

No. 10-235

IN THE
Supreme Court of the United States

CSX TRANSPORTATION, INC.,

Petitioner,

v.

ROBERT MCBRIDE,

Respondent.

**On Writ Of Certiorari to the
United States Court of Appeals
For the Seventh Circuit**

**AMICUS CURIAE BRIEF OF THE
AMERICAN ASSOCIATION FOR JUSTICE
IN SUPPORT OF RESPONDENT**

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IDENTITY AND INTEREST OF *AMICUS CURIAE*

The American Association for Justice (“AAJ”) respectfully submits this brief as *amicus curiae* in support of the Respondent. Letters from the parties giving consent to the filing of this amicus brief accompany this filing.¹

AAJ is a voluntary national bar association whose trial lawyer members primarily represent individual plaintiffs in civil suits, including personal injury actions, consumer lawsuits, and employment-related cases. Many AAJ attorneys represent injured workers entitled to pursue their legal remedies under the Federal Employers’ Liability Act.

AAJ believes that the lower court correctly upheld the jury’s verdict under this Court’s long-settled precedents. To adopt Petitioner’s novel construction would undermine Congress’s purpose in enacting this important legislation.

SUMMARY OF THE ARGUMENT

1. This Court has already addressed and answered the issue presented here: An injured worker suing his or her employer under the Federal Employers’ Liability Act, 45 U.S.C. § 51 [“FELA”] is not required to introduce proof of “proximate cause” in addition to proving the employer’s negligence in fact caused the injury.

¹ Pursuant to Rule 37.6, *Amicus Curiae* discloses that no counsel for a party authored any part of this brief, nor did any person or entity other than *Amicus Curiae*, its members, or counsel make a monetary contribution to its preparation.

There is no basis in the Act for such a requirement. The FELA provides that an employee may recover for an injury “resulting in whole or in part from” the railroad’s negligence. Nothing in the statutory text or in the legislative history even suggests any additional requirement. Indeed, Congress did not employ the phrase “by reason of” which this Court has construed as incorporating common law proximate cause. The FELA’s “resulting from” language, in other statutes, has been interpreted as requiring only factual causation.

Nor is there any basis for Petitioner’s contention that the FELA was meant to incorporate proximate cause as it was known at common law. The FELA cause of action is governed by federal law. In interpreting elements of the federal remedy, the principles of the common law are accorded great weight, but they are not determinative.

Congress clearly did not intend courts to apply the common law concept of proximate cause in FELA actions. First, at the time Congress enacted the FELA, proximate cause was a recent, confused, and misleading concept, variously and inconsistently defined by the courts to limit the liability of America’s fledgling industries, particularly the railroads. Common law courts, including this Court, sharply disagreed on its meaning and application. Secondly, FELA expands worker protections. Congress certainly did not incorporate into the FELA a common law rule that courts had used to deny workers their common law remedies, prompting Congress to enact the FELA statutory remedy.

2. Although the Court used the term “proximate cause” in early FELA cases, it was not

referring to the general common law doctrine designed to shield tort defendants. Instead, it was the version of proximate cause developed by this Court under federal common law specifically for FELA cases.

That development was informed by the context in which Congress acted. The railroads brought progress and prosperity to America in the nineteenth century, but exacted a terrible toll on railroad workers. Congress enacted the Federal Employers' Liability Act in 1908 in an effort to reduce the horrific number of workers injured and killed on the job. Congress sought to enable workers and their families to overcome common law barriers to presenting their cases to the jury and obtaining recovery. By holding railroads accountable for the harm caused by their negligence. Congress sought to establish a financial incentive for improving workplace safety. This Court sought to carry out this legislative purpose by a liberal construction of the FELA remedy.

The Court's standard for proof of causation in FELA cases unlike the stringent proximate cause rules applied by common law courts, is jury-centered. A FELA plaintiff is required to present evidence from which a jury could reasonably infer that the employer's negligence played a part, however slight, in causing the plaintiff's injury. The Act does not require any particular type of evidence. Instead, the focus of judicial review is whether the jury could reasonably draw this inference from all the evidence, regardless of whether the court might have come to a different conclusion.

Not only has this Court consistently adhered to this relaxed causation standard, it has explicitly rejected the proximate cause standard urged by Petitioner in this case. CSXT contends that its insistence that McBride use wide-body locomotives for switching operations was deemed negligent because it created a risk of possible collision or derailment. But no such incident occurred here. Petitioner argues that its negligence did not proximately cause McBride's hand injury because his injury was completely outside the scope of the risk created by CSXT.

Although a few early FELA decisions by this Court appear to lend support to this "scope of the risk" theory of proximate cause, the Court quickly and definitively declared that it rejected such a narrow view of causation under the Act.

3. This Court also should not require that juries in FELA cases be instructed that the plaintiff must establish proximate cause as a separate element. Parties are not entitled to instructions that are confusing or misleading. Courts and legal scholars overwhelmingly agree that "proximate cause" is one of the most confusing and misleading terms in the legal lexicon. It is all the more confusing to jurors. Empirical studies confirm that a large percentage of jurors misunderstand proximate cause instructions. Most states do not attempt to distinguish between proximate cause and but-for cause in their pattern jury instructions used in common law tort actions. A growing number eschew use of the term "proximate cause" altogether. There is no persuasive reason for this Court to require such an instruction in FELA cases.

This Court should, as it has on previous occasions, adhere to its settled precedents and to its support of Congress's purposes in enacting this important legislation.

