No. 10-75

IN THE
Supreme Court of the United States

CONSOLIDATED RAIL CORPORATION,
Petitioner,

v.

FRANCIS BATTAGLIA,
Respondent.

On Petition for a Writ of Certiorari To the Court of Appeals of Ohio, Sixth Appellate District

BRIEF OF THE ASSOCIATION OF AMERICAN RAILROADS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST OF *AMICUS CURIAE* [1]

AAR is an incorporated, nonprofit trade association representing the nation's major freight railroads and Amtrak. AAR's members operate approximately 78 percent of the rail industry's line haul mileage, produce 94 percent of its freight revenues, and employ

[1] In accordance with Rule 37.2.(a), AAR has provided notice of its intent to file this brief to counsel for petitioner and respondent. The parties have consented to AAR's filing of an *amicus* brief. Letters expressing consent have been filed with the Clerk of the Court. Pursuant to Rule 37.6, AAR states that no person or entity other than AAR has made monetary contributions toward this brief, and no counsel for any party authored this brief in whole or in part.

92 percent of rail employees. In matters of significant interest to its members, AAR frequently appears before Congress, administrative agencies and the courts on behalf of the railroad industry, including participation as *amicus curiae* in cases raising significant legal and policy issues.

This case, arising under the Federal Employers' Liability Act (FELA), 45 U.S.C. §§51-60, presents such issues. FELA, a federal negligence statute, takes the place of workers' compensation in the railroad industry. FELA presents unique issues and problems for railroads because, as a negligence law, it differs fundamentally from the no-fault compensation systems that cover virtually all other U.S. industries. Each year thousands of FELA claims and lawsuits, like the case below, are asserted against AAR member railroads, to which they devote substantial legal and financial resources: all told, the railroads spend three quarters of a billion dollars annually in the payment and defense of FELA claims. Because FELA litigation is an ongoing event for all major railroads, AAR has a strong interest in assuring that lower courts do not improperly expand railroad liability under FELA.

Echoing prior decisions of some other lower state and federal courts, the court below erroneously sanctioned the application of a relaxed standard of causation in FELA cases, a ruling that is at odds with the plain language of the statute, Congressional intent and prior decisions of this Court and other courts. This issue is relevant in virtually every FELA lawsuit, and numerous lower court decisions demonstrate that the way in which causation is interpreted can affect the outcome of a case. Therefore, AAR members, who make up the vast majority of FELA

defendants, have a strong interest in seeking definitive guidance from this Court on the standard of causation.

AAR's members also are greatly concerned over the lower court's failure to defer to the Federal Railroad Administration's (FRA) interpretation of an important federal railroad safety regulation. The ruling that the regulation was violated if any diesel exhaust enters a locomotive cab, which was contrary to FRA's the interpretation of a rule that it promulgated and enforces, amounted to a finding that the defendant was negligent as a matter of law. As with the court's ruling on causation, this ruling has the potential greatly, and improperly, to expand FELA liability in a manner inconsistent with the view's of the expert federal agency.

When AAR participates as *amicus curiae* in a FELA case, it brings a broad, industry-wide perspective to the issues before the court. AAR works closely with its member railroads on a host of issues arising under FELA. Moreover, AAR has had long-standing involvement with the subject of rail safety, and participates in all significant railroad safety rulemaking proceedings conducted by the FRA. Thus, AAR is thoroughly familiar with the trends and key issues that confront its members both in FELA litigation and in the field of safety regulation. As a trade association representing the nation's major railroads, AAR has an interest not only in assisting the petitioner in obtaining relief from an erroneous decision, but also in assuring that an important federal law is not misconstrued to the detriment of railroads in the future.

STATEMENT OF THE CASE

AAR adopts the Statement of the Case of Petitioner.

SUMMARY OF THE ARGUMENT

This Court should grant the petition in order to provide guidance on a fundamental issue arising under FELA that has been the source of confusion and lack of uniformity for many years: the proper standard of causation. Time and again, in providing jury instructions, ruling on dispositive motions, and in reviewing such matters on appeal, some lower courts have held that a more "relaxed" burden applies to plaintiffs in proving causation in FELA cases than would in ordinary common law actions. Many of those decisions demonstrate that how courts interpret causation can have a significant impact on the outcome of a case. In contrast, other courts hold that FELA plaintiffs must show proximate cause. Only clarification of the proper standard of causation by this Court will end the intolerable lack of uniformity on this fundamental issue.

