No. 10-

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

PETITION FOR A WRIT OF CERTIORARI

DAVID A. DAMICO
BURNS, WHITE & HICKTON, LLC
Four Northshore Center
106 Isabella Street
Pittsburgh, PA 15212
(412) 995-3000

CARTER G. PHILLIPS*
PAUL J. ZIDLICKY
CLIFFORD W. BERLOW
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000
cphillips@sidley.com

Counsel for Petitioner

(Additional Counsel Listed On Inside Front Cover)

July 13, 2010 * Counsel of Record

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

COLLEEN A. MOUNTCASTLE
GALLAGHER SHARP
Sixth Floor – Burkley Bldg.
1501 Euclid Avenue
Cleveland, Ohio 44115
(216) 241-5310

QUESTIONS PRESENTED

1. Whether the Federal Employers' Liability Act ("FELA"), 45 U.S.C. § 51 *et seq.*, requires that the plaintiff prove proximate causation as an element of a claim for damages.

2. Whether the imposition of liability under FELA based upon exposure to *any* diesel exhaust conflicts with this Court's decisions requiring courts to defer to a federal agency's interpretation of its own safety regulation.

LIST OF PARTIES AND AFFILIATES

The parties to this matter are listed in the caption to the petition.

RULE 29.6 STATEMENT

Petitioner Consolidated Rail Corporation ("Conrail") is jointly owned by CSX Corporation and Norfolk Southern Corporation, both of which are publicly traded and, indirectly, hold more than 10% of Conrail's stock. No other publicly held company owns more than 10% of Conrail's stock.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES Page

TABLE OF AUTHORITIES – continued

TABLE OF AUTHORITIES – continued

TABLE OF AUTHORITIES – continued

PETITION FOR A WRIT OF CERTIORARI

Petitioner Conrail respectfully petitions for a writ of certiorari to review the judgment of the Court of Appeals of Ohio.

JUDGMENT FOR WHICH REVIEW IS SOUGHT

The opinions of the Court of Common Pleas of Lucas County, Ohio granting Respondent's motions for partial summary judgment are reproduced in the appendix to the petition ("Pet. App.") at 28a-33a, and 34a-38a. The opinion of the Court of Appeals of Ohio, Sixth Appellate District, affirming the judgment of the trial court is unreported, and is reproduced at Pet. App. 2a-27a. The order of the Supreme Court of Ohio declining to review the decision of the Court of Appeals is reproduced at Pet. App. 1a. The order of the Supreme Court of Ohio denying Conrail's timely motion for reconsideration is reproduced at Pet. App. 39a.

JURISDICTION

The final judgment of the Court of Appeals was entered on October 16, 2009. The Supreme Court of Ohio, with three justices dissenting, declined to review the decision of the Court of Appeals on February 10, 2010. On April 14, 2010, the Ohio Supreme Court denied Conrail's timely motion for reconsideration of its order declining to review the judgment of the Court of Appeals. This Court has jurisdiction under 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 *et seq.*, are reproduced at Pet. App. 40a. Relevant portions of the

Locomotive Inspection Act ("LIA"), 49 U.S.C. § 20701, are reproduced at Pet. App. 41a. The Railroad Locomotive Safety Standard appearing at 49 C.F.R. § 229.43(a) is reproduced at Pet. App. 42a.

STATEMENT OF THE CASE

In this case, Respondent Francis Battaglia obtained $2,600,000 in damages under the Locomotive Inspection Act, 49 U.S.C. § 20701 ("LIA"), and the Federal Employers' Liability Act, 45 U.S.C. § 51 ("FELA") based upon his claim that he suffered from asthma caused by exposure to diesel exhaust while employed by Conrail. Pet. App. 2a ¶ 1; *id.* at 3a ¶¶ 4-5. The trial court granted summary judgment for Battaglia as to causation, and the court of appeals affirmed, because both courts concluded that FELA requires only that the exposure to diesel exhaust "contributed to any degree, even the slightest, to Plaintiff's asthma." *Id.* at 32a; see *id.* at 7a ¶ 26, 11a ¶ 40. The trial court also granted summary judgment to Respondent, and the court of appeals affirmed, based upon the conclusion that exposure to diesel exhaust at *any* level violates 49 C.F.R. § 229.43, a safety regulation under the LIA promulgated by the Federal Railroad Administration (FRA). The violation of that safety regulation, in turn, was deemed to constitute negligence *per se* under FELA. This case presents two issues of recurring national importance.

First, the case presents the issue whether a plaintiff must prove that an alleged violation of FELA was a proximate cause of his injuries, or whether, as the trial court and the court of appeals ruled, plaintiff must show only that a violation "contributed to any degree, even the slightest" to plaintiff's alleged injuries. Courts across the country have reached

conflicting decisions regarding what is required to establish causation under FELA, and that conflict has grown more pronounced in the wake of this Court's ruling and separate opinions by concurring Justices in *Norfolk Southern Railway* v. *Sorrell*, 549 U.S. 158, 160 (2007).

In *Sorrell*, the full Court declined to reach the issue whether proximate causation was an element under FELA, but, in a concurring opinion, Justice Souter, joined by Justices Scalia and Alito, argued that proximate causation is an element under FELA. Justice Souter explained that the "even the slightest" language from *Rogers* v. *Missouri Pacific Railroad*, 352 U.S. 500, 506 (1957), did not provide an alternative causation standard. 549 U.S. at 172-77 (Souter, J., concurring). Justice Ginsburg, in contrast, expressed her view that *Rogers* adopted a "relaxed" causation standard for FELA claims. *Id.* at 178 (Ginsburg, J., concurring in judgment). These competing views about the requirements of FELA mirror a deep divide among federal and state courts throughout the nation. *Id.* at 173 n.* (Souter, J., concurring) (identifying conflicting authorities).

As a result of this conflict, plaintiffs and defendants across the country are subject to different standards for proving a core element under FELA depending on geography and, in some states, depending upon which court (federal or state) the case is filed. This deep and persistent conflict undermines FELA's goal of "creat[ing] uniformity throughout the Union" in cases involving injuries to railroad employees. *Norfolk & W. Ry.* v. *Liepelt*, 444 U.S. 490, 493 n.5 (1980). Here, in seeking summary judgment, respondent highlighted that he was not required to prove "proximate cause," and the trial court's grant of summary judgment was predicated upon its

assessment whether the record satisfied the "relaxed" "even slightest degree" standard first set forth in *Rogers*. As a result, this case squarely presents the issue whether proximate causation is an element under FELA.