ARGUMENT

I. CONGRESS DID NOT WRITE INTO THE FELA THE UNJUST AND ILL-DEFINED COMMON LAW RULES OF PROXIMATE CAUSE, BUT INSTEAD CHARGED THE COURTS WITH DEVELOPING A FEDERAL COMMON LAW OF CAUSATION TO FURTHER THE AIMS OF THE STATUTE.

This Court has already addressed and answered the issues raised by Petitioner in this case. CSXT asks this Court to amend the Federal Employers' Liability Act, 45 U.S.C. § 51 and impose upon claimants an additional proof requirement that is not present in the text of the Act and which contravenes this Court's long-settled construction of that statute. Petitioner would turn back the clock and cast aside this Court's long-settled precedents under *federal* common law and resurrect one of the ill-defined and unjust old common law barriers to worker recovery that prompted Congress to enact the FELA in the first place.

This Court long ago made clear its understanding of the FELA:

[I]nstead of a detailed statute codifying common-law principles, Congress saw fit to enact a statute of the most general terms, thus leaving in large measure to

the courts the duty of fashioning remedies for injured employees in a manner analogous to the development of tort remedies at common law. But it is clear that the general congressional intent was to provide liberal recovery for injured workers.

Kernan v. Am. Dredging Co., 355 U.S. 426, 432 (1958).

This Court should, as it has on previous occasions, “decline to blur, blend, or reconfigure our FELA jurisprudence in the manner urged by the petitioner [and instead] adhere to the clear line our recent decisions delineate.” *Norfolk & W. Ry. v. Ayers*, 538 U.S. 135, 141 (2003).

A. In Enacting a Statutory Legal Remedy for Injured Workers, Congress Did Not Incorporate Common Law Rules that Had Denied Workers Their Common Law Remedies.

Petitioner CSXT required locomotive engineer Robert McBride to perform rail car switching operations using a wide-body locomotive normally used on long hauls. Repeated use of the more difficult independent brake equipment over the course of a ten-hour shift caused McBride’s hand to go numb, and as he reached for the brake lever, he smashed his hand on it. *See McBride v. CSX Transp., Inc.*, 598 F.3d 388, 389-90 (7th Cir. 2010). The resulting injury required medical and surgical treatment and has left McBride with pain and impairment. *Id.* at 390. In this FELA action against

the railroad, a federal district court jury returned a verdict in Mr. McBride's favor, finding his injury resulted from CSXT's negligence, which the Court of Appeals for the Seventh Circuit upheld. *Id.*

Petitioner concedes that in this case the "evidence permits a finding that CSXT's negligence was" a "but for" cause of McBride's injury," but contends it was not a "proximate cause." Pet. for Cert. at 14. In short, Petitioner asks this Court to hold that an FELA plaintiff must not only prove that the employer in fact caused the injury, but also satisfy a separate proof requirement. *Id.*²

² CSXT does not identify what evidence was lacking in the trial below nor suggest that it was precluded from arguing lack of causation. It does not defend its proposed instruction, Pet'r's Br. 19 n.3, but argues only that "a properly instructed jury unquestionably could have found" in CSXT's favor on the issue. *Id.* at 32. This Court has made clear with respect to causation in FELA cases,

It is not the function of a court to search the record for conflicting circumstantial evidence in order to take the case away from the jury on a theory that the proof gives equal support to inconsistent and uncertain inferences. The focal point of judicial review is the reasonableness of the particular inference or conclusion drawn by the jury. It is the jury, not the court, which is the fact-finding body.

Tennant v. Peoria & Pekin Union Ry. Co., 321 U.S. 29, 35 (1944).

1. **The statutory text contains no indication that Congress intended to require proof of proximate cause in FELA cases.**

CSXT fails to establish any basis under the Act for such a requirement. It admits that “[t]he only language in the Act that addresses causation appears in Section 1, which provides that an employee may recover for an injury ‘resulting in whole or in part’ from the railroad’s negligence.” Pet’r’s Br. 23 (quoting 45 U.S.C. § 51). CSXT correctly notes that the statute makes no mention at all of proximate cause. *Id.* Consequently, this Court has declined to read into the FELA any additional requirement. “[N]othing in either the language or the legislative history discloses expressly an intent to exclude from the Act’s coverage any injury resulting ‘in whole or in part from the negligence’ of the carrier.” *Urie v. Thompson*, 337 U.S. 163, 181 (1949).

CSXT nonetheless contends that its “reading of FELA follows from the ordinary meaning of the statutory language, which governs when, as here, a term is not defined in the statute.” Pet’r’s Br. 25.

Confessing the complete absence of authority that might support its reading of the FELA, CSXT resorts to this Court’s construction of *other* statutes, notably the Sherman Act, 15 U.S.C. § 15(a). *See* Pet’r’s Br. 47-48. Those examples provide no support for CSXT’s reading of the FELA text. To the contrary, as this Court explains in the very decision CSXT relies on, its conclusion that Congress incorporated common-law proximate cause into the Sherman Act was not based on a “literal reading of

the statute,” but rather on “the larger context in which the entire statute was debated.” *Associated Gen. Contractors of Cal. Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 529 & 530 (1983). The context in which Congress considered the FELA, as Amicus demonstrates below, clearly indicates that Congress intended to reject, not incorporate, the restrictive proximate cause rule of the common law.

