moreover, this Court did so in no uncertain terms, stating, for example, that "[t]o recover under the Act plaintiff must prove that defendant was negligent and that such negligence in whole or in part was the proximate cause of his injuries." *Larsen v. Chicago & N.W. Ry.*, 171 F.2d 841, 844 (7th

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[3] In addition to the cases cited in the text, see *Norfolk & W. Ry. v. Earnest*, 229 U.S. 114, 118-19 (1913) (jury was "rightly" instructed that, "if the said engineer did not exercise * * * reasonable care and caution and his failure so to do was the proximate cause of the accident, then [you] must find for the plaintiff"); *St. Louis, Iron Mountain & S. Ry. v. McWhirter*, 229 U.S. 265, 280 (1913) ("it must be shown that the alleged negligence was the proximate cause of the damage"); *Lang v. N.Y. Cent. R.R.*, 255 U.S. 455, 461 (1921) (jury's verdict must be reversed because "the collision was not the proximate result of the defect") (internal quotation marks omitted); *Minneapolis, St. Paul & Sault Ste. Marie Ry. v. Goneau*, 269 U.S. 406, 410-11 (1926) ("As there was substantial evidence tending to show that the defective coupler was a proximate cause of the accident * * *, the case was rightly submitted to the jury * * *."); *St. Louis-S.F. Ry. 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. Co. v. Bobo*, 290 U.S. 499, 503 (1934) ("If petitioner was negligent * * *, there is nothing whatsoever to show that this was the proximate cause of the unfortunate death."); *Swinson v. Chicago, St. Paul, Minneapolis & Omaha Ry.*, 294 U.S. 529, 531 (1935) ("The Safety Appliance Act * * * give[s] a right of recovery [under FELA] for every injury the proximate cause of which was a failure to comply with a requirement of the act."); *Tiller v. Atl. Coast Line R.R.*, 318 U.S. 54, 67 (1943) (FELA "leave[s] for practical purposes only the question of whether the carrier was negligent and whether that negligence was the proximate cause of the injury"); *Brady v. S. Ry.*, 320 U.S. 476, 483 (1943) ("evidence of the unsuitability of the rail for ordinary use * * * would justify a finding for [the plaintiffs], if the defective rail was the proximate cause of the derailment"); *Coray v. S. Pac. Co.*, 335 U.S. 520, 523 (1949) (plaintiff "was entitled to recover if this defective equipment was the sole or a contributory proximate cause of the decedent employee's death"); *Urie*, 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 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. Andrews 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").

Cir. 1948). There are numerous other decisions to the same effect.[4]

3. *Rogers* did not abrogate the proximate-cause requirement

In eliminating proximate causation, the drafters of the pattern jury instruction delivered by the district court relied on the Supreme Court's decision in *Rogers*. Indeed, virtually every court that has rejected proximate cause in FELA cases has done so in reliance on *Rogers*. *See, e.g., Sorrell*, 549 U.S. at 173 n.* (Souter, J., concurring). As the three-Justice concurrence in *Sorrell* explained, however, "*Rogers* did not address, much less alter, existing law governing the degree of causation necessary for redressing negligence as the cause of negligently inflicted harm." *Id.* at 173. There is thus no basis to conclude that *Rogers* overruled the more than 15 decisions holding that FELA requires proximate cause, much less that it did so *sub silentio*.

a. At common law, 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. *Gottshall*, 512 U.S. at 542. Under Section 1 of the Act, a defendant is liable for an injury to the plaintiff "resulting in whole *or in part*" from the defendant's