Second, this case presents the question whether the courts below violated this Court's precedent when they refused to consider the views of the Federal Railroad Administration (FRA) – the agency that promulgated and enforces the LIA safety regulation at issue in this case – when assessing whether the safety regulation's requirements had been violated. The FRA has concluded, in a report to Congress, that it looks to the exposure thresholds adopted by OSHA "to determine compliance with the Locomotive Inspection Act." Pet. App. 46a. That interpretation is entirely consistent with the language of § 229.43(a), and therefore is subject to deference under this Court's controlling decisions.

The court below, however, disregarded the FRA's interpretation and concluded that a railroad violates 49 C.F.R. § 229.43 whenever diesel exhaust makes its way into a locomotive cab. Pet. App. 10a-11a ¶ 38. The refusal of the court of appeals to consider the FRA's interpretation of its own safety regulation is contrary to this Court's holdings that require "substantial deference to an agency's interpretation of its own regulations" so that "the agency's interpretation must be given controlling weight unless it is plainly erroneous or inconsistent with the regulation." *Thomas Jefferson Univ.* v. *Shalala*, 512 U.S. 504, 512 (1994) (internal quotation marks omitted); see also *Bowles* v. *Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945); *accord* 2 Kenneth C. Davis, *Administrative Law Treatise* § 7:22, at 105 (2d ed. 1979). That deference is all the more appropriate

where, as here, the regulation concerns "a complex and highly technical regulatory program." *Thomas Jefferson Univ.*, 512 U.S. at 512.

The erroneous ruling of the court below is one of surpassing importance because the standard adopted imposes an onerous and unwarranted burden on railroads by subjecting them to liability without any finding that the levels of diesel exhaust exceed permissible thresholds identified by OSHA. Because the decision below is irreconcilable with the standards established by this Court, certiorari should be granted.

A. Statutory Background

For more than a century, FELA has provided a remedy under federal law for railroad workers whose workplace injury or death was caused by the actions of a railroad. 45 U.S.C. § 51. The interpretation of FELA is guided by a clear and simple rule: "Absent express language to the contrary, the elements of a FELA claim are determined by reference to the common law." *Sorrell*, 549 U.S. at 165-66; *accord Consol. Rail* v. *Gottshall*, 512 U.S. 532, 544 (1994); *Urie* v. *Thompson*, 337 U.S. 163, 174 (1949). Thus, the elements of a common-law negligence claim apply to actions under FELA unless FELA's text explicitly rejects or obviously conflicts with the traditional common-law standard. *Sorrell*, 549 U.S. at 165-66.[1]

---

[1] For example, FELA expressly departed from the common law by abolishing the contributory negligence defense and instead adopting a comparative negligence regime, which was an innovation when FELA was enacted in 1908. 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."). FELA

FELA differs from a traditional workers compensation statute, however, as it does not adopt no-fault liability in exchange for a cap on recoveries. Instead, FELA requires proof of railroad negligence and allows traditional tort damages. As a result, FELA plaintiffs must prove "causation, i.e., the relation of the negligence to the injury." *Sorrell*, 549 U.S. at 169. As to the element of causation, shortly after FELA's enactment, this Court held that a plaintiff proceeding under FELA must prove that the injury flows proximately from the railroad's negligence. *E.g.*, *Norfolk & W. Ry.* v. *Earnest*, 229 U.S. 114, 118-20 (1913); *St. Louis, Iron Mountain & S. Ry.* v. *McWhirter*, 229 U.S. 265, 280 (1913).

More than 40 years later, in *Rogers* v. *Missouri Pacific Railroad*, this Court stated that in actions 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. at 508 (emphasis added). In the wake of this statement from *Rogers*, lower federal and state courts have applied differing standards to the element of causation under FELA. *Sorrell*, 549 U.S. at 173 n.* (Souter, J., concurring).

As to the element of negligence, a FELA plaintiff may establish negligence by demonstrating that the railroad violated a safety statute, thereby making the railroad *per se* negligent. See *Urie*, 337 U.S. at 174. One such safety statute is the LIA (originally the Boiler Inspection Act), which requires railroads to keep locomotives "in proper condition and safe to

---

also "abolished the fellow servant rule . . . , prohibited employers from contracting around the Act, and abolished the assumption of risk defense." *Sorrell*, 549 U.S. at 168.

operate without unnecessary danger of personal injury." 49 U.S.C. § 20701(1). To implement this statutory command, the FRA promulgated 49 C.F.R. § 229.43(a), which provides:

> Products 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.

Id. FRA explained when it adopted the current version of § 229.43 that "it is impossible to prevent the entry of some fumes into the cab in certain unusual wind and weather conditions." 45 Fed. Reg. 21,092, 21,098 (Mar. 31, 1980). Specifically, in a Report to Congress, FRA explained that it "employs the OSHA criteria to determine compliance with the Locomotive Inspection Act." Pet. App. 46a; *id.* at 50a ("FRA will also continue to apply OSHA criteria as reference standards to determine compliance with the Locomotive Inspection Act.").

In response to a request for clarification of the requirements of § 229.43(a), FRA explained that it enforces this regulation "by closely inspecting the exhaust system of the locomotive" for defects that result in "exhaust gas discharge into the engine compartment." Defendants' Brief in Opposition to Plaintiff's Motion for Summary Judgment on Count Two, Ex. C at 1, *Battaglia* v. *Conrail*, No. CI 05-5191 (Ct. Com. Pl. Lucas County, Ohio Feb. 8, 2007) ("Defendants' Brief in Opposition Count Two"). FRA likewise explained that the phrase "'to prevent entry of the products of combustion into the cab' only relates to the height of the exhaust stacks." *Id.* According to FRA, "[i]f the gases are released from a stack of suitable height but some small amount of gas

migrates into the cab of the hauling locomotive . . . because of wind currents the FRA would find this acceptable." *Id.*, Ex. C at 2. Further, if the levels of exhaust gases in the locomotive cab "are less than the standards set forth in the Occupational Safety and Health Administration regulations, no action is required." *Id.*

B. Factual Background

Respondent Battaglia worked for Conrail as a brakeman from 1976 to 1979 and from 1988 to 1993. Pet. App. 2a ¶2. Following training in 1993, Battaglia was promoted to locomotive engineer and remained in that position until November 2007. *Id.* Respondent claims that during his time as a locomotive engineer, diesel exhaust from the locomotive would enter the locomotive cab in which he worked and that he developed asthma as a result. *Id.* at 2a-3a ¶¶ 3-4. Battaglia stated that the level of exhaust in the cab would decrease if the windows of the locomotive were closed. Plaintiff's Motion for Summary Judgment on Count Two, Ex. A at 77, *Battaglia* v. *Conrail*, No. CI 05-5191 (Ct. Com. Pl. Lucas County, Ohio Jan. 26, 2007) ("Plaintiff's Motion for Summary Judgment").