By contrast, the phrase “results from,” which is similar to the FELA text, in at least some circumstances indicates that Congress does *not* require proximate cause. For example, in *United States v. Atkins*, 289 Fed. Appx. 872, 876 (6th Cir. 2008), the court held that 21 U.S.C. § 841(b)(1)(C), imposing prison sentence if the defendant has a prior drug conviction, sells illegal drugs, and “death or serious bodily injury results from the use of” those drugs, does not require proof of proximate cause. Chief Judge Boggs, writing for the court noted that six other circuits “have held that the use of the passive words “if death or serious bodily injury results from the use of” eliminates any requirement that the distribution be the proximate cause of the victim’s death,” citing *United States v. Houston*, 406 F.3d 1121, 1124 (9th Cir. 2005); *United States v. Carbajal*, 290 F.3d 277, 284 (5th Cir. 2002); *United States v. Soler*, 275 F.3d 146, 153 (1st Cir. 2002); *United States v. McIntosh*, 236 F.3d 968, 973 (8th Cir. 2001); *United States v. Robinson*, 167 F.3d 824, 831 (3d Cir. 1999); *United States v. Patterson*, 38 F.3d 139, 145 (4th Cir. 1994). *See also United States v. Hatfield*, 591 F.3d 945, 948 (7th Cir. 2010) (“[T]he statutory term ‘results from’ required the government to prove that ingestion of the

defendants' drugs was a 'but for' cause of the deaths and the bodily injury").

2. Congress would not have intended that courts undermine the FELA statutory remedy by incorporating common law proximate cause, which was an ill-defined rule used to deny remedies to injured workers.

CSX is incorrect in stating that "FELA was meant to incorporate the common law," Pet'r's Br. 20, or that any aspect of the remedy that is not defined in the text "is consequently governed by the common law." *Id.* at 24.

The FELA cause of action is governed by federal substantive law. *Norfolk S. Ry. Co. v. Sorrell*, 549 U.S. 158, 165 (2007). "Absent express language to the contrary, the elements of a FELA claim are determined *by reference to* the common law." *Id.* at 165-66 (emphasis added) (citing *Urie v. Thompson*, 337 U.S. 163 (1949)). In this analysis, common law principles "are entitled to great weight." *Sorrell*, at 168; *Norfolk & W. Ry. Co. v. Ayers*, 538 U.S. 135, 145 (2003); *Metro-North Commuter R. Co. v. Buckley*, 521 U.S. 424, 429 (1997); *Consol. Rail Corp. v. Gottshall*, 512 U.S. 532, 544 (1994). At the same time, this Court has cautioned, they are "not necessarily dispositive." *Sorrell*, at 168; *Gottshall*, at 544.

There are two compelling reasons to reject CSXT's assertion that Congress intended to incorporate the common law rules of proximate cause

into the FELA. First, those rules were at the time Congress was considering the FELA (as well as now) an ill-defined, vague, contradictory and confusing jumble of judge-made limitations on liability. Second, proximate cause was one of the judge-made rules that common law employed to deny a remedy, which prompted Congress to enact FELA in the first place.

CSXT bases its incorporation argument on the assumption that “proximate cause” was a venerable common law concept that carried a “universal” meaning accepted “in all jurisdictions.” Pet’r’s Br. 22.³ That is famously not the case.

“Proximate cause” at the close of the nineteenth century was a recent invention in the law

³ For this proposition, CSXT cites *Raab v. Utah Ry.*, 221 P.3d 219, 230 (Utah 2009), Pet’r’s Br. 22, which in turn cites four decisions. Tellingly, each of those decisions offers a different definition of proximate cause, none of which appears to match CSXT’s. See *Stewart v. Federated Dep’t Stores*, 662 A.2d 753, 757 (Conn. 1995) (proximate cause means “a substantial factor in the resulting harm”); *Transp. Indem. Co. v. Page*, 406 P.2d 980, 986 (Okla. 1963) (“The proximate cause of an injury must be the efficient cause which sets in motion the chain of circumstances leading to the injury.”); *Kent v. Commonwealth*, 771 N.E.2d 770, 777 (Mass. 2002) (Proximate cause depends on “whether the injury to the plaintiff was a foreseeable result of the defendant’s negligent conduct.”); *Stahl v. Metro. Dade County*, 438 So. 2d 14, 17 (Fla. Ct. App. 1983) (“[T]o constitute proximate cause there must be such a natural, direct, and continuous sequence between the negligence act [or omission] and the [plaintiff’s] injury that it can reasonably be said that but for the [negligent] act [or omission] the injury would not have occurred.”).

of torts.⁴ Like the defenses of contributory negligence, assumption of the risk, and the fellow servant doctrine, it was devised and promoted by the railroads' legal departments and adopted by courts who saw the necessity of protecting America's fledgling industry from the burden of liability for the harms they cause. *See, e.g.*, Lawrence M. Friedman, *A History of American Law* 409-11 (1973); Morton J. Horwitz, *The Transformation of American Law, 1870-1960* 85-89 (1977); Guido Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 *Yale L.J.* 499, 515-17 (1961); Edmund Ursin, *Judicial Creativity in Tort Law*, 49 *Geo. Wash. L. Rev.* 229, 259-63 (1981); Stuart Speiser, *Lawsuit* 120, 122, 124-26 (1980); *cf.* Gary T. Schwartz, *Tort Law and the Economy in Nineteenth-Century America: A Reinterpretation*, 90 *Yale L.J.* 1717, 1719-20 (1981) (concluding from a survey of reported tort decisions that the common law courts of the late 19th century were not broadly protective of business, but were notably hostile to claims by injured employees, especially railroad workers).

CSXT insists that we “need not consult a dictionary to know that the ordinary meaning” of the FELA text supports its definition of proximate cause.