The language and legislative history of the statute, and early decisions of this Court, show that Congress did not intend to modify the common law standard of causation when it enacted FELA in 1908. Congress expressly modified some of the prevailing common law defenses that made recovery more difficult, including the traditional contributory negligence doctrine, but these modifications did not address the causation standard. Consequently, in the years following FELA's enactment this Court consistently held that plaintiffs had to prove their injuries were proximately caused by the defendant's negligence. Neither subsequent amendments to FELA, nor this

Court's decision in *Rogers v. Missouri Pac. R.R.*, offers support for lower court decisions that hold otherwise.

The lower court's failure to defer to the FRA's interpretation of its own safety regulation, which will have profound implications for the rail industry's locomotive fleet, also warrants granting the petition. The court below held that evidence of the presence of any diesel exhaust in a locomotive cab constitutes a violation of 49 C.F.R. §229.43(a), requiring a finding of negligence per se under FELA. However, the language of the regulation does not remotely compel such a conclusion. Consistent with the regulation's language and intent, FRA's enforcement efforts have focused on defects in a locomotive exhaust system and the sufficiency of stack heights. In addition, FRA has stated that it utilizes the OSHA diesel exhaust criteria to determine compliance. This interpretation, which the court rejected, is entitled to deference because it is entirely consistent with the language of the regulation and plainly reasonable under the circumstances.

ARGUMENT

I. THIS COURT SHOULD GRANT THE PETITION AND CLARIFY THE PROPER STANDARD OF CAUSATION UNDER FELA BECAUSE IT IS A FUNDAMENTAL ISSUE ARISING UNDER THE STATUTE WHICH CONTINUES TO BE THE SUBJECT OF CONFUSION AND LACK OF UNIFORMITY IN THE LOWER COURTS

As in any negligence action, causation is a fundamental issue in litigation arising under FELA. *See e.g., Adams v. CSX Transp., Inc.*, 899 F.2d 536, 539 (6th Cir. 1990) (A FELA plaintiff must "prove the

traditional common law elements of negligence: duty, breach, foreseeability, and causation"). During the statute's first fifty years causation was a straightforward and non-controversial issue, but has since become muddled and confused. Echoing this confusion, the Kentucky Supreme Court recently observed that "[t]he [U.S.] Supreme Court has yet to state clearly whether *Coray*, *Carter*, and *Rogers* altered the common-law proximate cause standard," and noted further that "[t]he court declined to address what the causation standard should be in *Norfolk Southern v. Sorrell*." *CSX Transp., Inc. v. Begley*, ___ S.W.3d ___, 2010 WL 2016531, at *5 (Ky. 2010). This case presents an excellent opportunity for this Court to answer the question left unresolved in *Sorrell*, and provide much needed clear and definitive guidance on the proper standard of causation under FELA.

A. The Erroneous Interpretation of FELA's Causation Standard By the Court Below and Other Lower Courts Has and Will Continue to Have A Substantial and Decisive Impact on the Outcome of FELA Cases

Commenting on the disarray that existed on causation even in 1968, the California Court of Appeals observed that "[i]t is almost impossible to frame a definition of causation for F.E.L.A. cases . . . because the federal decisions cannot themselves be fully harmonized on the subject." *Parker v. Atchison, Topeka & Santa Fe Ry. Co.*, 263 Cal.App.2d 675, 678, 70 Cal. Rptr. 8, 10 (Cal. App. 1968). As the Petition describes, this confusion and lack of uniformity has only increased, to the point where there presently is a serious split of authority in the lower federal and state courts on the standard of causation that applies