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[4] *See, e.g., Vigor v. Chesapeake & Ohio Ry.*, 101 F.2d 865, 868 (7th Cir. 1939) ("the injuries to decedent for which [the plaintiff] seeks recovery must have been proximately caused by the failure of the car and tender to couple automatically"); *Wendell v. Chicago Rock Island & Pac. Ry.*, 184 F.2d 868, 871 (7th Cir. 1950) ("[T]here must be proof of the defendant's negligence which is the proximate cause of the employee's injury or death."); *Wetherbee v. Elgin, Joliet & E. Ry.*, 191 F.2d 302, 306 (7th Cir. 1951) ("The question[s] [are], Was the carrier negligent, and if so was such negligence a proximate cause of plaintiff's injuries?"); *Sivert v. Pa. R.R.*, 197 F.2d 371, 375 (7th Cir. 1952) ("In order to recover under [FELA], it was incumbent upon plaintiff to prove that defendant was negligent and that such negligence was the proximate cause in whole or in part of the fatal accident."); *Kaminski v. Chicago River & Ind. R.R.*, 200 F.2d 1, 3 (7th Cir. 1952) (quoting *Wetherbee, supra*); *Wadiak v. Ill. Cent. R.R.*, 208 F.2d 925, 930 (7th Cir. 1953) ("there is not an iota of proof that [defendant's negligence] was the proximate cause of plaintiff's injuries"); *O'Day v. Chi. River & Ind. R.R.*, 216 F.2d 79, 83 (7th Cir. 1954) ("this question of proximate causation was a question of fact for the jury"); *Teets v. Chicago, S. Shore & S. Bend R.R.*, 238 F.2d 223, 226 (7th Cir. 1956) ("It is for the jury to determine whether a violation of [the] rule is a proximate cause which contributed in whole or in part to the accident."); *Rogers v. Elgin, Joliet & E. Ry.*, 248 F.2d 710, 712 (7th Cir. 1957) (finding sufficient evidence "of a violation of the Safety Appliance Act and that it was the sole or contributory proximate cause of plaintiff's injuries"); *Shupe v. N.Y. Cent. Sys.*, 339 F.2d 998, 1000 (7th Cir. 1965) (FELA plaintiff "cannot recover damages which are not proximately caused by defendant's * * * negligence").

negligence, 45 U.S.C. § 51 (emphasis added), and under Section 3 the plaintiff's damages are reduced "in proportion to the amount of negligence attributable to [the plaintiff]," *id.* § 53. *Rogers* concerned those principles, and multiple causation more generally. Quoting Sections 1 and 3 of FELA, *Rogers*, 352 U.S. at 506 n.12, 507 & n.14, the Court explained that a railroad is liable if its negligence "played any part, even the slightest," in producing the employee's injury, regardless of whether the injury also had "other causes, including the employee's contributory negligence," *id.* at 506; *see also id.* at 507-08. The Court ultimately held that the evidence in the case before it was sufficient to support a finding that the defendant's negligence "played a part" in the plaintiff's injury. *Id.* at 503. As Justice Souter observed in *Sorrell*, *Rogers* thus addressed only "the occasional multiplicity of causations," 549 U.S. at 175—the question of "how to proceed when there are multiple cognizable causes of an injury," *id.* at 173. It did not address "the necessary directness of cognizable causation." *Id.* at 175.

The statutory "in whole or in part" language construed in *Rogers* had always been part of FELA, and both the Supreme Court and this Court had consistently interpreted the Act to require proximate causation. Indeed, a number of those decisions explicitly stated that FELA requires proof that the defendant's negligence was the "proximate cause in whole or in part" of the plaintiff's injury, thereby confirming that directness of causation ("proximate cause") and multiplicity of causation ("in whole or in part") are distinct. *See Tennant*, 321 U.S. at 32; *Larsen*, 171 F.2d at 844; *Sivert v. Pa. R.R.*, 197 F.2d 371, 375 (7th Cir. 1952); *Teets v. Chicago, S. Shore & S. Bend R.R.*, 238 F.2d 223, 226 (7th Cir. 1956). *Rogers* merely clarified that "in part" means in "any part, even the slightest." 352 U.S. at 506. Consistent with the view of the three-Justice concurrence in *Sorrell*, this Court has correctly understood the "any part, even the slightest" language in *Rogers* to mean that "[t]he fact that there may have been a number of

causes of the injury is * * * irrelevant as long as one cause may be attributable to the railroad's negligence." *Heater v. Chesapeake & Ohio Ry.*, 497 F.2d 1243, 1246-47 (7th Cir. 1974); *accord Harris v. Chesapeake & Ohio Ry.*, 358 F.2d 11, 12 (7th Cir. 1966).

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

"The absence of any intent to water down the common law requirement of proximate cause is [also] evident from the prior cases on which *Rogers* relied." *Sorrell*, 549 U.S. at 175 (Souter, J., concurring). Those cases require proof that the railroad's negligence was a proximate cause—though not necessarily the *sole* proximate cause—of a FELA plaintiff's injury. Thus, for the proposition that the test under the Act is whether the defendant's negligence "played any part, even the slightest," in producing the plaintiff's injury, *Rogers*, 352 U.S. at 506, the Court cited *Coray v. Southern Pacific Co.*, 335 U.S. 520, 523 (1949), which holds that a FELA plaintiff may recover if the railroad's negligence was "the sole or a contributory proximate cause" of the injury. *See Rogers*, 352 U.S. at 506 n.11. And for the proposition that the question in a FELA case is whether a jury may reasonably conclude that the defendant's negligence "played any part at all" in the plaintiff's injury, *id.* at 507, the Court cited *Carter v. Atlanta & St. Andrews Bay Railway*, 338 U.S. 430, 435 (1949), which holds that a jury may find for a FELA plaintiff if it determines that the defendant's negligence is "a contributory proximate cause" of the injury. *See*

Rogers, 352 U.S. at 507 n.13.