⁴ The law of negligence was itself very new. The first American torts treatise was not published until 1859. John Fabian Witt, *Toward a New History of American Accident Law: Classical Tort Law and the Cooperative Firstparty Insurance Movement*, 114 *Harv. L. Rev.* 690, 703 (2001). Lawsuits arising out of the harms wrought by railroads and factories quickly became its primary focus. Oliver Wendell Holmes, *The Path of the Law*, 10 *Harv. L. Rev.* 457, 467 (1897).

Pet'r's Br. 25.⁵ That, too, is not the case. As the court of appeals correctly noted, "There is not currently, and was not at the time of the FELA's passage, a uniform or generally accepted definition of proximate cause." 598 F.3d at 393 n.3.

When Congress enacted the FELA, the common law notion of proximate cause was "a chaos of confusion and uncertainty" where judges expressed "a kaleidoscope of 'rules' of which each confessedly is subject to indefinite exceptions and not one is based on a satisfactory foundation." See Joseph W. Bingham, *Some Suggestions Concerning "Legal Cause" at Common Law*, 9 Colum. L. Rev. 16, 16-17 (1909). A contemporary judge lamented that that the term "has been productive of infinite confusion and error" and is "always ambiguous." Jeremiah Smith, *Legal Cause in Actions of Tort*, 25 Harv. L. Rev. 103, 106 & 107 (1911). A practitioner described six separate formulations of proximate cause that were known at common law and added, "The Supreme Court has failed to adopt any of these tests or rules of causation." William H. DeParcq, *A Decade of Progress Under the Federal Employers' Liability Act*, 18 Law & Contemp. Probs. 257, 266-67 (1953).

Congress clearly did not incorporate such a contradictory and contentious rule into its statutory

⁵ Even dictionary definitions are not entirely helpful. As Judge Posner has noted, "primary cause" is listed in Black's law dictionary as a synonym for "proximate cause" *United States v. Hatfield*, 591 F.3d 945, 949 (7th Cir. 2010). Even CSXT does not contend that proximate cause means primary cause. See Pet'r's Br. 24.

cause of action when it was *expanding* the remedies available to injured workers.

One example, which was likely known to Congress, illustrates both the unsettled meaning of proximate cause and its overt use by courts to shield the railroads from liability. In the famous case of *Ryan v. New York Central Railroad Co.*, 35 N.Y. 210 (1866), defendant's locomotive set a wood shed on fire, which spread to plaintiff's house 130 feet away. Acknowledging the difficulty in reconciling the common law cases, the court nonetheless held that the destruction of plaintiff's house was too remote and was therefore not proximately caused by defendant's negligence. To hold otherwise would create a liability "that no private fortune would be adequate" to meet and "which would be the destruction of all civilized society." *Id.* See also Friedman, *supra* at 410-11, criticizing *Ryan* as a conspicuous example of judicial protectiveness of the railroads and hostility toward common law tort remedies in the nineteenth century.⁶

This Court, however, emphatically rejected this direct/remote notion of proximate cause in *Milwaukee & Saint Paul Railway Co. v. Kellogg*, 94 U.S. 469 (1876). There defendant's steam boat set

⁶ CSX appears to support this restrictive proximate cause rule, quoting Justice Holmes' dictum in a different, non-injury context that the "general tendency of the law . . . is not to go beyond the first step [and] does not attribute remote consequences to a defendant." Pet'r's Br. 21 (quoting *S. Pac. Co. v. Darnell-Taenzer Lumber Co.*, 245 U.S. 531, 534 (1918)). Justice Holmes clearly did not apply this restrictive view of causation in FELA cases. See, e.g., *Union Pac. R. Co. v. Hadley*, 246 U.S. 330, 333 (1918).

fire to a wooden elevator on the river bank, from which the fire spread to plaintiff's saw mill and lumber. This Court upheld the judgment against the railroad. The Court explicitly disagreed with *Ryan* and similar cases, emphasizing that "proximate cause of an injury is ordinarily a question for the jury," which in this case found "no intervening and independent cause" of the harm. *Id.* at 474-75.

Despite the absence of a clear or universally accepted definition, at the end of the nineteenth century, proximate cause was one of "a number of judge-made rules [that] circumscribed the availability of damages recoveries in both tort and contract litigation." *Associated Gen. Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519, 532 (1983).

The California Supreme Court similarly recognized that comparative negligence, along with "concepts of duty and *proximate cause*, [provided] a convenient instrument of control over the jury, by which the liabilities of rapidly growing industry were curbed and kept within bounds." *Am. Motorcycle Ass'n v. Superior Court*, 578 P.2d 899, 904-05 (Cal. 1978) (quoting William Prosser, *Comparative Negligence*, 41 Cal. L. Rev. 1, 4 (1953)). The Virginia Supreme Court recently noted that "employees lost approximately eighty percent of their cases" because of "narrow common law theories" including proximate cause. *Simms v. Ruby Tuesday, Inc.*, 704 S.E.2d 359, 361 (Va. 2011) (quoting Samuel B. Horowitz, *Assaults and Horseplay Under Workmen's Compensation Laws*, 41 Ill. L. Rev. 311, 311 (1946)). See also Friedman, at 411 (noting that courts used "proximate cause" concepts to protect railroads from

juries even prior to widespread adoption of contributory negligence).

Clearly Congress would not have incorporated into the FELA, without so stating, the restrictive common law rules of proximate cause which had barred workers' remedies and prompted Congress to enact the statutory remedy.

