No. 09-

IN THE

Supreme Court of the United States

NORFOLK SOUTHERN RAILWAY COMPANY,
Petitioner,

v.

THOMAS DAVID JORDAN,
Respondent.

On Petition for a Writ of Certiorari to the Court of Appeals of Tennessee

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Tennessee Court of Appeals erred when, in conflict with a century of this Court's precedents and the decisions of multiple other courts, it treated the Federal Employers' Liability Act – which deviates from common-law principles only when the statute explicitly requires it – as implicitly abrogating the ordinary standards for proving negligence.

PARTIES TO THE PROCEEDINGS

Pursuant to Supreme Court Rule 14.1, petitioner states that the Burlington Northern Santa Fe Railroad Company was a party to the proceedings in the court whose judgment is sought to be reviewed, along with the parties listed in the caption.

RULE 29.6 STATEMENT

Norfolk Southern Railway Company ("Norfolk Southern") has a parent company, the Norfolk Southern Corporation, which is publicly traded. No other publicly held company owns more than 10% of petitioner's stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Norfolk Southern respectfully petitions for a writ of certiorari to review the judgment of the Court of Appeals of Tennessee.

JUDGMENT FOR WHICH REVIEW IS SOUGHT

The opinion of the Court of Appeals of Tennessee affirming the judgment of the trial court is unreported, but is available at 2009 WL 112561, and is reproduced in the Petition Appendix ("Pet. App.") at 1a-63a. The order of the Supreme Court of Tennessee denying an application for permission to appeal is reproduced at Pet. App. 67a-68a.

JURISDICTION

The judgment of the Court of Appeals was entered on January 15, 2009. Pet. App. 1a. The Supreme Court of Tennessee denied the application for permission to appeal on August 31, 2009. Pet. App. 67a. On November 23, 2009, Justice Stevens granted an extension to and including December 30, 2009 to file a petition for a writ of certiorari. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

STATUTES OR OTHER PROVISIONS INVOLVED

Relevant portions of the Federal Employers' Liability Act ("FELA"), 45 U.S.C. §§ 51-60, are reproduced at Pet. App. 74a-75a. The relevant instructions provided to the jury are reproduced at Pet. App. 69a-71a.

STATEMENT OF THE CASE

FELA allows recovery for a railroad employee's workplace injury or death "resulting in whole or in part from the negligence" of the railroad. Absent express statutory language to the contrary, elements and defenses that existed at common law govern negligence actions under FELA. *Urie* v. *Thompson*, 337 U.S. 163, 182 (1949). And, in a series of cases beginning shortly after FELA's enactment, this Court repeatedly held and reaffirmed that negligence actions under FELA require the plaintiff to prove traditional, common-law proximate cause. *E.g.*, *Norfolk & W. Ry.* v. *Earnest*, 229 U.S. 114, 118-120 (1913); *St. Louis, Iron Mountain & S. Ry.* v. *McWhirter*, 229 U.S. 265, 280 (1913); *infra* at 19 n.11.

In an infelicitous phrase, however, that has spawned profound confusion and deep division throughout the state and federal courts,[1] this Court wrote in *Rogers* v. *Missouri Pacific Railroad* that under FELA, "the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, *even the slightest*, in producing the injury or death for which damages are sought." 352 U.S. 500, 506 (1957) (emphasis added). Nothing in *Rogers* purported to overrule the cases that came before it, but – contrary to this Court's established rule, see *Rodriguez de Quijas* v. *Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989) – numerous courts have treated *Rogers* as having overruled them implicitly. The

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[1] State and federal courts share jurisdiction over FELA claims, but both apply the law "established and applied in the federal courts." *Urie*, 337 U.S. at 174 (internal quotation marks omitted); *see also* 45 U.S.C. § 56.

result has been a half-century's worth of disarray among federal and state courts alike.

In *Norfolk Southern Railway* v. *Sorrell*, this Court resolved one aspect of that confusion: It clarified that under FELA, the standards for railroad negligence and employee comparative negligence are the same. 549 U.S. 158, 160 (2007). *Sorrell*, however, declined to address a related conflict that is both more persistent and more important – namely, whether FELA departed from the traditional common-law rule of proximate causation. *Id.* at 171-72. Illustrating both the depth of the division and the importance of the issue, four members of this Court addressed this issue in competing concurring opinions. Justices Scalia and Alito joined Justice Souter's separate opinion, which explained that proximate cause was the common-law rule in negligence actions before FELA; that FELA did not expressly abrogate that rule; and that this Court never has held otherwise. *Id.* at 172-77 (Souter, J., concurring). In a dueling concurrence, Justice Ginsburg expressed the contrary view – that FELA adopted a "relaxed" causation standard that was articulated in *Rogers*. *Id.* at 178 (Ginsburg, J., concurring in the judgment).