Prior to his work at the railroad, Battaglia worked as an aircraft electrician, during which time he had significant exposure to asbestos. Defendants' Brief in Opposition to Plaintiff's Motion for Summary Judgment on Count One, Ex. C at 2, *Battaglia* v. *Conrail*, No. CI 05-5191 (Ct. Com. Pl. Lucas County, Ohio Sept. 10, 2007) ("Defendants' Brief in Opposition Count One"). Battaglia also smoked a pack of cigarettes each day for 13 years. *Id.* Battaglia was diagnosed with adult onset asthma, although subsequent physicians have diagnosed him with emphysema rather than asthma. *See* Brief of

Consol. Rail Corp. at 4, *Battaglia* v. *Consol. Rail Corp.*, No. L-08-1332 (Ohio Ct. App. Jan. 2, 2009) ("Conrail Br."); Reply Brief of Consol. Rail Corp. at 7, *Battaglia* v. *Consol. Rail Corp.*, No. L-08-1332 (Ohio Ct. App. Mar. 16, 2009) ("Conrail Reply Br.").

C. Proceedings Below

1. On September 9, 2005, Battaglia filed suit in the Court of Common Pleas of Lucas County, Ohio, alleging that exposure to diesel exhaust had caused his asthma. Pet. App. 3a ¶ 5. He asserted LIA and FELA claims, alleging both that the railroad violated the LIA through 49 C.F.R. § 229.43, and that this violation had a sufficient causal relationship to his injuries to warrant relief under FELA.

Battaglia moved for summary judgment on his LIA claim. He first argued that, under § 229.43, petitioner "had an absolute duty to prevent diesel fumes from entering the cab while the Plaintiff's decedent [sic] was working . . . ." Plaintiff's Motion for Summary Judgment at 12. According to Respondent, § 229.43 does not "permit 'some,' or 'limited,' or even '*reasonable*' amounts [of diesel exhaust] to be emitted within the cab." *Id.* at 11 (emphasis added). Rather, he argued that the LIA imposes "[s]trict liability . . . based merely on the fact that the exhaust was present in the cab in violation of federal regulations under regular operating conditions." *Id.*[2]

---

[2] Conrail disputed respondent's reading of the requirements of the LIA and highlighted that the FRA has interpreted § 229.43 to permit some levels of diesel exhaust in locomotives so long as they are below the permissible levels adopted by OSHA. Pet. App. 30a-31a; *id.* at 8a.

On the issue of causation, Battaglia relied exclusively on a report from his expert Dr. Kelly, who had been retained to offer a medical opinion "regarding the possible causes of Francis Battaglia's asthma." Plaintiff's Motion for Summary Judgment, Ex. C ¶ 3. When Dr. Kelly initially examined Battaglia, he concluded that Battaglia suffered from asbestosis as well as "noise induced hearing loss" given his "history of work-related noise exposure." See Defendants' Brief in Opposition Count One, Ex. C at 4. In support of summary judgment, however, Dr. Kelly submitted a second report in which he concluded that Battaglia's exposure to "diesel exhaust" was "a significant factor in the development of his asthma." Plaintiff's Motion for Summary Judgment, Ex. C ¶ 7.[3]

Based on Dr. Kelly's second report, Battaglia argued that, as a matter of law, "[e]xposure to diesel exhaust contributed to Mr. Battaglia's asthma." Plaintiff's Motion for Summary Judgment at 12. Battaglia candidly acknowledged that "it may be very possible that there were other causes that *also* contributed to his asthma," but they were irrelevant because "under the FELA, the railroad is liable for Mr. Battaglia's damages if the exposure to diesel exhaust *contributed to any degree*, even the slightest, to Mr. Battaglia's asthma." *Id.* (emphasis in original). Respondent stressed that, under FELA,

---

[3] Conrail disputed Battaglia's showing as to causation through the reports of its own experts, Dr. David Rosenberg and Dr. Laura Green, both of which stated that diesel exhaust had not played any role in Battaglia's alleged injuries. Pet. App. 32a. The trial court, however, refused to credit Conrail's expert reports because they were not sworn, and persisted in doing so even after Conrail submitted affidavits by these experts adopting their expert opinions. Pet. App. 12a.

"[i]n establishing causation, [he] need not prove that exposure to diesel exhaust was the proximate cause of Mr. Battaglia's asthma." *Id.* at 13.[4]

The trial court granted summary judgment to respondent on his LIA claim. It rejected Petitioner's showing regarding the FRA's interpretation of 49 C.F.R. § 229.43(a) because it found "that the regulation is clear and unambiguous – products of combustion shall be released entirely outside the cab." Pet. App. 31a. As a result, it declined to "give deference to FRA's interpretation of the regulation" and concluded that exposure to diesel exhaust, at any level, while in a locomotive cab violated 49 C.F.R. § 229.43. Pet App. 31a.

As to causation, the court also concluded that Petitioner "is liable if the exposure contributed to any degree, even the slightest, to Plaintiff's asthma." Pet. App. 32a. The trial court held that plaintiff satisfied that burden by crediting the opinion of Respondent's expert that his "'exposure to diesel exhaust . . . was a significant factor in the development of his asthma.'" *Id.* The trial court ruled "that Plaintiff's exposure to the diesel exhaust fumes contributed to his asthma" and therefore "Plaintiff is entitled to judgment as a matter of law." *Id.* at 33a.