B. The Federal Common Law Rules of Causation in FELA Cases Reflect the Intent of Congress to Remove Common Law Barriers to Recovery for Injuries Resulting from an Employer's Negligence.

1. The context in which Congress enacted the FELA demonstrates that Congress intended railroads to be held accountable for worker safety and compensation of injury.

Interpretation and application of FELA's remedy is a matter of federal common law, which does not share the same goals as the non-statutory general common law of torts. Instead, the federal common law aims to interpret the statute, guided by the purposes of the Act. That determination is made within "the larger context in which the entire statute was debated." *Associated Gen. Contractors*, at 530. That background makes clear that Congress's primary goal was to lower the common law barriers that had precluded recovery by injured railroad workers.

The railroads brought rapid progress and prosperity to Americans across the country, see Gary T. Schwartz, *Tort Law and the Economy in Nineteenth-Century America: A Reinterpretation*, 90 Yale L.J. 1717, 1748 (1981); William L. Withuhn, *How the Railroads Built America; Railroads Have Been Essential to the Growth of America For Generations. The Next Generation Is Just Beginning*, Railway Age, Sept. 2006. But there is a “dark and bitter” side to this story. Melvin L. Griffith, *The Vindication of a National Public Policy under the Federal Employers’ Liability Act*, 18 Law & Contemp. Probs. 160, 163 (1953). Ever-growing numbers of workers were killed and injured by huge machines lacking basic safety protections. “In the second half of the nineteenth century, the United States experienced an accident crisis like none the world had ever seen and like none any Western nation has witnessed since.” John Fabian Witt, *Toward a New History of American Accident Law: Classical Tort Law and the Cooperative Firstparty Insurance Movement*, 114 Harv. L. Rev. 690, 694 (2001). The rates of death and serious injury to railroad workers were “astronomical.” Of all employees killed in Massachusetts between the late 1850s and 1880, 64 percent were railroad employees. Walter Licht, *Working For The Railroad: The Organization of Work in the Nineteenth Century* 124-29 (1983). In 1890, one railroad worker in every three hundred was killed on the job; a rate four times higher than in Great Britain. Among freight railroad brakemen, one in every hundred died in work accidents *each year*. Witt, *supra*, at 694-95; Michael L. Rustad & Thomas H. Koenig, *Taming the Tort Monster: The American Civil Justice System As a Battleground of Social Theory*, 68 Brook. L. Rev. 1, 27 & n.167

(2002); Thomas E. Baker, *Why Congress Should Repeal the Federal Employers' Liability Act of 1908*, 29 Harv. J. on Legis. 79, 81 (1992) (“The injury rate among railroad employees in the late nineteenth century was horrific—the average life expectancy of a switchman was seven years, and a brakeman’s chance of dying from natural causes was less than one in five.”).

This Court noted that President William Henry Harrison, “in his annual messages of 1889, 1890, 1891, and 1892, earnestly urged upon Congress the necessity of legislation to obviate and reduce the loss of life and the injuries” among railroad workers. *Johnson v. S. Pac. Co.*, 196 U.S. 1, 19 (1904).

At this time, “public attention had focused on abuses by the railroads, including a perceived industry indifference to the hazards facing railroad workers.” Baker, *supra*, at 81-82. Congress responded in 1893 by enacting the Federal Safety Appliance Act, which required safety equipment, including automatic couplers and air brakes. Act of Mar. 2, 1893, ch. 196, 27 Stat. 531 (codified as amended at 45 U.S.C. §§ 1-7 (1988)).

Yet, the human toll continued to rise. Interstate Commerce Commission figures reveal that “The railway injury rate doubled in the seventeen years between 1889 and 1906.” At the time Congress enacted the FELA in 1908, casualties to trainmen on the interstate railroads of the United States totaled 281,645. 45 Cong. Rec. 4034 (1910).

Because “the legal system offered little or no relief,” and no social safety net existed, “[w]orkers disabled in accidents and the widows and families of

deceased railwaymen faced a grim and uncertain future.” Licht, *supra*, at 197. A Baltimore newspaper reported that two brakemen had “thrown themselves under the wheels,” and others had contemplated suicide due to the dangers, working conditions, and financial stress of their jobs. *Id.*

Congress, in 1906, enacted the precursor to the FELA, expressing its desire to “do something toward stopping the fearful slaughter of human life and destruction of human limbs by our railroads.” 40 Cong. Rec. 4607 (1906). Civil liability for injury, in that Congress’s view was not a destructive burden, but a financial incentive for safety. “The only manner in which [railroads] can be persuaded to take reasonable care of their employees is by holding them responsible in damages for the absence of such care.” 40 Cong. Rec. 4605 (1906).

Much of the credit for this accomplishment may be accorded to Edward A. Moseley, the first Secretary of the new Interstate Commerce Commission in 1887. A former seaman, Moseley devoted his career to securing federal protections for the rights of railroad employees. Griffith, *supra*, at 164-65. His efforts led to the enactment, over strenuous industry opposition of the Safety Appliance Act, 45 U.S.C. §§ 1-43a (1988), and the Boiler Inspection Act, now codified at 45 U.S.C. § 23 (1988). *See generally*, James Morgan, *The Life Work of Edward A. Moseley in the Service of Humanity* 57-62 (1913).

In 1895, Moseley drafted the first Employers’ Liability Act to be introduced in Congress. President Theodore Roosevelt threw his support behind the proposal, declaring to Congress that, “The practice of

putting the entire burden of loss to life or limb upon the victim or the victim's family is a form of social injustice." 42 Cong. Rec. 73 (1907).