in FELA cases. [Pet. at 16-21] Some lower courts erroneously ascribe to this Court's decision in *Rogers v. Missouri Pac. R.R.*, 352 U.S. 500, *reh'g denied*, 353 U.S. 943 (1957), an intent to "relax" the standard of causation under FELA, often utilizing colorful metaphors to describe this alleged statutory metamorphosis.[2] For example, the Seventh Circuit explained that to sustain a jury verdict in a FELA case requires "evidence scarcely more substantial than pigeon bone broth." *Harbin v. Burlington Northern Ry. Co.*, 921 F.2d 129, 132 (7th Cir. 1990); *see also, Rivera v. Union Pac. R.R.*, 378 F.3d 502, 506 (5th Cir. 2004)(calling the plaintiff's burden of proof "featherweight"). Here, the Ohio Court of Appeals relied on *Rogers* for the conclusion that a railroad is liable under FELA if its negligence "in any degree, contributes . . . even in the slightest degree" to the plaintiff's injury. *Battaglia v. Consolidated Rail Corp.*, 2009 WL 3325903, at *3-4 (Ohio App. 6 Dist. 2009). Agreeing that plaintiff satisfied his burden under this standard, the Court affirmed the grant of summary judgment for plaintiff on causation, taking that issue from the jury. *Id.* at *6.

This issue is of great importance because the determination of the proper standard for showing causation, whether reflected in jury instructions, rulings on dispositive motions (as in this case), or appellate

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[2] *E.g., Williams v. Long Island R.R. Co.*, 196 F.3d 402, 406 (2d Cir. 1999); *Oglesby v. Southern Pac. Transp. Co.*, 6 F.3d 603, 606-07 (9th Cir. 1993). Recently, a district court in Indiana agreed with the defendant that "the causation evidence in the record as it stands is tenuous" but nonetheless denied the defendant's motion for summary judgment "in light of the featherweight standard of proof required" under FELA. *Grogg v. CSX Transp., Inc.*, 659 F.Supp.2d 998, 1005 (N.D. Ind. 2009).

review, surely can affect the outcome of a FELA case. Perhaps no better example exists of how the standard of causation can be outcome determinative than the Fifth Circuit's opinion in *Armstrong v. Kansas City Southern Ry. Co.*, 752 F.2d 1110 (5th Cir. 1985). In *Armstrong*, the railroad had hired a local cab company to transport the plaintiff from the point where he disembarked from a train late at night to the railroad's yard offices. In route, the driver stopped the cab on the road without turning on the emergency flashers. The cab was hit from the rear by another motorist, injuring the plaintiff. Asserting that the "common-law proximate cause standard is modified and the employee has a less demanding burden of proving causal relationship," *id.* at 1113, the Court affirmed the jury's verdict finding the railroad liable, allowing the jury a wide berth to make inferences supporting its verdict.

Armstrong also involved a state law indemnity action by the railroad against the cab company, its agent.[3] Under the very same set of facts, the Court of Appeals affirmed the denial of the railroad's claim, upholding the lower court's finding that the cab driver was not negligent. The Court held that "even though the jury found that [defendant] was liable to Armstrong [in the FELA action] because of the negligent conduct of its agent, the district court was neither constrained nor required to find the negligence of [the cab company] proximately caused Armstrong's injury." *Id.* at 1115. The Court ex-

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[3] In *Norfolk & Western Ry. Co. v. Ayers*, 538 U.S. 135 (2003), this Court held that while joint and several liability applies to FELA, railroads have the right to bring indemnity and contribution actions against third parties under applicable state or federal law. *Id.* at 162.

plained that the railroad's "argument ignores the different causation standards of the two actions . . . The standards of liability for negligence under §1 of [FELA] are significantly broader than in ordinary common-law negligence actions." *Id.* Thus, the very conduct that gave rise to liability in the FELA action, did not support liability in the indemnity action, an outcome directly attributable to the Court's ruling that a different, "significantly broader" standard of causation applies under FELA. *Id.*[4]

Other examples of the impact of FELA's purported "relaxed" causation standard abound. In ruling on a railroad's summary judgment motion, a federal district court in Kentucky described the plaintiff's case as "weak" and stated that the evidence "cast substantial doubt on the ability of Plaintiff to meet even the low bar of proof required in a FELA case." *Kreig v. CSX Transp., Inc.*, 2006 WL 2792406, at *2 (W.D. Ky. 2006). Nevertheless, the Court denied the motion based on its view that the "[p]laintiff's burden is significantly lighter than in an ordinary negligence case," with its comments strongly suggesting that the outcome would have been different had this not been a FELA action. *Id.*

In *Davis v. CSX Transp.*, Inc., 2005 WL 1935676, at *1 (W.D. Ky. 2005), the Court explained that the

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[4] Not only does the *Armstrong* decision demonstrate starkly how applying a relaxed causation standard can affect the outcome of a case, it highlights the inherent unfairness of such a rule. *Ayers* suggests that the impact of holding railroads jointly liable for the negligence of other tortfeasors is mitigated by the railroads' right to seek indemnity under state law. However, the fairness of this balance is undermined if railroads must defend against a relaxed standard of causation as FELA defendants, but must prove proximate cause as indemnity plaintiffs.