The division on this Court mirrors a square conflict in the lower courts on the same issue, which both predated *Sorrell* and has deepened since. Lower courts continue to disagree as to whether the phrase "even the slightest" in *Rogers* signals a departure from the common-law standard of proximate causation. See *Sorrell*, 549 U.S. at 173 n.* (Souter, J., concurring). Courts similarly disagree over whether this phrase imposes a "slight" negligence standard that heightens the duty of care beyond the baseline common-law rule. These divisions thwart

FELA's clear purpose to "'create uniformity throughout the Union'" in cases involving injuries to railroad employees. *Norfolk & W. Ry.* v. *Liepelt*, 444 U.S. 490, 493 n.5 (1980) (quoting H.R. Rep. No. 1386, 60th Cong., 1st Sess. 3 (1908)). Instead, railroads engaging in multistate operations face different duties from one state to the next; indeed, even within certain states, the federal and state courts employ conflicting rules under this federal statute. Certiorari is warranted to resolve this clear division of authority.

A. Statutory Background

Since its enactment in 1908, FELA has preempted state law tort remedies in favor of a unified federal remedial scheme for cases involving railroad workplace injuries. See *Sorrell*, 549 U.S. at 166. FELA is not, however, a traditional workers' compensation statute; it does not provide injured workers with strictly capped recoveries in exchange for no-fault liability. Instead, it requires that an injured railroad employee prove negligence, and if he or she does, then the recovery is generally the same as in any tort case.

Of relevance to this petition, a FELA claim includes two fundamental elements: "(1) negligence, i.e., the standard of care, and (2) causation, i.e., the relation of the negligence to the injury." *Id.* at 169. These substantive elements of a FELA negligence claim are defined by common-law principles, unless and to the extent that they are expressly modified by the statute. *Urie*, 337 U.S. at 174. FELA's principal departure from common-law standards was its adoption of a comparative negligence regime in place of the contributory negligence rule that existed at the time of the statute's enactment. 45 U.S.C. § 53 ("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").[2]

Relevant here, Section one of the Act makes "[e]very common carrier by railroad . . . liable in damages" for the injury or death of any employee employed in interstate commerce that "result[s] *in whole or in part* from the [railroad's] negligence." *Id.* § 51 (emphasis added). In *Rogers*, this Court considered the meaning of the phrase "in whole or in part." This language, it held, rejected a construction of proximate cause that would require a plaintiff to prove that the railroad's negligence was the "sole, efficient, producing cause of injury." 352 U.S. at 506. "Sole proximate cause" was at the time a contentious formulation of proximate causation. In rejecting that formulation, the Court explained, where multiple causes are at issue, a plaintiff need only establish "that employer negligence played any part, *even the slightest*, in producing the injury or death for which damages are sought." *Id.* (emphasis added).

B. Factual Background

Respondent Jordan was a conductor at Norfolk Southern. Pet. App. 2a. As part of his duties, he would take Train 17A from Sheffield Yard in Muscle Shoals, Alabama to the Memphis, Tennessee railroad yard, spend the evening in Memphis, and then return the train to Sheffield the following day. In addition,

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[2] FELA also departs from the common law by "abolish[ing] the fellow servant rule . . ., prohibit[ing] employers from contracting around the Act, and abolish[ing] the assumption of risk defense." *Sorrell*, 549 U.S. at 168.

upon arrival in Memphis, he would help separate the engine from the railcars and then work with the engineer to "run around" the cars on an adjacent track so that they could recouple the engines to the train on the other end of the train. *Id.*

On the night of November 13, 2002, Jordan completed his customary delivery of Train 17A from Sheffield to Memphis. Pet. App. 2a. After passing through Norfolk Southern's Memphis railroad yard, Train 17A reached a stretch of Memphis track called "Broadway," which begins approximately one mile west of the railroad yard. *Id.* Broadway consists of six tracks alongside each other, each owned by different railroad companies. *Id.* The clearances between those tracks are known to be particularly close. *Id.* at 7a. Following a meeting with the engineer, Jordan began to assist in separating the engines from the railcars. *Id.* at 2a. While working, Jordan was struck by an oncoming train operated by the Burlington Northern Santa Fe Railroad Company ("Burlington Northern"), which was travelling on the track immediately adjacent to Norfolk Southern's. *Id.* Evidence suggested that Jordan performed his task next to a track that allowed less reaction time, and at the time of the collision was not vigilantly watching for the easily visible lights of oncoming trains that, in plaintiff's words, are "extremely bright . . . kind of like the sun coming up." Trial Transcript, Jan. 30 – Feb. 2, 2006, *Jordan v. Burlington N. Santa Fe Ry.*, Case No. CT604175-03D2 (Tenn. Cir. Ct.), at 1106-07, 1518.