This Court struck the 1906 legislation as exceeding Congress's commerce powers. In the *Employers' Liability Cases*, [*Howard v. Illinois Central Railroad Co.*] 207 U.S. 463 (1908), Congress quickly responded, enacting the current version of FELA to address "mounting concern about the number and severity of railroad employees' injuries." *Sorrell*, at 165.

The Act created a federal cause of action for damages due to "injury or death resulting in whole or in part from the negligence" of the railroad. 45 U.S.C. § 51. Congress's purpose was broad, most expansively stated in a report by the Senate Committee on the Judiciary accompanying an amendment to the Act in 1910:

[To] place such stringent liability upon the railroads for injuries to their employees as to compel the highest safeguarding of the lives and limbs of the men in this dangerous employment. The tremendous loss of life and limb on the railroads of this country is appalling. . . .

It was the intention of Congress . . . to shift the burden of the loss resulting from these casualties from "those least able to bear it" and place it upon those who can, as the Supreme Court said in [*St. Louis & Iron Mountain & Southern Railway v. Taylor*, 210 U. S. 281, 295-96

(1908)], “measurably control their causes.”

[The FELA stands as] a declaration of public policy *to radically change, as far as congressional power can extend, those rules of the common law* which the President, in a recent speech at Chicago, characterized as “unjust.” President Taft in his address at Chicago, September 16, 1909, referred “to the continuance of unjust rules of law exempting employers from liability for accidents to laborers.”

This public policy which we now declare is based upon the *failure of the common-law rules* as to liability for accident, to meet the modern industrial conditions.

Sen. Committee on the Judiciary, S. Rep. No. 432, 61st Cong. 2nd sess., 45 Cong. Rec. 4034 (1910) (emphasis added). This Court upheld the Act’s validity. *Second Employers’ Liability Cases*, [*Mondou v. New York, N.H. & H.R. Co.*], 223 U.S. 1 (1912).

The crucial means of accomplishing this purpose, in Congress’s view, was to enable workers to present their cases to juries of their fellow Americans, overcoming judge-made common law barriers and judicial bias in favor of the railroads. See *Rogers v. Mo. Pac. R.R. Co.*, 352 U.S. 500, 508-09 (1957). For that reason, Congress made the right to trial by jury “part and parcel” of the remedy under FELA. William E. Davis, III, *The Jury A Block Away: The False Conflict Between Texas and Federal Jury Trial*, 56 Baylor L. Rev. 671, 687 (2004); *Dice v.*

Akron, Canton & Youngstown R.R., 342 U.S. 359, 363 (1952); *Bailey v. Cent. Vt. Ry.*, 319 U.S. 350, 354 (1943).

The powerful social history that led Congress to enact the FELA informed this Court's interpretation of the statutory remedy:

This limited liability [of railroad employers at common law] derived from a public policy, designed to give maximum freedom to infant industrial enterprises, . . . But it came to be recognized that, whatever the rights and duties among persons generally, the industrial employer had a special responsibility toward his workers, who were daily exposed to the risks of the business and who were largely helpless to provide adequately for their own safety.

Kernan v. Am. Dredging Co., 355 U.S. at 430-31.⁷

The Act must therefore be given “liberal construction in order to accomplish [Congress’s] objects.” *Urie v. Thompson*, 337 U.S. 163, 180 (1949). “The language is as broad as could be framed . . . The wording was not restrictive as to the employees covered; *the cause of injury*, . . . or the particular

⁷ In 1920, Congress made the FELA remedy applicable to seamen under the Jones Act, 46 U.S.C. § 30104(a). *See Am. Dredging Co. v. Miller*, 510 U.S. 443, 456 (1994) . Consequently, “[u]nder both statutes, the plaintiff bears a reduced burden of proof with respect to causation.” *Wills v. Amerada Hess Corp.*, 379 F.3d 32, 47 & n.8 (2d Cir. 2004) (Sotomayor, J.).

kind of injury resulting. *Id.* at 180-81 (emphasis added). Rather, “it is clear that the general congressional intent was to provide liberal recovery for injured workers.” *Kernan*, at 432.

II. FELA REQUIRES SUFFICIENT EVIDENCE FOR A JURY TO INFER THAT THE RAILROAD’S NEGLIGENCE RESULTED IN WHOLE OR IN PART IN PLAINTIFF’S INJURY.

A. This Court Has Developed a Causation Requirement Specific to the FELA Which Is Separate From the Proximate Cause of the Common Law.

This Court has developed the FELA remedy as Congress directed under the federal common law, including rules of causation suited to accomplishing the remedial purpose of the Act. CSXT cites early FELA cases in which this Court employed the phrase “proximate cause,” Pet’r’s Br. 30-31 n.7, and strenuously argues that *Rogers v. Missouri Pac. R.R. Co.*, 352 U.S. 500 (1957) “did not abandon proximate causation.” Pet’r’s Br. 33. But the “proximate cause” referred to in *Rogers* and other cases cited by Petitioner was not the proximate cause of the general common law. “It would be more accurate,” as Justice Ginsberg has stated, to recognize that the Court in these cases “describes the test for proximate causation *applicable in FELA suits.*” *Sorrell*, at 812-13 (Ginsberg, J. concurring).

To hold otherwise would freeze the law governing FELA claims in the mold of the general

common law of torts in 1908, because the federal courts have no authority to develop that body of law:

There is no federal general common law. Congress has no power to declare substantive rules of common law applicable in a State, whether they be local in their nature or “general,” be they commercial law *or a part of the law of torts*. And no clause in the Constitution purports to declare such a power upon the federal courts.

Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938) (emphasis added).

The federal common law regarding causation, which Justice Ginsberg referred to as specifically “applicable in FELA suits,” was described, even before *Rogers*, as having a “tendency to liberalize the requirement of causal connection, and afford an ever wider scope to the ambit of jury authority.” William H. DeParcq, *A Decade of Progress Under the Federal Employers’ Liability Act*, 18 Law & Contemp. Probs. 257, 271 (1953). The Court “avoided adherence to any proximate cause doctrine left over from the general common law, *id.* at 270, and adopted in its place a “more expansive” rule, *Eglsaer v. Scandrett*, 151 F.2d 562, 565-66 (7th Cir. 1945); John M. Ennis, *An Analysis of Judicial Interpretation and Application of Certain Aspects of the Federal Employers’ Liability Act*, 18 Law & Contemp. Probs. 350, 351 (1953) (similar).

B. The FELA Requires Only Sufficient Evidence from Which a Jury Could Reasonably Infer That the Employer's Negligence Played Any Part in Plaintiff's Injury.

The FELA causation test developed by this Court, unlike the stringent proximate cause rules of the common law courts, is jury-centered. A FELA plaintiff is “required to present probative facts from which the negligence and the causal relation could reasonably be inferred.” *Tennant v. Peoria & Pekin Union Ry. Co.*, 321 U.S. 29, 32 (1944). “If that requirement is met, . . . [n]o court is then justified in substituting its conclusions for those of the twelve jurors.” *Id.* at 33.

The Court also made clear that a plaintiff is not obliged to introduce particular evidence that can be specifically labeled “proof of proximate cause.” Causation is an inference that may be drawn from the totality of facts shown to the jury. Thus “focal point of judicial review is the *reasonableness of the particular inference or conclusion drawn by the jury*. It is the jury, not the court, which is the fact-finding body.” *Id.* at 35 (emphasis added).

This Court has consistently applied this standard in reviewing FELA cases. *See, e.g., Tiller v. Atl. Coast Line R.R.*, 323 U.S. 574, 578 (1945); *Schulz v. Pa. R. Co.*, 350 U.S. 523 (1956) (“The very essence of [the jury’s] function is to select from among conflicting inferences and conclusions that which it considers most reasonable.”); *Rogers*, 352 U.S. at 506) (“the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played a part, even the

slightest, in producing the injury or death for which damages are sought.”); *Gottshall*, 512 U.S. at 543 (quoting *Rogers*); *Gallick v. B&O R.R.*, 372 U.S. 108, 116 (1963) (the controlling question on causation was “whether there was evidence . . . enough to justify a jury’s determination that employer negligence had played any role in producing the harm.”)

C. This Court Has Rejected the Definition of Proximate Cause Urged by Petitioner.

The causation requirement this Court has devised for FELA cases, whether or not referred to as “proximate cause,” does not in any way resemble the standard advocated by Petitioner here. Indeed, CSXT’s “scope of the risk” formulation is one definition of proximate cause that this Court has squarely and explicitly rejected.

CSXT contends that its actions were deemed negligent in requiring McBride to use a wide-body locomotive to perform switching operations due to the risk of derailment and “possibly putting something on the ground.” Pet’r’s Br. 6. “There was no derailment or collision in this case, however.” *Id.*

CSXT argued in its Petition:

McBride’s theory of negligence was that his assigned train . . . was unsafe because of its propensity to cause derailment or collision, not because of its propensity to cause imprecise hand movements . . . Yet McBride was injured while operating the brake, not in a rail accident.

Pet'r's Br. 29. The jury could have found that the risk created by CSXT's breach of duty was "a different kind of loss from the one that materialized." *Id.* at 29-30.

There was at least some support in pre-FELA common law decisions for this "scope of the risk" definition of proximate cause. See Joseph W. Bingham, *Some Suggestions Concerning "Legal Cause" at Common Law*, 9 Colum. L. Rev. 16 (1909). An early FELA decision by this Court appears to have employed that approach. In *St. Louis & San Francisco Railroad Co. v. Conarty*, 238 U.S. 243 (1915), a brakeman was fatally crushed when the engine he was riding collided with a rail car. Had the car been equipped with a drawbar and automatic coupler, as required by the Safety Appliance Act, they would have maintained sufficient space between the car and the front of the engine where the brakeman was riding. The court held, however, that the railroad's violation was not a proximate cause of the brakeman's death. Automatic couplers are required to prevent injury to workers walking between the cars to manually couple or uncouple cars, not "to provide a place of safety between colliding cars." *Id.* at 250. The court concluded that proximate cause is lacking "where a duty is imposed for the protection of persons in particular situations or relations a breach of it which happens *to result in injury to one in an altogether different situation.*" *Id.* at 249 (emphasis added). In a very similar case, *Lang v. New York Central Railroad Co.*, 255 U.S. 455 (1921), a brakeman's leg was fatally crushed when the rail car he was riding collided with a car that was missing an automatic coupler. The Court, relying on *Conarty*, overturned a verdict for the

widow, holding that the “absence of the coupler and drawbar was not the proximate cause of the injury, nor was it a concurring cause.” *Id.* at 458.