"burden of proof of causation under FELA is relaxed compared to ordinary negligence actions" and therefore the plaintiff "need offer little more than a scintilla of evidence that the employer's negligence played any part in the plaintiff's injury." As a result, the Court dispensed with the need for the plaintiff to offer evidence connecting the alleged negligent conduct (allowing pools of grease to accumulate in the yard) to her injury (losing her footing and falling off a boxcar sill step), and denied the railroad's motion for summary judgment. *Id.* at *2.

In *Koller v. Burlington Northern Santa Fe Ry. Co.*, No. Civ. S-01-914 GGH (E.D. Calif. 2002), the plaintiff brought a FELA action based on his employer's failure to prevent an assault by a third party. The Court evaluated the railroad's motion for summary judgment under the premise that "[i]n a FELA case, the causation standard is relaxed" and "the jury's power to engage in inferences is significantly broader than in common law negligence actions." Examining the evidence in the context of these legal conclusions, the Court denied the railroad's motion "given the weakened causation standard in FELA cases."

Even in the rare instance where a trial court grants a defendant's dispositive motion in a FELA case, such rulings typically do not survive appellate review in courts applying a relaxed standard of causation. For example, in *Booth v. CSX Transp., Inc.*, 211 S.W.3d 81 (Ky. App. 2006), the trial court granted summary judgment for the railroad, finding that "it does not appear that the testimony of either of Plaintiff's physicians provides the necessary testimony stated within a reasonable degree of medical probability to establish causation on the part of CSX." *Id.* at 85. However, the Kentucky Court of

Appeals reversed, expressing its view that "Congress intended FELA to be a departure from common law principles of liability . . ." and that "FELA plaintiffs have a lower standard of proof than plaintiffs in ordinary negligence cases." *Id.* at 83-84.

This point was recently underscored by an Illinois district court which, referring to FELA's purported "relaxed standard for proving causation," explained that while the plaintiff's "first claim might not survive a motion for summary judgment in the traditional tort context, the low negligence threshold of FELA ensures that this count will live to see another day." *Gibbs v. Union Pac. R.R.*, 2009 WL 3064956, at *4 (S.D. Ill. 2009). Similarly, a federal court in Louisiana summarized the judicial attitude about FELA cases when it found that "FELA plaintiffs can survive dispositive motions by offering evidence which would be insufficient to overcome a similar motion in an ordinary civil case." *Kansas City Southern Ry. Co. v. Nichols Construction Co.*, 574 F.Supp.2d 590, 594 (E.D. La. 2008).

B. Although Prior Rulings of this Court Supporting Proximate Cause Were Neither Overruled nor Questioned By *Rogers* it Will Take a Definitive Ruling By This Court to Resolve the Uncertainty That Has Existed for Over Fifty Years

While this Court did not directly decide the issue of the proper standard of causation under FELA in *Norfolk Southern v. Sorrell*, 549 U.S. 158 (2007), the approach adopted in that decision strongly suggests that Congress intended to incorporate common law proximate cause into FELA. *Sorrell* held that the causation standard for employee contributory negli-

gence was equivalent to the standard for employer negligence. 549 U.S. at 171. This Court based its decision in part on the fact that under common law the same standard of causation applied to both employer and employee negligence, which, it explained, was "strong evidence against Missouri's disparate standards." *Id.* at 168. Thus, *Sorrell* was grounded in the well established rule that except where Congress expressly altered the common law, FELA is to be interpreted in accordance with common law principles. *Accord Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532, 544 (1994); *Metro-North Comm. R.R. v. Buckley*, 521 U.S. 424, 429 (1997). As with the principle of equivalence of standards, proximate cause also was the common law rule when FELA was enacted. It would be curious indeed to hold that Congress adopted the common law rule of equivalence, but at the same time rejected the equally entrenched common law rule of proximate cause. Certainly, there is no statutory basis for doing so.