B. The Panel's Reasoning Is Flawed

Although the panel ultimately held that FELA does not require proof of proximate causation, it took no real issue with the arguments that FELA *does* require such proof. The panel agreed that FELA incorporates common-law principles "[a]bsent express language to the contrary"; that proximate cause is a common-law principle; and that it "is not explicitly mentioned in the statute." Slip op. 37 (internal quotation marks omitted). The panel acknowledged that "[e]arly FELA cases did not interpret" the Act to have "alter[ed] the common-law requirement of proximate cause" and that those cases "never have been overruled explicitly." *Id.* at 10, 12. And the panel recognized that *Rogers* "was a case that involved multiple causes" and that much of it "speaks directly to the issue of when a case with multiple causes must be submitted to a jury." *Id.* at 37. The panel thus conceded that the three-Justice concurrence in *Sorrell* has "considerable force"—and, indeed, that "some [other] members of the [*Sorrell*] majority may have been sympathetic to Justice Souter's view." *Id.* at 36, 37.

Despite the strong implication that our interpretation of FELA is correct, the panel believed that four "countervailing considerations" prevented it from holding that proximate causation is required. Slip op. 37. These considerations in fact weigh *against* the panel's result.

First, the panel pointed out that courts of appeals "have been admonished not to anticipate future actions of the Supreme Court." Slip op. 38. But the principle on which the panel relied, *id.*, is that a decision of the Supreme Court that "has not been *expressly* overruled" must be followed, even when it may be thought "inconsistent with later decisions by the Supreme Court." *Khan v. State Oil Co.*, 93 F.3d 1358, 1363 (7th Cir. 1996), *vacated on other grounds*, 522 U.S. 3 (1997). As the panel correctly recognized, neither *Rogers* nor any other decision expressly overruled the Supreme Court's decisions holding that FELA requires proof of

proximate causation, and thus the panel was obligated to apply the earlier decisions. "It is not [this Court's] place" to say that they are no longer the law. *Id.*

Second, the panel stated that it "must treat with great respect the prior pronouncements of the Supreme Court, even if [they] are technically dicta." Slip op. 38. But a court of appeals panel has no authority to follow later dicta of the Supreme Court rather than its earlier holdings. In any event, there is no need to make that choice, because the post-*Rogers* dicta the panel identified, *id.* at 38-39, can be reconciled with the Supreme Court's square holdings that proximate cause is required. For example, the Court's statement in *Gottshall* that FELA applies "a relaxed standard of causation," 512 U.S. at 543, is best understood as a reference to *Rogers*' holding that FELA allows a plaintiff to recover even when the railroad bears only a small proportion of responsibility for the injury. Likewise, the Court's statement in a non-FELA case, *Crane v. Cedar Rapids & Iowa City Railway*, 395 U.S. 164 (1969), 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]," *id.* at 166, is properly understood to mean that FELA does not embody the common-law concept of *sole* proximate causation. What is true of *Gottshall* and *Crane* is equally true of this Court's similar dicta in *Lisek v. Norfolk & Western Railway*, 30 F.3d 823, 826 n.4 (7th Cir. 1994), and *Holbrook v. Norfolk Southern Railway*, 414 F.3d 739, 741-42 (7th Cir. 2005). *See* slip op. 22-24.

Third, the panel expressed concern that a holding that FELA requires proof of proximate causation "would cause a conflict with every other court of appeals." Slip op. 39-40. This is a considerable exaggeration. Like the Supreme Court in *Gottshall*, many of the court of appeals decisions on which the panel relied, *id.* at 24-25, merely cited *Rogers* for the general proposition that FELA employs a "relaxed" standard of causation, without discussing or even mentioning

proximate cause. And while there certainly are a number of circuits that *have* interpreted *Rogers* to have abandoned proximate cause, a number of state courts of last resort have reached the opposite conclusion, as the three-Justice concurrence pointed out in *Sorrell*, 549 U.S. at 173 n.*, and as the panel itself acknowledged here, slip op. 35 & n.7. The panel thus had no choice but to pick a side in the debate among the lower courts, and there is no *a priori* reason to prefer federal courts of appeals to state courts of last resort if the state courts have gotten it right—as the panel seems to believe may well be the case here. *Cf.* Sup. Ct. R. 10. In any event, the panel's decision is the first by a federal court of appeals to decide the issue post-*Sorrell*, so a holding that FELA requires proximate causation would not have created a circuit conflict on what may fairly be viewed as the real question before the panel: whether the comprehensive three-Justice concurrence in *Sorrell* correctly interpreted *Rogers*.