In addition, Norfolk Southern's engineer testified that the Burlington Northern train did not turn on its headlight until after the train hit Jordan. Pet. App. 6a-7a. (The engineer of Burlington Northern's train

testified that the headlight was illuminated prior to the accident. *Id.*) Evidence presented at trial established that the Memphis railroad yard is somewhat dark, despite the multiple overhead street lights and the fact that Jordan used a lantern while performing his tasks, and that it would be difficult to see an oncoming train at night if its headlights were off. Tr. at 957, 970, 1105-07, 1455-57.

C. Proceedings Below

1. Jordan brought suit under FELA, alleging that Norfolk Southern failed to provide him "a reasonably safe place to work," and also proceeded against Burlington Northern under Tennessee common law, alleging that Burlington Northern was negligent because the headlight of its train was not illuminated at the time of the collision. Pet. App. 3a. His sole allegation as to Norfolk Southern was that by allowing the tracks on Broadway to be so close together – a situation that has existed since before Norfolk Southern bought the portion of track at issue in 1898 – the railroad created an unsafe condition, which was permissible under state and federal regulatory law, but nonetheless ultimately led to his injuries. Tr. at 1480-81. At trial, Norfolk Southern offered evidence that Jordan was negligent for failing to monitor for oncoming trains, and that Burlington Northern was negligent because its locomotive was not using its headlight in the dark. Tr. at 1106-07, 1518; Pet. App. 6a-7a.

Following trial, Norfolk Southern requested an instruction that Jordan had the burden of proving that Norfolk Southern proximately caused his injuries, and objected to the court's draft instructions on the grounds that its ambiguous use of the phrase "even the slightest" could lead the jury to impose an

erroneous burden of proof. The court rejected Norfolk Southern's requested instruction and, instead instructed the jury that FELA "imposes liability on the railroad employer . . . when the defect or insufficiency [that caused the plaintiff's injury] is due to negligence, *even the slightest*, on the part of the employer." Pet. App. 69a-70a (emphasis added). This contrasted with the court's instruction to the jury on Jordan's common law negligence claim against Burlington Northern, which employed the traditional elements of negligence. Pet. App. 70a-71a.

Ultimately, the jury returned a verdict of $5 million against Norfolk Southern, which the court reduced to $4 million dollars, the amount specified in Jordan's *ad damnum* request. Pet. App. 65a-66a. The jury found no negligence on the part of Jordan or Burlington Northern. *Id.* Norfolk Southern moved for a new trial based on (among other things) the jury instructions, which the court denied. *Id.* at 9a.

2. The Tennessee Court of Appeals affirmed the judgment. Pet. App. 1a-63a. Relevant here, Norfolk Southern reiterated its argument that the jury had been improperly instructed – specifically, that the "even the slightest" language permitted the jury to find Norfolk Southern liable under a "slightest cause" or "slightest negligence" standard. Relying on its pre-*Sorrell* precedent, the court held that the instructions adequately required the plaintiff to prove that Norfolk Southern's negligence was the "legal cause" of the plaintiff's injuries. *Id.* at 29a-30a. It recognized the "split of authority" over the proper standard of causation under FELA, but held that even if the instructions did reduce Jordan's evidentiary burden, *Rogers*' use of the phrase "even

the slightest" justified its continued use in jury instructions. *Id.* at 32a, 35a-36a.[3]

3. Norfolk Southern sought permission to appeal in the Supreme Court of Tennessee. That application was denied without comment. Pet. App. 67a-68a.

REASONS FOR GRANTING THE PETITION

This case is emblematic of the confusion and inconsistency engendered in FELA cases throughout the country by the misuse of the phrase "even the slightest." This petition squarely presents the issue left unaddressed by *Sorrell*: namely, whether in an action under FELA, a plaintiff must prove that the defendant's negligence was the proximate cause of the plaintiff's injury, or instead need only show "slightest causation." See 549 U.S. at 171-72. Part and parcel of this confusion is whether the standard of care has been lessened to a rule of "slightest" negligence. In rejecting the clear instruction requested by Norfolk Southern in favor of an instruction using the "even the slightest" language to establish negligence, the court below replicated the error of other courts that have interpreted FELA to require only "relaxed" causation and negligence. This mistaken approach departs from better-reasoned authority of other lower courts – as well as binding

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[3] Norfolk Southern also argued on appeal that because the track clearance on Broadway was adequate as a matter of law under Tennessee law, *see* Tenn. Code Ann. § 65-6-205(d), Norfolk Southern had complied with the per se standard of care under the Federal Railroad Safety Act ("FRSA"), 49 U.S.C. § 20106(a)(2), which therefore preempted Jordan's FELA claim. The court of appeals rejected this argument, concluding that a state railroad safety statute did not establish a per se standard of care under FRSA for purposes of preempting FELA claims. Pet. App. 23a.

precedents of this Court – explaining that FELA incorporated and employs traditional, common-law negligence standards. This Court should grant review to resolve this persistent decisional conflict.