In *Sorrell*, the plaintiff argued that use of the term "in whole or in part," in section 1 of FELA, but not in section 3, signaled that each section incorporated a different standard of causation, with section 1, which addresses employer negligence, calling for a more relaxed standard. *See* 45 U.S.C. §§51, 53. This Court rejected that argument. *Sorrell* instead confirmed that the "in whole or in part" language—the alleged statutory basis for the elimination of proximate cause—simply is descriptive of FELA's comparative negligence standard, under which the employer's negligence need not be the sole cause of an injury for the employer to be liable for damages (albeit, reduced damages if the employee's negligence also contributes to the injury). 549 U.S. at 170-71.

Notwithstanding the reasoning of *Sorrell*, and Justice Souter's concurring opinion, critiquing with "considerable force" the cases suggesting that FELA has abolished proximate cause, *see McBride v. CSX Transp., Inc.*, ___ F.3d ___, 2010 WL 909071, at *15 (7th Cir. 2010), it is clear that uncertainty over the proper standard of causation will continue among lower courts. *See e.g., Mills v. CSX Transp., Inc.*, 2009 WL 4547685, at *5, n. 4 (Tenn. 2009) ("It is not entirely clear which standard of causation *Rogers* applies to FELA cases—the common law standard or a relaxed standard."); *Montgomery v. CSX Transp., Inc.*, 656 S.E.2d 20, 27 (S.C. 2008)("[T]he *Sorrell* Court did not establish precisely what the FELA standard for causation is."); *Hall v. Norfolk Southern Ry. Co.*, 2007 WL 2765540, at *6, n.2 (N.D.Ga. 2007) ("With respect for [sic] a standard of causation, the Supreme Court continues to debate the precise contours of its holding in *Rogers*.")

Though *Sorrell* has ignited debate over the meaning of *Rogers*, and the proper standard of causation under FELA, some lower courts continue to view *Rogers* as precedent for the abandonment of proximate cause in FELA cases. *E.g., Medwig v. Long Island R.R.*, 2007 WL 1659201 (S.D.N.Y. 2007) (adhering to Second Circuit precedent interpreting *Rogers* as countenancing both a relaxed standard of causation and negligence in FELA cases, finding that *Sorrell* did not overrule that precedent). Others do not. *See Raab v. Utah Ry.*, 221 P.3d 219 (Utah 2009)(notion that *Rogers* "'definitively abandoned' the requirement that a FELA plaintiff show proximate cause" is "not mandated by the Supreme Court's language in *Rogers*"). In a decision earlier this year, the Seventh Circuit acknowledged that "[e]arly FELA cases did not interpret [FELA] as altering the

common-law requirement of proximate cause" and that "[t]hese early cases never have been overruled explicitly." *McBride*, 2010 WL 909071 at *4-5. Nonetheless, *McBride* "decline[d] to hold that. . . common law causation is required to establish liability under FELA," *id.* at *17, as the Seventh Circuit adhered to the notion that the concept of proximate cause has "broadened" over "FELA's history," and that a "new conception of proximate cause 'crystallized' in *Rogers*." *Id.* at *6.

Indeed, several federal courts of appeals, which previously had understood FELA to incorporate proximate cause, came to the conclusion that *Rogers* required them to repudiate their previous holdings. *See e.g.*, *Richards v. Consolidated Rail Corp.*, 330 F.3d 428 (6th Cir. 2003) (holding that *Rogers* "announced a relaxed test for establishing causation in FELA cases," *id.* at 433, and rejecting prior Sixth Circuit decision in *Reetz v. Chicago & Erie R.R.*, 46 F.2d 50 (6th Cir. 1931), as "no longer good law in light of *Rogers*." *Id.* at 437); *Compare Anderson v. Baltimore & Ohio R.R.*, 89 F.2d 629, 630 (2d Cir. 1937) (the issue is whether the defect "was the proximate cause of [plaintiff's] death.") *with Nicholson v. Erie R.R.*, 253 F.2d 939, 940 (2d Cir. 1958) ("[T]o impose liability on the defendant, the negligence need not be the proximate cause of the injury."); *Larsen v. Chicago & Northwestern Ry. Co.*, 171 F.2d 841, 844 (7th Cir. 1949) ("To recover under [FELA] plaintiff must prove that the defendant was negligent and that such negligence in whole or in part was the proximate cause of his injuries.") *with Coffey v. Northeast Ill. Reg. Comm. R.R.*, 479 F.3d 472, 476 (7th Cir. 2007) ("relaxation of common law standards of proof applies to" causation.). The Tenth Circuit explained that "[d]uring the first half of this century,