Fourth, the panel 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." Slip op. 40. But the Supreme Court has made clear that "congressional inaction * * * deserve[s] little weight in the interpretive process." *Alexander v. Sandoval*, 532 U.S. 275, 292 (2001) (internal quotation marks omitted). In any case, the only square holdings of the Supreme Court on point are that FELA requires proof of proximate causation, and there is no consensus in the lower courts on that issue. If anything is to be inferred from Congress's failure to change FELA's causation standard, therefore, it is that Congress does not disapprove of the Supreme Court's *holdings* that proximate cause is required.

C. The Issue Is One Of Exceptional Importance

The question presented is one of exceptional importance for a number of reasons.

First, the panel's holding that FELA does not require proof of proximate cause conflicts with pre-*Rogers* decisions of the Supreme Court; pre- *and* post-*Rogers* decisions of this Court;

and post-*Rogers* decisions of state courts of last resort, including a post-*Sorrell* decision of the Utah Supreme Court, *Raab v. Utah Ry.*, 221 P.3d 219 (Utah 2009). *See* Fed. R. App. 35(a), (b)(1).

Second, the issue is a recurring one. Because FELA "pre-empt[s] state tort remedies," *Sorrell*, 549 U.S. at 165, it is the exclusive remedy for injuries sustained by railroad employees in the workplace. And the remedy is frequently invoked: nearly 400 FELA actions were commenced in this Circuit alone between 2005 and 2009. *See* http://www.uscourts.gov/judbususc/judbus.html (Annual Reports of the Director for 2005 through 2009, Supplemental Table C-3). Because causation is a basic element of a FELA claim, moreover, the question whether FELA requires proof of proximate cause can arise in every case brought under FELA, at every stage of the litigation. The question can also arise in every case brought under the Jones Act, 46 U.S.C. § 30104(a), which governs workplace injuries by seamen and "adopts the entire judicially developed doctrine of liability under [FELA]," *Am. Dredging Co.* v. *Miller*, 510 U.S. 443, 456 (1994) (internal quotation marks omitted).

Third, whether FELA requires proximate cause is often outcome-determinative. This case demonstrates the point, because a properly instructed jury could have found that McBride's injury was not proximately caused by any negligence on the part of CSXT. McBride's theory of negligence was that his assigned train—which had five locomotives with a wide-body locomotive in the lead—was unsafe because of its propensity to cause derailment or collision, not because of its propensity to cause imprecise hand movements by fatiguing the thumbs of engineers actuating the independent brake. Yet McBride was injured while operating the brake, not in a rail accident. On this record, a properly instructed jury could have found that CSXT had a duty "to take precautions against a different kind of loss from the one that materialized,"

Movitz v. First Nat'l Bank, 148 F.3d 760, 763 (7th Cir. 1998), and that any negligence on CSXT's part did not "directly injure[]" McBride, *Holmes v. Sec. Investor Prot. Corp.*, 503 U.S. 258, 269 (1992).

The train assigned to McBride may well have been a necessary condition for his injury: had there been fewer locomotives, he may have needed less time to bail off the brake; and had a conventional locomotive been in the lead, he may have actuated the brake with his whole hand rather than his thumb. But the existence of a necessary condition does not establish proximate cause. And the jury was never asked to make such a finding. McBride's counsel capitalized on the lack of a proximate-cause instruction in his summation, arguing: "What we * * * have to show is defendant's negligence caused or contributed to [the] injury. It never would have happened *but for* the defendant giving him that train." SA236 (emphasis added). McBride thus asked the jury, in effect, to return a verdict in his favor on the ground that CSXT's asserted negligence created "an incidental condition or situation" that resulted in his injury. *Davis*, 263 U.S. at 243. The Supreme Court has repeatedly rejected that standard, and the panel erred in refusing to give effect to its decisions.

CONCLUSION

The petition for rehearing en banc should be granted.

Respectfully submitted,

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Dated: March 26, 2010

CERTIFICATE OF SERVICE

The undersigned, an attorney, certifies that he caused two copies of this Petition for Rehearing En Banc to be served on the following via overnight delivery, postage pre-paid, on this 26th day of March, 2010:

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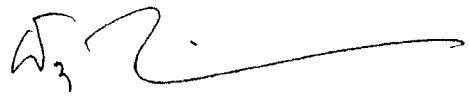

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