I. THE DECISION BELOW WIDENS A CONFLICT AMONG NUMEROUS DECISIONS OF STATE AND FEDERAL COURTS.

A. Lower Courts Are Intractably Divided Over The Standard For Proving Causation In A Negligence Action Under FELA.

"[A]lthough common-law principles are not necessarily dispositive of questions arising under FELA, unless they are expressly rejected in the text of the statute, they are entitled to great weight in our analysis." *Consol. R. Corp.* v. *Gottshall*, 512 U.S. 532, 544 (1994); see also *Urie*, 337 U.S. at 174. In practice, this principle should be easy to apply: Unless language in FELA explicitly rejects or obviously conflicts with a traditional common-law standard, the common-law principle controls. *Sorrell*, 549 U.S. at 165-66. FELA does not expressly reject the common-law rule of proximate causation. On the contrary, "FELA said nothing . . . about the familiar proximate cause standard for claims either of a defendant-employer's negligence or a plaintiff-employee's contributory negligence." *Id.* at 174 (Souter, J., concurring).[4] Nonetheless, there exists an

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[4] *See also id.* at 173 (Souter, J., concurring) ("*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; the case merely instructed courts how to proceed when there are multiple cognizable causes of an injury.").

entrenched and acknowledged division over whether FELA eliminated the common-law requirement of proximate causation in cases brought under FELA. *Id.* at 173 n.* (Souter, J., concurring) (recognizing the split of authority); Pet. App. 35a (noting the "split of authority regarding the Supreme Court's use of the phrase 'even the slightest' in *Rogers*").

1. Consistent with the rule at common law, and with Justice Souter's concurring analysis in *Sorrell*, at least seven state supreme courts have held that plaintiffs under FELA must prove that their injuries were proximately caused, in whole or in part, by the defendant's negligence.

The Utah Supreme Court, for instance, recently relied on Justice Souter's concurrence in holding that plaintiffs seeking to recover under FELA must prove that employer negligence proximately caused the plaintiff's injuries. Noting the "extensive debate" over the significance of the phrase "even the slightest," the court concluded that "[w]hile one could certainly read the Supreme Court's language in *Rogers* to speak to the standard of causation under FELA, this is not the best reading of the case." *Raab* v. *Utah Ry.*,—P.3d—, 2009 WL 2971868, at *6-7 & nn.28-29 (Utah Sept. 18, 2009). It expressly rejected the argument that *Rogers* lowered a plaintiff's burden to prove proximate causation. *Id.* at *7. Rather, it explained, "there is no [ ] statutory support for reading *Rogers* as eliminating the requirement of proximate causation"; such a holding "would be contrary to the Supreme Court's approach to FELA." *Id.* at *7-8.

In *Marazzato* v. *Burlington Northern Railroad*, the Montana Supreme Court likewise held that a plaintiff proceeding under FELA "has the burden of proving

that defendant's negligence was the proximate cause in whole or in part of plaintiff's" injury. 817 P.2d 672, 675 (Mont. 1991) (internal quotation marks omitted). Like the Utah Supreme Court, *Marazzato* specifically rejected the argument that *Rogers* reduced the plaintiff's burden to prove proximate causation. *Id.* at 674. Instead, it concluded, *Rogers* dealt with the unrelated issues of multiple causation and contributory negligence. *Id.* The supreme courts of Iowa, Minnesota, Nebraska, Ohio, and West Virginia have reached the same conclusion: FELA plaintiffs must prove that employer negligence proximately caused their injuries.[5]

2. Courts in other jurisdictions, however, treat *Rogers* as having eliminated the common-law requirement of proximate causation in negligence actions under FELA. That is consistent with Justice Ginsburg's concurrence in *Sorrell*, see 549 U.S. at 180, and it is the approach of the court below, which instructed the jury that FELA "imposes liability on the railroad employer . . . when the defect or insufficiency [that caused the plaintiff's injury] is due to negligence, even the slightest, on the part of the employer." Pet. App. 70a.

Similarly, the Second, Fifth, Sixth, Seventh, Ninth, Tenth, and District of Columbia Circuits require a FELA plaintiff to show nothing more than that the railroad's negligence was the "slightest cause" of the employee's injuries. See *Johnson* v. *Cenac Towing,*

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[5] *See Gardner* v. *CSX Transp., Inc.*, 498 S.E.2d 473, 483 (W. Va. 1997); *Snipes* v. *Chi., Cent. & Pac. R.R.*, 484 N.W.2d 162, 164 (Iowa 1992); *Chapman* v. *Union Pac. R.R.*, 467 N.W.2d 388, 395 (Neb. 1991); *Brabeck* v. *Chi. & Nw. Ry.*, 117 N.W.2d 921, 923 (Minn. 1962); *Reed* v. *Pennsylvania R.R.*, 171 N.E.2d 718, 721 n.3 (Ohio 1961).