---

[4] Respondent further argued that in *Rogers*, this Court "held that to establish liability under the FELA, the relevant inquiry is 'whether negligence of the employer *played any part, however small*, in the death or injury which is the subject of the suit." Plaintiff's Motion for Summary Judgment at 12 (citing *Rogers*, 352 U.S. at 508). Respondent included a copy of *Rogers* as an exhibit to his motion and argued that *Rogers*, is "likely the most referred to and cited case by both Federal and State Courts respecting the FELA." *Id.* at 12 n.53.

After the trial court's initial summary judgment ruling, plaintiff moved for summary judgment on the FELA claim arguing that the grant of summary judgment based upon the violation of the LIA resulted in *per se* liability under FELA. The court granted summary judgment on plaintiff's FELA claim. Pet. App. 37a-38a. The case proceeded to a damages-only trial, where a jury awarded plaintiff $2,600,000 in damages.

2. On appeal, Conrail explained that the trial court erred by adopting both an erroneous causation standard under FELA and an erroneous interpretation of the requirements of the LIA.

Conrail argued that the causation standard applied by the trial court – "contributed to any degree, even the slightest" – applies only when deciding whether there is sufficient evidence for a plaintiff "to survive summary judgment." Conrail Br. at 15. Conrail specifically argued that the "any part, even the slightest" language from *Rogers* was not the standard for proving causation because FELA requires a plaintiff to "prove that 'negligence was the proximate cause in whole or part' of the employee's injury." Conrail Reply Br. at 4-5 (quoting *Tennant* v. *Peoria & Pekin Union Ry.*, 321 U.S. 29, 32 (1944)).

Likewise, Conrail argued that the "FRA has determined that the mere presence of diesel exhaust in the cab of a locomotive does not constitute a violation . . . of the regulatio[n] set forth in 49 C.F.R. § 229.43(a)." Conrail Br. at 7. Conrail explained that the FRA "utilizes the standards set forth by OSHA to determine compliance with the LIA." *Id.* at 10.

The Ohio Court of Appeals affirmed. It held that the standard for causation under FELA is that "[a]n injury sustained by a railroad worker that is caused

in any degree, even the smallest, by the negligence of the employer, results in the obligation of the employer to pay damages." Pet. App. 11a ¶ 40 (citing *Rogers*, 352 U.S. at 508). According to the Court of Appeals, under *Rogers*, "when a railroad's negligence, in any degree, contributes to an injury at issue in a FELA claim, liability adheres to the railroad." *Id.* at 7a ¶ 26.

The Court of Appeals also ruled that 49 C.F.R. § 229.43 prohibits the presence of any diesel exhaust in a locomotive cab. Pet. App. 10a-11a ¶ 38. The court of appeals did not address the FRA's interpretation of this Rule. Specifically, it did not assess whether the exhaust allegedly entered the cab after being released from the exhaust stack or whether it entered the cab directly from the locomotive's exhaust system. Nor did the court evaluate whether the diesel exhaust exceeded the threshold standards set forth by OSHA. Instead, the court of appeals ruled that "the intent of the rule is to protect occupants of a locomotive cab from exposure to toxic exhaust emissions during normal operating conditions." *Id.* The court stated that the rule "direct[s] that such exhaust be released entirely outside the cab and that the railroad shall vent the exhaust through stacks of sufficient height or to provide 'other means' to prevent the exhaust from entering the cabin in normal operation." *Id.* According to the court of appeals, "if during normal operation exhaust enters the cab, the rule is violated." *Id.*

3. The Ohio Supreme Court declined to review the decision of the court of appeals, with three justices dissenting.

REASONS FOR GRANTING THE PETITION

The petition should be granted to resolve two issues of nationwide importance. First, the decision below implicates a deep division of authority among the lower federal and state courts on the issue whether a plaintiff must establish proximate causation as an element of his or her claim under FELA. That conflict turns on a determination whether this Court's decision in *Rogers* "relaxes" a plaintiff's traditional requirement to prove proximate causation in an action under FELA. As Justice Souter explained in *Sorrell*, confusion surrounding this Court's decision in *Rogers* has led to a deep division among lower courts over the question whether FELA requires a showing of traditional proximate cause or, conversely, whether it requires only a showing of "slight" cause. See 549 U.S. at 173 n.* (Souter, J., concurring) (recognizing division of authority).

The state supreme courts of Iowa, Minnesota, Montana, Nebraska, Utah, and West Virginia have all held that a FELA plaintiff must establish that their injuries were the proximate result of the defendant's action. In contrast, the Second, Fifth, Sixth, Seventh, Ninth, Tenth, and District of Columbia Circuits have all concluded that *Rogers* relaxed the common law requirement, and that FELA requires plaintiffs to prove only "slight cause." Certiorari is necessary to clarify that FELA plaintiffs must prove that their injuries were the proximate result of a railroad's negligent actions.

Resolution of this conflict is critical because of the dispositive and recurring nature of this issue; causation will be at issue in nearly every FELA case. The difference between the two standards for causation has proven outcome determinative in a large number of cases. In this case, respondent

highlighted that he was not required to prove "proximate causation" and relied heavily upon the "relaxed standard of causation under the FELA" to support his argument that "exposure to diesel exhaust contributed to any degree, even the slightest, to Mr. Battaglia's asthma." Plaintiff's Motion for Summary Judgment at 12. The trial court and court of appeals agreed that summary judgment on causation was appropriate because the single expert's opinion met the relaxed "contributed to any degree, even the slightest" standard those courts derived from *Rogers*. As such, the judgment below fundamentally depends on whether proximate causation is an element of a plaintiff's case under FELA.

Second, this Court's review is warranted in light of the lower courts' refusal to consider the federal agency's interpretation of the requirements of that agency's regulation. Conrail showed that, in assessing whether a railroad has violated 49 C.F.R. § 229.43(a), the FRA "employs [OSHA's] criteria" regarding "workplace concentration limits" for the "common products of diesel fuel combustion" in order "to determine compliance with the Locomotive Inspection Act." The court below ignored the FRA's interpretation, and instead concluded *de novo* that entry of *any* diesel exhaust into a locomotive cab violates the LIA, even if the levels are below the thresholds adopted by OSHA, and thereby imposes per se liability on the railroad.