it was customary for courts to analyze liability under the FELA in terms of proximate causation," but that *Rogers* "definitively abandoned this approach." *Summers v. Missouri Pac. R.R. Sys.*, 132 F.3d 599, 606 (10th Cir. 1997).

Notwithstanding these holdings, the argument that FELA eliminated proximate cause finds no support in the statute's legislative history. When Congress enacted FELA, it made express changes to some of the harsher aspects of nineteenth century common law which often erected insurmountable barriers to recovery by workers sustaining job-related injuries.[5] Accordingly, contemporaneous with the statute's enactment, the Senate reported that FELA "revises the law as now administered in the courts in the United States in four important particulars." S. Rep. No. 460, at 1 (1908). Specifically, the Senate Report described these revisions to the common law as addressing the fellow servant doctrine, assumption of the risk, contributory negligence and prohibiting contracts that relieve the employer of liability. *Id.* at 1-3. There was no suggestion that the common law standard of causation was being modified. The House of Representatives offered an identical list when it described how FELA "change[d] the common-law

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[5] For example, recovery was denied if the worker knew the inherent dangers of a job and assumed those risks by accepting employment. *E.g., Clark v. St. Paul & Sioux City R.R.*, 9 N.W. 581 (Minn. 1881); *Gibson v. Erie Ry. Co.*, 63 N.Y. 449 (1875). The fellow servant rule, a variant of the assumption of the risk doctrine, held that among the ordinary risks of employment the employee takes upon himself is the "carelessness and negligence of those who are in the same employment," on the theory that "these are perils which the servant is as likely to know, and against which he can as effectually guard, as the master." *Farwell v. Boston & Worcester R.R.*, 4 Metc. 49, 57 (Mass. 1842).

liability of employers," H.R Rep. No. 1386, at 1 (1908), noting in addition, that the FELA "makes each party responsible for his own negligence and requires each to bear the burden thereof." *Id.*

Similarly, this Court's understanding of the revisions of common law made by FELA did not include any modification to the standard of causation. Shortly after its enactment, the constitutionality of FELA was challenged. Among other arguments advanced by those challenging the statute was that in modifying the common law Congress exceeded its authority to regulate interstate commerce. In addressing this challenge, which it rejected, this Court described those modifications as including (1) the abrogation of the fellow servant rule; (2) the replacement of the contributory negligence rule with a scheme of comparative negligence; (3) the abrogation of the assumption of the risk doctrine where a violation of a safety statute caused the injury; and (4) the right of a personal representative to seek damages for the death of an employee for the benefit of designated relatives. *Mondou v. N.Y., N. H. & Hartford R.R.*, 223 U.S. 1, 49-50 (1912). None of these changes, however, addresed the standard of causation. Not surprisingly, as petitioner has shown, this Court's decisions in the decades following FELA's enactment were remarkably consistent in identifying proximate cause as the proper standard of causation.[6] [Pet. at 24-25]

Since Congress has made no change to the relevant language of FELA since 1908, there simply is no basis to support the assertion that the concept of

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[6] *See e.g., Lang v. N.Y. Cent. R.R.*, 255 U.S. 455, 461 (1921); *St. Louis-S.F. Ry. v. Mills*, 271 U.S. 344, 347 (1926); *Northwestern Pac. R.R. v. Bobo*, 290 U.S. 499, 503 (1934).

proximate cause has broadened over the years since FELA was enacted. Some courts have asserted that *Rogers*' purported introduction of a relaxed causation standard was to conform to the 1939 amendments to FELA. *Richards*, 330 F.3d at 434; *Morrison v. N.Y. Cent. R.R.*, 361 F.2d 319, 320 (6th Cir. 1966). However, a review of those amendments gives lie to that rationale.