Inc., 544 F.3d 296, 302 & n.4 (5th Cir. 2008); *Coffey* v. *Ne. Ill. Regional Commuter R.R. (Metra)*, 479 F.3d 472, 476 (7th Cir. 2007); *Churchwell* v. *Bluegrass Marine, Inc.*, 444 F.3d 898, 907 (6th Cir. 2006); *Williams* v. *Long Island R.R.*, 196 F.3d 402, 406-07 (2d Cir. 1999); *Summers* v. *Mo. Pac. R.R. Sys.*, 132 F.3d 599, 606-07 (10th Cir. 1997); *Ogelsby* v. *S. Pac. Transp. Co.*, 6 F.3d 603, 609 (9th Cir. 1993); *Little* v. *Nat'l R.R. Passenger*, 865 F.2d 1329 (D.C. Cir. 1988) (per curiam) (Table); *Page* v. *St. Louis Sw. Ry.*, 312 F.2d 84, 89-90 (5th Cir. 1963).

The same is true of state courts in Alabama, Florida, Mississippi, Missouri, South Carolina, Texas, and Washington, as well as in the District of Columbia. See *Montgomery* v. *CSX Transp.*, 656 S.E.2d 20, 26, 28 & n.6 (S.C. 2008); *Canadian Nat'l/Ill. Cent. R.R.* v. *Hall*, 953 So. 2d 1084, 1091 (Miss. 2007); *Glass* v. *Birmingham S. R.R.*, 905 So. 2d 789, 796 (Ala. 2004); *Keranen* v. *Nat'l R.R. Passenger Corp.*, 743 A.2d 703, 712 (D.C. 2000); *Seeberger* v. *Burlington N. R.R.*, 982 P.2d 1149, 1152 (Wash. 1999); *Maritime Overseas Corp.* v. *Ellis*, 971 S.W.2d 402, 406 (Tex. 1998); *McCalley* v. *Seaboard Coast Line R.R.*, 265 So. 2d 11, 14-15 (Fla. 1972); *Wilmoth* v. *Chi., Rock Island & Pac. R.R.*, 486 S.W.2d 631, 634 (Mo. 1972).

In those jurisdictions, *Rogers* is seen to have "definitively abandoned" the practice of determining "liability under the FELA in terms of proximate causation," *Summers*, 132 F.3d at 606, and to have established that "'proximate cause' is not required to establish causation under FELA," *Ogelsby*, 6 F.3d at 609; see *Montgomery*, 656 S.E.2d at 28 & n.6 (adopting Justice Ginsburg's *Sorrell* analysis in affirming South Carolina's use of a "relaxed"

causation standard in negligence actions under FELA). To the extent these authorities are rooted in the statutory text at all, they depend upon FELA's "in whole or in part" language, which they say creates a "relaxed" causation standard. *E.g.*, *Williams*, 196 F.3d at 406. This is squarely at odds with the proper interpretation of that language, as Justice Souter's *Sorrell* concurrence explained. 549 U.S. at 174-75 (Souter, J., concurring).

3. This split of authority over FELA's causation standard exists along numerous dimensions. Not only has it persisted after *Sorrell*; it has deepened. See, *e.g.*, *Raab*, 2009 WL 2971868 at *6-7 (recognizing the division of authority); *Montgomery*, 656 S.E.2d at 28 & n.6 (same); *In re Global Santa Fe Corp.*, 275 S.W.3d 477, 489 n.79 (Tex. 2008). Furthermore, the standard for causation under this federal statute varies between courts within certain states, depending on whether a case is filed in state or federal court. Thus, the parties in a FELA case filed in state court in Salt Lake City will litigate under a different causation standard than a case filed in the federal district court down the street.[6] Similar divisions exist in federal district courts and state intermediate appellate courts in jurisdictions where there is no controlling authority.[7]

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[6] *Compare Raab*, 2009 WL 2971868, at *6-8, *with Summers*, 132 F.3d at 606. The same is true in at least Montana and Ohio. *Compare Marazzato*, 817 P.2d at 675 (Mont. 1991), *with Ogelsby*, 6 F.3d at 609 (9th Cir. 1993); *compare Reed*, 171 N.E.2d at 721 n.3 (Ohio 1961), *with Churchwell*, 444 F.3d at 907 (6th Cir. 2006).