In reaching this conclusion, the courts below ignored this Court's cases holding that deference must be accorded to an expert agency's interpretation of its own regulations. Instead, the courts below adopted an interpretation of an FRA regulation that imposes liability without any showing that employees

are exposed to conditions that create "unnecessary danger of personal injury." 49 U.S.C. § 20701(1). That ruling places substantial and unwarranted burdens on railroad carriers that stand in stark contrast to the FRA's conclusion regarding the burdens imposed by this regulation. Review of this issue is warranted because the ruling below conflicts with the controlling interpretive rules set forth by this Court.

In tandem, these two rulings make it virtually impossible for a railroad to defend itself against a claim of injury based on diesel exhaust fumes. The plaintiff need only prove some exposure, which will be based solely on his or her testimony, and have an expert say that the exposure contributed at least "slightly" to the plaintiff's condition. Railroads will have liability imposed without the benefit of a trial, and the only issue for the jury will be the size of the damages. That is not the liability scheme that Congress created in enacting FELA and this Court should intervene now to rectify this harmful and unwarranted situation.

I. THE DECISION BELOW IMPLICATES A DEEP CONFLICT OVER THE ISSUE WHETHER PROXIMATE CAUSATION IS AN ELEMENT IN A CASE UNDER FELA.

Review is warranted because there is a deep and persistent conflict on the issue whether a plaintiff is required to establish proximate causation as an element under FELA. A host of state Supreme Courts have held that proximate causation is an element under FELA. In contrast, a number of federal courts of appeals have held that the relaxed "slight" cause standard set forth in this Court's decision in *Rogers* properly states a plaintiff's obligation as to causation in a FELA case. Review is

especially warranted because a number of courts have acknowledged the competing concurring opinions in *Sorrell*, but those courts deemed themselves without authority to depart from their interpretation of *Rogers* absent an express ruling from this Court. Resolution of this conflict will have a broad impact on cases across the country in which courts and juries must decide whether the evidence is sufficient to establish causation under FELA.

A. There Is A Deep Division Of Authority Over The Standard For Proving Causation Under FELA.

1. As Justice Souter thoroughly documented in his concurring opinion in *Sorrell*, there is a very mature conflict in the federal and state lower courts over whether plaintiffs under FELA must prove that their injuries were proximately caused, in whole or in part, by the defendant's negligence.

Most recently, the Utah Supreme Court followed Justice Souter's concurrence in holding that plaintiffs proceeding under FELA must prove that employer negligence proximately caused the plaintiff's injuries. Recognizing the "extensive debate" over the importance of the phrase "even the slightest" from *Rogers*, the court determined 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.*, 221 P.3d 219, 229 (Utah 2009). The court concluded that FELA requires a plaintiff to prove proximate causation based on its finding that "there is no [ ] statutory support for reading *Rogers* as eliminating the requirement of proximate causation" and that such a holding "would be contrary to the Supreme Court's approach to FELA." *Id.* at 229-30.

Even before *Sorrell*, substantial authority supported the conclusion that *Rogers* did not "relax" the common-law standard of causation for actions under FELA. In *Marazzato* v. *Burlington Northern Railroad*, for example, the Montana Supreme Court 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, the court in *Marazzato* rejected the argument that *Rogers* abridged the common-law requirement to prove proximate causation. Rather, the court concluded that *Rogers* dealt with the unrelated issues of multiple causation and contributory negligence. The supreme courts of Iowa, Minnesota, Nebraska, and West Virginia have likewise held that FELA plaintiffs must prove that employer negligence proximately caused their injuries.[5]

2. In contrast, other courts have relied upon language in *Rogers* to hold that FELA abrogates the common-law requirement of proximate causation in favor of a "relaxed" standard of causation. These

---

[5] *See Gardner* v. *CSX Transp., Inc.*, 498 S.E.2d 473, 483 (W. Va. 1997) (requiring, under FELA, that negligence "contributed proximately, in whole or in part, to plaintiff's injury"); *Snipes* v. *Chi., Cent. & Pac. R.R.*, 484 N.W.2d 162, 164 (Iowa 1992) (requiring, under FELA, that negligence "proximately caused, in whole or in part, the accident"); *Chapman* v. *Union Pac. R.R.*, 467 N.W.2d 388, 395 (Neb. 1991) (ruling that FELA requires that employer's negligence "is a proximate cause of the employee's injury"); *Brabeck* v. *Chi. & Nw. Ry.*, 117 N.W.2d 921, 923 (Minn. 1962) (ruling that liability under FELA attaches only if the conduct is "proximate cause of an accident"); *cf. Reed* v. *Pa. R.R.*, 171 N.E.2d 718, 720-21 & nn.2-3 (Ohio 1961) ("relaxed" standard in *Rogers* applies only to assess whether plaintiff's evidence creates a jury question).

courts, including the courts in this case, align themselves with Justice Ginsburg's concurrence in *Sorrell*, see 549 U.S. at 180, in holding that "[a]n injury sustained by a railroad worker that is caused in any degree, even the smallest, by the negligence of the employer results in the obligation of the employer to pay damages." Pet. App. 11a ¶ 40 (citing *Rogers*, 352 U.S. at 508).

Most recently, the Seventh Circuit held that "common-law proximate causation is [not] required to establish liability under the FELA." *McBride* v. *CSX Transp., Inc.*, 598 F.3d 388, 406 (7th Cir. 2010). The court conceded the "considerable force" of Justice Souter's concurrence in *Sorrell*, but declined to "embrac[e] Justice Souter's view at this juncture." *Id.* at 404. That court highlighted that lower courts "have been admonished not to anticipate future actions of the Supreme Court" for "'it is [the Supreme Court's] prerogative alone to overrule one of its precedents.'" *Id.* at 405 (quoting *State Oil Co.* v. *Khan*, 522 U.S. 3, 20 (1997)). As a result, the Seventh Circuit joined the federal and state jurisdictions embracing the "relaxed" standard of causation in FELA actions, largely based on its own previous interpretations of several of this Court's precedents. *See id.* at 405-06.