Rogers does briefly reference the 1939 amendments, 352 U.S. at 509-10, but never suggests that they required a reexamination of the causation standard under FELA, for the simple reason that they did not. The 1939 amendments were primarily intended to ease the path toward recovery by FELA plaintiffs by modifying aspects of the statute that served to prevent injured employees from recovering, either because they could not meet the strict test of interstate commerce[7] or because the employer successfully argued that the employee had assumed the risks inherent in the employment. However, the 1939 amendments did not purport to address, let alone modify, the standard of causation.

Adding a provision to section 1 of FELA, the 1939 amendments expanded the scope of FELA's coverage so that workers would no longer have to prove they were engaged directly in interstate commerce at the time they were injured in order to come within the scope of FELA's coverage. Act of Aug. 11, 1939, c. 685, §1, 53 Stat. 1404; *see* S. Rep. No. 661, at 2-3 (1939); *see Southern Pac. Co. v. Gileo*, 351 U.S. 493

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[7] In order to recover, "the employee, at the time of the injury," had to be "engaged in interstate transportation, or in work so closely related to it as to be practically a part of it." *See Shanks v. Delaware, Lackwanna & Western R.R.*, 239 U.S. 556, 558 (1916).

(1956); *Reed v. Pennsylvania R.R.*, 351 U.S. 502 (1956). In addition, in 1939, Congress amended FELA to eliminate the defense of assumption of the risk in all cases. *Id.* The 1939 amendments also increased the statute of limitations under FELA from two to three years, *id.* at §2, and prohibited railroads from establishing and enforcing rules which penalized employees for giving information concerning an accident to the injured person or his representative. *Id.* at §3. Thus, there is no statutory basis for incorporating into FELA a standard of causation that differs from what Congress intended in 1908.

Indeed, a few years after enactment of the 1939 amendments, this Court described the "proximate cause" standard as requiring a finding "that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances," adding that "[e]vents too remote to require reasonable prevision need not be anticipated." *Brady v. Southern Ry. Co.*, 320 U.S. 476, 483 (1943). Rather than repudiate *Brady* and dozens of other prior decisions, as the Petition explains, *Rogers* "does not alleviate a plaintiff's burden to prove proximate cause." [Pet. at 27] That lower courts would suggest otherwise underscores the vital need for this Court directly to address the important issue of causation under FELA.

The "relaxed" standard that has become entrenched in many jurisdictions will continue to impact numerous cases in the future. Several thousand FELA lawsuits are filed each year. Except in the occasional case where the railroad defendant admits liability, causation is an element of the plaintiff's case in each such lawsuit. The "relaxed"

standard utilized by some courts will continue to make recovery of damages more likely—often virtually assured—in FELA cases.

II. THE LOWER COURT'S FAILURE TO DEFER TO THE FEDERAL RAILROAD ADMINISTRATION'S INTERPRETATION OF ITS OWN FEDERAL SAFETY REGULATION HAS THE POTENTIAL FOR GREATLY AND IMPROPERLY EXPANDING FELA LIABILITY

The decision affirming the grant summary judgment on the grounds that Conrail violated 49 C.F.R. §229.43(a) demands review because the lower court's failure to defer to the FRA's interpretation of its own regulation will have profound implications for the rail industry's fleet of over 24,000 locomotives. Section 229.43(a) states, in relevant part, that "[p]roducts of combustion shall be released entirely outside the cab and other compartments. Exhaust stacks shall be of sufficient height or other means provided to prevent entry of products of combustion into the cab or other compartments under usual operating conditions." In a ruling affirmed by the Ohio Court of Appeals, the trial court held that evidence of the presence of diesel exhaust in a locomotive cab, at any level, constitutes a violation of §229.43(a), resulting in a finding of per se negligence in FELA cases. *Battaglia*, 2009 WL 3325903, at *5. The court justified its ruling on the grounds that the language of the regulation unambiguously required such a result. *Id.* The language of §229.43(a) does not remotely compel the conclusion that the presence of diesel exhaust at any level necessarily requires a finding of negligence per se. Yet the court refused to consider any evidence supporting a less rigid, and more reasonable, reading

of the regulation, including evidence reflecting the intent of the FRA, the agency which promulgated the regulation and which is charged by Congress with its enforcement.