[7] *Compare, e.g.*, *Dickerson* v. *Staten Trucking, Inc.*, 428 F. Supp. 2d 909, 915 (E.D. Ark. 2006) (federal district court in the Eighth Circuit holding that proximate causation is required),

The breadth of the division underscores its significance. The standard of causation arises in every case brought under FELA, and these differences in jury instructions can be both outcome-determinative and can cause litigation to be needlessly prolonged. The inherent uncertainty over whether a plaintiff must prove proximate causation means that both sides can legitimately hope that they will receive a favorable instruction, which creates a perverse incentive to litigate at least until a decision is made by the court on the proper instruction. [8]

B. Lower Courts Are Further Divided Over The Standard For Proving Negligence Under FELA.

1. A closely related division of authority concerns the duty of care under FELA. See *Williams*, 196 F.3d at 406-07 (recognizing the conflict); *Montgomery*, 656 S.E.2d at 26, 28 & n.6 (same). Certain courts have applied the "slightest" language not only to the statute's standard of causation, but also to the

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with, e.g., *Magelky* v. *BNSF Ry.*, 491 F. Supp. 2d 882, 887 (D.N.D. 2007) (federal district court in the Eighth Circuit holding that proximate causation is not required). In state appellate courts, *compare also, e.g.*, *Brooks* v. *Brennan*, 625 N.E.2d 1188, 1193 (Ill. App. Ct. 1994) (Illinois Fifth District Appellate Court holding that proximate causation is required), *with, e.g.*, *Albin* v. *Ill. Cent. R.R. Co.*, 660 N.E.2d 994, 999 (Ill. App. Ct. 1995) (Illinois Fourth District Appellate Court holding that proximate causation is not required).

[8] The conflict's significance is further heightened by the fact that judicial interpretations of FELA also apply to cases brought under the Jones Act, 46 U.S.C. § 30104(a), the federal law governing liability for workplace injuries suffered by seamen. *Am. Dredging Co.* v. *Miller*, 510 U.S. 443, 456 (1994) (the Jones Act "adopts the entire judicially developed doctrine of liability under [FELA]" (internal quotation marks omitted)).

fundamental negligence requirement itself, requiring FELA plaintiffs to prove only "slight" negligence. As the Second Circuit has explained:

> While some circuits have limited the application of the "in whole or in part" language to the element of causation and apply traditional standards to the duty of care owed, this Circuit has explicitly stated that it construes "the statute, in light of its broad remedial nature, as creating a relaxed standard for negligence as well as causation."

Williams, 196 F.3d at 406 (citation omitted) (quoting *Ulfik* v. *Metro-North Commuter R.R.*, 77 F.3d 54, 58 & n.1 (2d Cir. 1996)).

In addition to the Second Circuit, the Ninth Circuit and the Supreme Courts of Pennsylvania and Washington have held that a FELA plaintiff need only prove a minimal degree of negligence. See *Mullahon* v. *Union Pac. R.R.*, 64 F.3d 1358, 1364 (9th Cir. 1995); *Seeberger*, 982 P.2d at 1152; *Hileman* v. *Pittsburgh & Lake Erie R.R.*, 685 A.2d 994, 995-96 (Pa. 1996).

These authorities rely upon the "even the slightest" language from *Rogers* as the basis for applying a standard of "slightest" rather than ordinary negligence. See, e.g., *Seeberger*, 982 P.2d at 1152. Some also apply a broad interpretation of FELA's "remedial nature." *E.g.*, *Williams*, 196 F.3d at 406. As this Court explained in *Sorrell*, however, while FELA "was indeed enacted to benefit railroad employees," that purpose alone does not require the Court "to interpret every uncertainty in the Act in favor of employees." 549 U.S. at 171. On this point, in any event, there is no "uncertainty" to construe.

FELA's text does not suggest a standard of negligence that is in any way distinct from the common law.

2. In direct conflict, four federal courts of appeals and two state supreme courts have rejected the view that FELA creates a "relaxed" standard for negligence. In *Gautreaux* v. *Scurlock Marine, Inc.*, for example, the Fifth Circuit sitting en banc reversed an earlier precedent adopting a slight negligence standard in actions brought under FELA. 107 F.3d 331, 335-36 (5th Cir. 1997) (en banc). It explained that FELA imposes a negligence standard without caveat or equivocation; accordingly, "one must assume that Congress intended its words to mean what they ordinarily are taken to mean – a person is negligent if he or she fails to act as an ordinarily prudent person would act in similar circumstances." *Id.* at 338 (internal quotation marks omitted).

In *Montgomery*, the South Carolina Supreme Court reached this same conclusion. It noted the "federal circuit split as to whether the relaxed FELA standard applies only to causation, or applies to the fault prong of FELA negligence as well," and concluded that "federal law has not conclusively established a relaxed standard of negligence (i.e., duty/breach) in FELA cases." 656 S.E.2d at 26-28. While accepting the (erroneous) proposition that *Rogers* adopted a "relaxed" standard for causation, the court rejected the argument that *Rogers* suggested that anything other than ordinary negligence principles apply to actions brought under FELA.

In addition to the decisions of the Fifth Circuit and the South Carolina Supreme Court, the Third, Sixth and Seventh Circuits, along with the Louisiana Supreme Court, have expressly rejected the

argument that FELA enacts a relaxed standard of negligence. See *Coffey*, 479 F.3d at 476; *Van Gorder* v. *Grand Trunk W. R.R.*, 509 F.3d 265, 269 (6th Cir. 2007), *cert. denied*, 129 S. Ct. 489 (2008)[9]; *Fashauer* v. *N.J. Transit Rail Operations, Inc.*, 57 F.3d 1269, 1283 (3d Cir. 1995); *Vendetto* v. *Sonat Offshore Drilling Co.*, 725 So. 2d 474, 478 (La. 1999).