Specifically, the Second, Fifth, Sixth, Ninth, Tenth, and District of Columbia Circuits treat *Rogers* as establishing that a FELA plaintiff need only prove that the railroad's negligence was the "slightest cause" of the employee's injuries.[6] The same is true

---

[6] *See Williams* v. *Long Island R.R.*, 196 F.3d 402, 406-07 (2d Cir. 1999) (applying "relaxed standard" of causation to claim under FELA); *Summers* v. *Mo. Pac. R.R. Sys.*, 132 F.3d 599, 606-07 (10th Cir. 1997) (ruling that the Supreme Court

of courts in Alabama, the District of Columbia, Florida, Mississippi, South Carolina, Texas, and Washington.[7]

These jurisdictions view *Rogers* as having established that "'proximate cause' is not required to establish causation under FELA." *Ogelsby* v. *S. Pac. Transp. Co.*, 6 F.3d 603, 609 (9th Cir. 1993); see *Montgomery* v. *CSX Transp.*, 656 S.E.2d 20, 28 & n.6 (S.C. 2008) (relying on Justice Ginsburg's *Sorrell* analysis in affirming South Carolina's use of a "relaxed" causation standard in actions under FELA). They rely almost entirely on the "even the slightest" language from *Rogers*, and to the extent they reference FELA's statutory text at all, they cite only to FELA's "in whole or in part" language as the basis for a "relaxed" standard of causation. *E.g.*, *Williams* v. *Long Island R.R.*, 196 F.3d 402, 406 (2d Cir. 1999). As Justice Souter's *Sorrell* concurrence makes clear, this interpretation fundamentally misconstrues both the statutory text and *Rogers* itself.

"definitively abandoned" "proximate causation" in FELA cases in *Rogers*); *Ogelsby* v. *S. Pac. Transp. Co.*, 6 F.3d 603, 609 (9th Cir. 1993) (ruling that "'proximate cause' is not required to establish causation under the FELA"); *Little* v. *Nat'l R.R. Passenger Corp.*, 865 F.2d 1329 (D.C. Cir. 1988) (per curiam) (Table); *See also Johnson* v. *Cenac Towing, Inc.*, 544 F.3d 296, 302 & n.4 (5th Cir. 2008) (applying *Rogers* causation standard to claim under the Jones Act); *Churchwell* v. *Bluegrass Marine, Inc.*, 444 F.3d 898, 907 (6th Cir. 2006) (same).

[7] *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).

3. The division of authority has deepened in the wake of this Court's decision in *Sorrell*. See, *e.g.*, *Raab*, 221 P.3d at 227 & nn.28-29 (recognizing division of authority); *Montgomery*, 656 S.E.2d at 28 & n.6 (same); *In re GlobalSanteFe Corp.*, 275 S.W.3d 477, 489 n.79 (Tex. 2008) (same). And it has become so profound that courts within certain states now apply differing standards to this same statute, depending on whether a case is filed in state or federal court. Compare *Raab*, 221 P.3d at 229 (Utah 2009), with *Summers* v. *Mo. Pac. R.R. Sys.*, 132 F.3d 599, 606 (10th Cir. 1997); compare *Marazzato*, 817 P.2d at 675 (Mont. 1991), with *Ogelsby*, 6 F.3d at 609 (9th Cir. 1993). This is unquestionably the most intolerable situation because it means that a plaintiff can prevail in one courthouse and lose in another that is located literally across the street. It is bad enough to think that a plaintiff's place of residence can dictate the outcome of a case, but beyond that, the street address of the court now controls the merits of FELA litigation.

The extent of the lower court's decisional division underscores its significance. The proper standard of causation arises in every case brought under FELA. Hundreds of FELA cases are filed each year in federal court alone.[8] Many other FELA claims are asserted in state court. In light of the uncertainty over the proper standard of causation created by *Sorrell*, both plaintiffs and defendants legitimately can seek a favorable causation instruction, incentivizing litigation of this issue in every FELA

---

[8] *See* Admin. Office of U.S. Courts, *Annual Report of the Director: Judicial Business of the United States Courts*, tbl.C-2A at 144 (2009), *available at* http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2009/appendices/C02ASep09.pdf (more than 3000 federal FELA cases filed from 2005-2009).

case until a clear precedent is established by this Court.[9]

4. This case presents an ideal vehicle to resolve this deep and abiding conflict.

For example, in *Syverson* v. *Consolidated Rail Corp.*, the Second Circuit reversed summary judgment for the railroad, noting that while it would have affirmed dismissal "had this been a negligence action at common law," reversal was required under FELA's "substantially diluted" and "relaxed" causation standard. 19 F.3d 824, 825-28 (2d Cir. 1994) (explaining that FELA permits liability "for risks that would be too remote to support liability under common law"). This case presents the converse situation. In his motion for summary judgment, Respondent argued that "[i]n establishing causation, [Respondent] need not prove that exposure to diesel exhaust was the proximate cause of [his] asthma." Plaintiff's Motion for Summary Judgment at 13. Indeed, Respondent predicated his summary judgment argument on the "relaxed standard of causation under the FELA," *id.*, and acknowledged that "it may be very possible that there were other causes that *also* contributed to his asthma" but they were irrelevant because "[u]nder the FELA, the railroad is liable for Mr. Battaglia's damages if the exposure to diesel exhaust *contributed to any degree*, even the slightest, to Mr. Battaglia's asthma." *Id.* at 12.

---

[9] Moreover, every case brought under the Jones Act, 46 U.S.C. § 30104, the federal law governing liability for workplace injuries to seamen, is subject to the same standards and judicial interpretations that apply to FELA. *See Am. Dredging Co.* v. *Miller*, 510 U.S. 443, 456 (1994) (noting that the Jones Act "adopts the entire judicially developed doctrine of liability under [FELA]") (internal quotation marks omitted).

The courts below agreed and granted summary judgment because they concluded that under FELA, a "railroad is liable if the exposure contributed to any degree, even the slightest, to Plaintiff's asthma." Pet. App. 32a; *id.* at 11a ¶ 40 ("An injury sustained by a railroad worker that is caused in any degree, even the smallest, by the negligence of the employer, results in the obligation of the employer to pay damages"). Measured against that standard, the courts below ruled that the affidavit of plaintiff's retained expert – who stated that Battaglia's "exposure to diesel exhaust, as a result of his work on the railroad, was a significant factor in the development of his asthma," Plaintiff's Motion for Summary Judgment, Ex. C ¶ 7 – was sufficient to satisfy the necessary "nexus" set forth in cases such as *Rogers* between Respondent's exposure and his alleged asthma. Pet. App. 9a ¶ 33.[10] Given the concession that there were other potential causes of plaintiff's condition, this case should have gone to a jury.