The lower court's conclusion that the regulation is unambiguous is simply wrong. Section 229.43(a) contains two operative sentences. The first requires that products of combustion be released outside the cab: it does not "unambiguously" demand that absolutely no exhaust ever enter the cab once it has been released outside the locomotive. *Id.* The second sentence is directed at the design of exhaust stacks, requiring that they be of sufficient height, or otherwise, to prevent entry of exhaust into the cab under usual operating conditions. *Id.* The court below found a violation of the regulation without any consideration of whether the stacks on the locomotives plaintiff operated were deficient in that regard.

When confronted with the issue of whether a safety regulation has been violated, courts must focus on the language, purpose and intent of the regulation. The Secretary of Transportation has plenary power to promulgate regulations "for every area of railroad safety," 49 U.S.C. §20103, authority which is exercised by FRA. In promulgating rail safety regulations, it is not FRA's intent to impose impossible obligations on railroads that serve no genuine safety-related purpose. *See* Federal Railroad Administration, Railroad Occupational Safety and Health Standards; Termination, Policy Statement 43 Fed. Reg. 10584, 10586 (1978), (FRA "must decide what regulations are necessary and feasible."). When applying §229.43(a), FRA has stated that its focus is on defects (e.g., leaks) in the locomotive exhaust system and the sufficiency of stack heights. Federal Railroad

Administration, Locomotive Crashworthiness and Cab Working Conditions, Report to Congress, ch. 7, p.7-1 (1996). Additionally, FRA has explained that it "employs the OSHA criteria to determine compliance with the Locomotive Inspection Act," *id.* at 7-2, indicating that the purpose of §229.43(a) is to protect employees from harmful levels of diesel exhaust, not to assure they work in a pristine environment.

FRA's interpretation of §229.43(a) is entitled to deference because it is entirely consistent with the language of the regulation and plainly reasonable under the circumstances. *See* Pet. at 28. FRA's stated policy recognizes that it would be virtually impossible for locomotive cabs to be perfectly sealed and airtight, a wholly reasonable conclusion considering that a locomotive cab is a compartment that contains windows and doors designed to open and close.

The lower court's failure properly to defer FRA's interpretation of §229.43(a)'s language has the effect of potentially rendering every locomotive used by railroads to be in violation of federal law.[8] Indeed,

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[8] The court's approach to interpreting the regulation, without consideration of the evidence of the regulatory intent presented by Conrail, was at odds with the fundamental tenets of statutory interpretation, which calls for construing statutes in a way that is consistent with their overall purpose and structure. *See Heydenfeldt v. Daney Gold and Silver Mining Co.*, 93 U.S. 634, 638-39 (1876). The Supreme Court has repeatedly explained that "[a]ll laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence. It will always, therefore, be presumed that the legislature intended exceptions to its language, which would avoid results of this character." *Sorrells v. United States*, 287 U.S. 435, 447 (1932) (quoting *United States v. Kirby*, 74 U.S. (7 Wall.) 482, 486-87 (1868));

given the court's ruling, plaintiff's testimony that he was "continuously exposed to diesel exhaust inside the locomotive cab since the first day he 'hired out,'" Pet. App. at 30a, would call for a conclusion that virtually all the locomotives that plaintiff operated violated the regulation. However, FRA, the agency that monitors railroad compliance with safety regulations, has never found such mass violations of §229.43(a).

The lower court's failure to defer to the FRA's interpretation of its safety regulation significantly affects the outcome of a FELA case. Violation of such a regulation obviates the need for the plaintiff to prove negligence. *Urie v. Thompson*, 337 U.S. 163, 174 (1949). Because the lower court failed to offer a reasoned analysis of §229.43(a), and given the potential impact that violation of the regulation can have on the outcome of a FELA case, this Court should grant the petition and provide guidance to lower courts regarding the circumstances that require a court to defer to an agency's interpretation of its own safety regulations.

United States v. Katz, 271 U.S. 354, 357 (1926); *United States v. Ryan*, 284 U.S. 167, 175 (1931); *see also Hawaii v. Mankichi*, 190 U.S. 197, 214 (1903) ("'Nothing is better settled than that statutes should receive a sensible construction, such as will effectuate the legislative intention, and, if possible, so as to avoid an unjust or an absurd conclusion.'" (quoting *Lau Ow Bew v. United States*,144 U.S. 47, 59 (1892)).

CONCLUSION

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

Respectfully submitted,

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