These courts recognize that, absent a clear directive to the contrary, ordinary negligence principles must govern actions under FELA. And as with causation, nothing in FELA's text remotely suggests a "relaxed" standard of negligence. This Court repeatedly has resisted attempts to transform FELA into a no-fault workers' compensation scheme, which such a reading effectively would accomplish. See *Gottshall*, 512 U.S. at 543 (FELA "does not make the employer the insurer of the safety of his employees while they are on duty. The basis of his liability is his negligence, not the fact that injuries occur.") (internal quotation marks omitted).

II. THE DECISION BELOW CONFLICTS WITH BINDING PRECEDENTS OF THIS COURT.

The trial court instructed the jury that FELA "imposes liability on the railroad employer . . . when the defect or insufficiency [that caused the plaintiff's injury] is due to negligence, *even the slightest*, on the part of the employer." Pet. App. 70a (emphasis added). This instruction disregards numerous of this Court's precedents interpreting FELA, and misconstrues *Rogers*, which did not purport to overrule any of those precedents.

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[9] Had this case been tried in Tennessee federal rather than state court, therefore, it is plain that this instruction could not have been given.

1. This Court repeatedly has recognized that FELA plaintiffs must prove proximate causation. See, *e.g.*, *Tennant* v. *Peoria & Pekin Union Ry.*, 321 U.S. 29, 32 (1944) (FELA plaintiffs must prove that "negligence was the proximate cause in whole or in part" of the employee's injury); accord *Brady* v. *S. Ry.*, 320 U.S. 476, 483 (1943) (a railroad's action is "'the proximate cause of an injury'" if it was "'the natural and probable consequence of the negligence'" and "'ought to have been foreseen in the light of the attending circumstances'." (quoting *Milwaukee & St. Paul Ry.* v. *Kellogg*, 94 U.S. 469, 475 (1876))). The Act simply makes no mention of, let alone dispenses with, the "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). Because FELA does not expressly abrogate the common law rule of proximate causation, this Court has "consistently recognized and applied proximate cause as the proper standard in FELA suits." *Id.* at 174 (Souter, J., concurring).

Perhaps the clearest example of this recognition appears in *Davis* v. *Wolfe*, 263 U.S. 239 (1923), which clearly articulated that proximate causation is the rule in negligence actions under FELA:

> [A]n employee cannot recover under [FELA] if the failure to comply with its requirements is not a proximate cause of the accident which results in his injury, but merely creates an incidental condition or situation in which the accident, otherwise caused, results in such injury; and, on the other hand, he can recover if the failure to comply with the requirements of the Act is a proximate cause of the accident, resulting in injury to him[.]

263 U.S. at 243.[10] *Davis* both followed and preceded a long line of decisions recognizing that proximate cause is the test under FELA.[11] Neither *Davis* nor its progeny have been overruled.

There is no basis for interpreting *Rogers* as *sub silentio* reversing not only *Davis*, but nearly a half century's worth of FELA precedents requiring proof of proximate causation. *Rogers* addressed the separate issue of whether a plaintiff had the burden to show that the railroad's wrongful act was the "sole, efficient, producing cause of injury," a concept distinct from the common-law standard of proximate causation. 352 U.S. at 506. As Justice Souter explained in *Sorrell*, the statement in *Rogers* that a railroad is liable under FELA if its negligence "'played any part, even the slightest'" in producing the employee's injuries addressed only "the occasional multiplicity of causations." 549 U.S. at 175 (quoting *Rogers*, 352 U.S. at 506). It did nothing, however, to undermine "the necessary directness of cognizable

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[10] *Davis* was brought under the Safety Appliance Act ("SAA"), which employs the same causation standard as FELA. See *Carter* v. *Atlanta & St. Andrews Bay Ry.*, 338 U.S. 430, 434 (1949).

[11] *See, e.g., Norfolk & W. Ry.*, 229 U.S. at 118-120; *St. Louis, Iron Mountain & S. Ry.*, 229 U.S. at 280; *Lang* v. *N.Y. Cent. R.R.*, 255 U.S. 455, 461 (1921); *Davis*, 263 U.S. at 243; *Minneapolis, St. Paul & Sault Ste. Marie Ry.* v. *Goneau*, 269 U.S. 406, 410-411 (1926); *St. Louis-S.F. Ry* v. *Mills*, 271 U.S. 344, 347 (1926); *N.Y. Cent. R.R.* v. *Ambrose*, 280 U.S. 486, 489 (1930); *Nw. Pac. R.R.* v. *Bobo*, 290 U.S. 499, 503 (1934); *Swinson* v. *Chi., St. Paul, Minneapolis & Omaha Ry.*, 294 U.S. 529, 531 (1935); *Tiller* v. *Atl. Coast Line R.R.*, 318 U.S. 54, 67 (1943); *Brady*, 320 U.S. at 483; *Coray* v. *S. Pac. Co.*, 335 U.S. 520, 523 (1949); *Urie*, 337 U.S. at 177; *O'Donnell* v. *Elgin, Joliet & E. Ry.*, 338 U.S. 384, 390 (1949).