Moreover, under Ohio and federal law, when reviewing a motion for summary judgment, courts are required to "'view the evidence presented through the prism of the substantive evidentiary burden.'" *Myocare Nursing Home, Inc.* v. *Fifth Third Bank*, 787 N.E.2d 1217, 1222 (Ohio 2003) (quoting *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 254 (1986)). Here, there can be no dispute that the courts below denied Conrail a jury trial on the question of causation based on their holdings that the "relaxed" standard of

---

[10] The courts below did not consider whether Dr. Kelly's affidavit could satisfy a heightened "proximate cause" standard. Indeed, as noted, Respondent underscored in his motion that he was not obligated to "prove that exposure to diesel exhaust *was* the proximate cause of Mr. Battaglia's asthma." Plaintiff's Motion for Summary Judgment at 13.

causation set forth in *Rogers* governed whether plaintiff had met his burden of showing that exposure to diesel exhaust caused Battaglia's alleged injuries. As a result, adoption of the traditional common-law proximate causation standard in this case requires the Court to vacate the judgment and permit the case to be tried. *E.g.*. *Sorrell*, 549 U.S. at 172 (vacating judgment of state court and remanding "for further proceedings not inconsistent with this opinion").[11]

B. The Decision Below Conflicts With Binding Precedents Of This Court.

Review also should be granted because, contrary to the decisions below, this Court's precedent firmly establishes that a FELA plaintiff must prove proximate causation. See, *e.g.*, *Tennant* v. *Peoria & Perkin Union Ry.*, 321 U.S. 29, 32 (1944) (interpreting FELA as requiring plaintiffs to 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" only if it was "the natural and probable consequence of the negligence" and "ought to have been foreseen in the light of the attending circumstances" (internal quotation omitted)).

This long-recognized rule reflects that it is "clear common law that a plaintiff had to prove that a

---

[11] For example, under Ohio law, an expert's statement that an alleged defect was a "significant factor" in causing a plaintiff's injury has been held to be inadequate to satisfy the requirement of proximate causation. *See Rhodes* v. *Firestone Tire & Rubber Co.*, No. 08AP-314, 2008 WL 4368480, at *3-4 (Ohio Ct. App. Sept. 25, 2008) (holding that an expert report stating that a defect in a tire was a "significant factor" in a tire failure was insufficient to establish proximate causation).

defendant's negligence caused his injury proximately, not indirectly or remotely," *Sorrell*, 549 U.S. at 173 (Souter, J., concurring), and that this common law standard has not been "expressly rejected in the text of [FELA]," see *Gottshall*, 512 U.S. at 544. Accordingly, this Court has "consistently recognized and applied proximate cause as the proper standard in FELA suits." *Sorrell*, 549 U.S. at 174 (Souter, J., concurring).

The Court's decision in *Davis* v. *Wolfe*, 263 U.S. 239 (1923), illustrates the fundamental role of proximate cause 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[.]

Id. at 243. Decisions from this Court preceding,[12] and following *Davis*,[13] likewise recognize that liability

---

[12] *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).

[13] *See, e.g.*, *Minneapolis, St. Paul & Sault Ste. Marie Ry.* v. *Goneau*, 269 U.S. 406, 410-11 (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.

under FELA is limited to injuries that a defendant's negligence proximately causes. These cases remain binding precedent.

Some courts, however, have misread *Rogers* to have overturned *sub silentio* nearly a half century of this Court's FELA precedents. But *Rogers* is entirely consistent with the long line of this Court's decisions requiring FELA plaintiffs to prove proximate causation. *Rogers* addressed the distinct issue of whether a FELA plaintiff has the burden to prove that a wrongful act was the "sole, efficient, producing cause of injury," a more demanding requirement than the proximate causation standard. 352 U.S. at 506. The statement in *Rogers* that FELA affixes liability on a railroad when its negligence "'played any part, even the slightest'" in the employee's injury spoke only to "the occasional multiplicity of causations." *Sorrell*, 549 U.S. at 175 (Souter, J., concurring) (quoting *Rogers*, 352 U.S. at 506). *Rogers* did not alter "the necessary directness of cognizable causation." *Id.*[14]

520, 523 (1949); *Urie*, 337 U.S. at 177; *O'Donnell* v. *Elgin, Joliet & E. Ry.*, 338 U.S. 384, 390 (1949).

[14] 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). These statements are correct, to the extent they merely acknowledge that FELA does not adopt the older common law conception of "sole proximate cause," which this Court addressed in *Rogers*. *See Sorrell*, 549 U.S. at 175 (Souter, J., concurring). But any suggestion that *Rogers* "relaxes" the federal rule of proximate causation is contrary to FELA's text and cannot be reconciled with the extensive line of this Court's precedents applying that standard under FELA.

Moreover, *Rogers* dealt with FELA's "in whole or in part" statutory language, which plainly does not alleviate a plaintiff's burden to prove proximate causation. This provision establishes only that a FELA injury can have more than one proximate cause, thereby abolishing the common law regime of pure contributory negligence. Accordingly, *Rogers* only held that a standard of "sole proximate cause" could not be reconciled with a statute adopting a standard of comparative negligence. See *Sorrell*, 549 U.S. at 175 (Souter, J., concurring).

The narrow ruling in *Rogers* simply did not reverse decades of decisions concluding that liability under FELA only exists where railroad "negligence was *the proximate cause* in whole or in part" of the employee's injury. *Tennant*, 321 U.S. at 32 (emphasis added). This is made all the more clear by the fact that *Rogers* derived its "test of a jury case" from *Coray* v. *Southern Pacific Co.*, which explicitly states that FELA requires plaintiffs to prove either that railroad negligence was "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; *Spokane & Inland Empire R.R.* v. *Campbell*, 241 U.S. 497, 509-10 (1916)(emphasis added)). There is simply no basis for interpreting *Rogers*, or, for that matter, any other precedent of this Court, as unsettling the long-established proximate cause standard under FELA. *Rogers* merely made clear that in cases where a jury could find that both the employee's and the railroad's negligence could 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 were slight relative to the employee's.