causation." *Id.*[12] Nor would there have been any basis for *Rogers* to say that FELA's "in whole or in part" language alleviates a plaintiff's burden to show proximate causation. Rather, it simply clarifies that a FELA injury can have more than one proximate cause. Accordingly, relying on the statutory provision making railroads liable for employee deaths or injuries that "result in whole or in part from the negligence" of the railroad, 45 U.S.C. § 51, *Rogers* rejected the former common law formulation of "sole proximate cause," as inconsistent with the statute's abolition of pure contributory negligence. See *id.* § 53; *Sorrell*, 549 U.S. at 175 (Souter, J., concurring).

This recognition, however, did not overturn a legacy of holdings concluding that a FELA plaintiff must prove that railroad "negligence was *the proximate cause* in whole or in part" of the employee's injury. *Tennant*, 321 U.S. at 32 (emphasis added). In fact, *Rogers* derived its "test of a jury case" from *Coray* v. *Southern Pacific Co.*, a case which explicitly stated that FELA requires plaintiffs to prove that railroad negligence was either "the sole or a contributory proximate cause" of the employee's injury. 335 U.S. 520, 523 (1949) (citing *Davis*, 263 U.S. at 243;

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[12] In the years following *Rogers*, this Court has stated in dicta that FELA adopts a "relaxed standard" of causation, *Gottshall*, 512 U.S. at 543, and that a FELA plaintiff "is not required to prove common-law proximate causation," *Crane* v. *Cedar Rapids & Iowa City Ry.*, 395 U.S. 164, 166 (1969). Both statements are correct, to the extent they simply recognize FELA's rejection of the older common law conception of "sole proximate causation" addressed in *Rogers*. *See Sorrell*, 549 U.S. at 175 (Souter, J., concurring). But if they meant to suggest that *Rogers* abrogates the federal rule of proximate cause, such dicta would be contrary to FELA's text and could not support the extensive line of precedents affirming the rule's application under FELA.

Spokane & Inland Empire R.R. v. *Campbell*, 241 U.S. 497, 509-10 (1916)). *Rogers* did nothing to unsettle the well-established causation standard recognized in *Davis* – it only made clear that in cases where a jury could find both the employee's and the railroad's negligence to be legal causes of the injury, the claim against the railroad had to go to a jury even if the railroad's contribution to the injury was slight relative to the employee's.

2. The suggestion that FELA incorporates a relaxed "slight negligence" standard likewise conflicts with clear pronouncements from this Court. Whatever confusion *Rogers* may have created with regard to *causation*, this Court never has indicated that FELA's *negligence* is anything other than the traditional rule at common law. This Court's FELA jurisprudence has consistently judged negligence (i.e., a breach in the standard of care) by reference to "common law principles." *Urie*, 337 U.S. at 174 (internal quotation marks omitted). Common-law negligence long has been understood to constitute a failure to exercise the care required under the circumstances to protect others against an unreasonable risk of harm. See, *e.g.*, W. Page Keeton et al., *Prosser & Keeton on the Law of Torts*, § 31, at 169-70 (5th ed. 1984). Consistent with this common-law standard, this Court long ago established that FELA applies "the general rule which defines negligence as the lack of due care under the circumstances; or the failure to do what a reasonable and prudent man would ordinarily have done under the circumstances of the situation; or doing what such a person under the existing circumstances would not have done." *Tiller* v. *Atl. Coast Line R.R.*, 318 U.S. 54, 67 (1943); accord *Anderson* v. *Atchison,*

Topeka & Santa Fe Ry., 333 U.S. 821, 823 (1948) (per curiam).

The application of ordinary negligence principles under FELA was affirmed most recently in *Sorrell*, where this Court was explicit: "so far as negligence is concerned, that standard is the same – *ordinary prudence* – for both Employee and Railroad alike." 549 U.S. at 169 (emphasis added; internal quotation makrs omitted). Recognition of the common-law standard of "ordinary prudence" leaves no room for a "relaxed" standard of "slight negligence." Such a construction would be curious in light of this Court's repeated admonition that FELA did not create a no-fault regime of workers' compensation: "'[t]he basis of [] liability is [] negligence, not the fact that injuries occur.'" *Gottshall*, 512 U.S. at 543 (quoting *Ellis* v. *Union Pac. R.R.*, 329 U.S. 649, 653 (1947)).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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