At a minimum the conflicts and confusion created by *Rogers* unquestionably warrant this Court's

review, and this case, which did not even get to the jury on the issue of causation, provides an ideal vehicle for deciding the issue presented.

II. THE DECISION BELOW IMPOSING LIABILITY UNDER FELA FOR A VIOLATION OF A SAFETY REGULATION CONFLICTS WITH THIS COURT'S STANDARDS GOVERNING THE INTERPRETATION OF AN AGENCY'S REGULATIONS.

Review should be granted because the decision below conflicts with this Court's decisions holding that courts "must give substantial deference to an agency's interpretation of its own regulations." *Thomas Jefferson Univ.*, 512 U.S. at 512. As this Court has explained, in construing the requirements of a federal rule, "the agency's interpretation must be given controlling weight unless it is plainly erroneous or inconsistent with the regulation." *Id.* (internal quotation marks omitted); *accord Lyng* v. *Payne*, 476 U.S. 926, 939 (1986); *accord Bowles*, 325 U.S. at 414; Davis, *supra*, at § 7.22, 105.

The decision below violates these standards because the court of appeals never assessed whether the FRA's interpretation of § 229.43(a) was "plainly erroneous" or "inconsistent with the regulation." Instead, the court of appeals substituted its own independent judgment regarding the meaning of § 229.43(a) for that of the expert agency and then, based on that erroneous interpretation, imposed liability on the railroad. The court of appeals did not assess whether the exhaust allegedly entered the cab after being released from the exhaust stack or whether it entered the cab directly as a result of a defect in the locomotive's exhaust system. Likewise, the court did not evaluate whether the diesel exhaust exceeded the threshold standards set forth by OSHA.

Instead, according to the Ohio Court of Appeals, "it is clear that the intent of the rule is to protect occupants of the cab of a locomotive from exposure to *toxic* exhaust emissions during normal operating conditions." Pet. App. 10a-11a ¶ 38 (emphasis added). As a result, the court saw "no ambiguity" and ruled that, regardless of the point of entry, "if during normal operation exhaust enters the cab, the rule is violated." *Id.*

In marked contrast, the FRA has interpreted § 229.43(a) in these circumstances to require compliance with the "limits for the concentration" set forth by OSHA for the "common products of diesel fuel combustion." Pet. App. 45a-46a; *id.* at 50a ("FRA also will continue to apply OSHA criteria as reference standards to determine compliance with the [LIA]"). By tying compliance to the levels of exposure identified as acceptable by OSHA, the FRA's interpretation of § 229.43 properly takes into account concerns regarding exposure to levels of diesel exhaust deemed "toxic" by OSHA while recognizing that "it is impossible to prevent the entry of some fumes into the cab in certain unusual wind and weather conditions." 45 Fed. Reg. at 21,098. FRA's interpretation is thus faithful to the language of § 229.43(a), addresses the core concern of exposure to "toxic" levels of diesel exhaust and is therefore reasonable under the circumstances. The FRA's interpretation of Section 229.43(a) thus should have been accorded "controlling weight." *Thomas Jefferson Univ.*, 512 U.S. at 512.

In contrast, the court of appeals' decision effectively requires railroads to insure that locomotive cabs are airtight or risk liability whenever diesel exhaust at any level is able to make its way inside the

locomotive cab.[15] Indeed, the court of appeals embraced Battaglia's position that § 229.43 "doesn't permit 'some,' or 'limited,' *or even 'reasonable' amounts* to be emitted within the cab." Plaintiff's Motion for Summary Judgment at 11. As a result, the court of appeals adopted a *per se* standard under which Petitioner is liable "based merely on the fact that the exhaust was present in the cab in violation of federal regulations under regular operating conditions." *Id.*[16]

This is a virtually impossible standard for railroads to defend, and effectively renders every locomotive in possible violation of a federal safety regulation. The decision below requires railroads to insure that locomotive cabs are airtight or risk liability whenever diesel exhaust at any level is able to make its way inside the locomotive cab. Cf. *Dixson* v. *Burlington N. R.R.*, 795 F. Supp. 939, 940 (D. Neb. 1992) (holding that § 229.43 is ambiguous as to whether it applies only to the lead locomotive). Even if the court of appeals' reading were a permissible one, the decision below ignores that the FRA is responsible for deciding "which among several competing interpretations best serves the regulatory purpose." *Thomas Jefferson Univ.*, 512 U.S. at 512.

---

[15] *Kayner* v. *Union Pac. R.R.*, No. 1003141, 2006 WL 4606753 (Dist. Ct. Douglas County, Neb. Mar. 2, 2006) (noting that "the LIA regulation, 49 C.F.R. 229.43, does not provide that the cab must be entirely free of all diesel exhaust, . . . only that the locomotive exhaust stacks be of sufficient height to allow the diesel exhaust to be released entirely outside the cab and to prevent reentry of the exhaust under usual operating conditions").

[16] Plaintiff put forth no quantitative evidence regarding the level of his exposure to diesel exhaust, and never argued that it exceeded the thresholds adopted by OSHA.

Review should be granted because the court of appeals' refusal to defer to the FRA's interpretation of § 229.43(a) conflicts with this Court's long-standing precedent governing the interpretation of federal regulations. Moreover, the draconian interpretation of the regulation coupled with the rejection of a requirement of proximate causation eviscerates the requirement that employees are only entitled to damages for injuries that are the product of a railroad's negligence. The regime in Ohio makes the railroad the guarantor of its employees' health, even when there clearly are multiple potential causes of injury. This is not the liability scheme that Congress implemented in the FELA and only review by this Court can put FELA back on the right course.

CONCLUSION

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

Respectfully submitted,

DAVID A. DAMICO
BURNS, WHITE & HICKTON, LLC
Four Northshore Center
106 Isabella Street
Pittsburgh, PA 15212
(412) 995-3000

CARTER G. PHILLIPS*
(COUNSEL OF RECORD)
PAUL J. ZIDLICKY
CLIFFORD W. BERLOW
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000
cphillips@sidley.com

COLLEEN A. MOUNTCASTLE
GALLAGHER SHARP
Sixth Floor – Burkley Bldg.
1501 Euclid Avenue
Cleveland, Ohio 44115
(216) 241-5310

Counsel for Petitioner

July 13, 2010

* Counsel of Record