Shortly after *Conarty*, this Court decided *Louisville & Nashville Railroad Co. v. Layton*, 243 U.S. 617 (1917), where a switchman was thrown from the top of a car in a collision that would not have occurred if the cars had been equipped with non-defective automatic couplers. The Court upheld a verdict for the plaintiff, rejecting the railroad’s argument that the sole purpose of the automatic coupler requirement was to prevent the risk of workers going between cars to couple them, not to protect employees riding on top of cars. *Id.* at 620. Similarly, in *Minneapolis & St. Louis Railroad Co. v. Gotschall*, 244 U.S. 66 (1917), a brakeman walking along the top of a moving train was thrown off and killed when the train separated because of the opening of a defective coupler. This Court sustained a judgment against the railroad although the injury was not one which the Safety Appliance Act coupler requirement sought to prevent.

This Court resolved the conflicting authorities in *Davis v. Wolfe*, 263 U.S. 239 (1923) where the plaintiff was injured when he fell from a moving train due to the defective condition of a grab iron. The Court rejected the railroad’s argument, based on *Conarty* and *Lang*, that the grab iron was required to mitigate the risk to employees engaged in coupling or uncoupling cars, not to assist riding moving cars. The Court rejected this contention and held that *Layton* and *Gotschall* had made clear that an employee can recover under FELA for injury caused by a railroad’s negligence in violating the Safety Appliance Act “while in the discharge of his duty,

although not engaged in an operation in which the safety appliances are specifically designed to furnish him protection.” *Id.* at 243.⁸

Similarly, in *Coray v. Southern Pacific Co.*, 335 U.S. 520 (1949), Plaintiff was injured while riding a track car that struck the back of a train that had unexpectedly stopped due to defective brakes. The railroad argued that the scope of the risk created by defective breaks extended to those who might be injured by a *moving* train, not to an employee injured by a *stopped* train. Justice Black responded for the Court, “We do not view the Act’s purpose so narrowly.” *Id.* at 522. Emphasizing that “[t]he language selected by Congress to fix liability in cases of this kind is simple and direct,” the Court concluded that a jury viewing all the circumstances could have found the employee’s death resulted from the defective brakes. *Id.* at 524. *See also Kernan*, 355 U.S. at 432 (Noting that common law “tort doctrine imposes liability for violation of a statutory duty only where the injury is one which the statute was designed to prevent.” However, this Court *has repeatedly refused to apply such a limiting doctrine in FELA cases.*) (emphasis added).

⁸ The Utah Supreme Court, in a decision relied on by CSXT, explains that this Court’s decision in *Davis* supports the railroad’s liability in this case: “*Davis* makes clear that in cases where the employer’s negligence was not the direct cause of the employee’s injury, the negligence is nonetheless a proximate cause of the injury if the injury occurred while the employee was discharging the duty that devolved on him or her by reason of the employer’s negligence.” *Raab v. Utah Ry.*, 221 P.3d 219, 230-31 (Utah 2009).

Plaintiff in this case introduced sufficient evidence from which the jury could infer that his hand injury resulted from CSXT's negligence while engaged in performing his duties as a locomotive engineer. Under this Court's FELA causation test, that is sufficient.

[W]here, as here, there is an evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion. And the appellate court's function is exhausted when that evidentiary basis becomes apparent, it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable.

Lavender v. Kurn, 327 U.S. 645, 653 (1946).

III. THIS COURT SHOULD NOT REQUIRE THAT FELA JURIES BE INSTRUCTED REGARDING PROXIMATE CAUSE.

Finally, this Court should reject Petitioner's invitation to require that juries in FELA cases be instructed that the plaintiff is required to prove proximate cause. Pet'r's Br. 19 n.3.

A party requesting a jury instruction must show not only that it is a correct statement of the law, but also that the proposed instruction is not confusing or misleading. *White v. Ford Motor Co.*, 312 F.3d 998, 1012 (9th Cir. 2002); see 89 C.J.S. Trial

§ 583.⁹ Significantly, Petitioner has not identified a single case in which it was reversible error to refuse to charge the jury on the requirement and definition of proximate cause.¹⁰

To hold that an FELA defendant is entitled to so instruct the jury would impose a daunting task upon trial courts. As one court recently suggested, the term proximate cause “may hold the dubious honor of having generated more confusion than any other term in the legal lexicon.” *Raab v. Utah Railway Co.*, 221 P.3d 219, 226 (Utah 2009). *See also Gerst v. Marshall*, 549 N.W.2d 810, 815 (Iowa 1996) (noting the inconsistent views of “the authorities upon which we have relied.”); *Busta v. Columbus Hosp. Corp.*, 916 P.2d 122, 138 (Mont. 1996) (“It is an

⁹ Although CSXT has chosen not to defend the correctness of its proposed instruction, Pet’r’s Br. 19 n.3, its definition of proximate cause as a “natural or probable sequence” is clearly objectionable as suggesting that that McBride could only recover upon proof of greater than 50 percent probability of causation. *Cf. Monessen Sw. Ry. Co. v. Morgan*, 486 U.S. 330, 353 (1988) (O’Connor, J., dissenting in part) (party may not assign error to rejection of proposed instruction that was more misleading than the instruction actually given).

¹⁰ By contrast, the *giving* of an instruction requiring an FELA plaintiff to prove proximate cause has been held to be reversible error. *See, e.g., Hausrath v. N.Y. Cent. R. Co.*, 401 F.2d 634 (6th Cir. 1968); *Page v. St. Louis Sw. Ry. Co.*, 312 F.2d 84, 92 (5th Cir. 1963); *Dutton v. S. Pac. Transp.*, 576 S.W.2d 782 (Tex. 1978); *Collins v. Mercury S.S. Co., Inc.*, 549 S.W.2d 213 (Tex. Civ. App. 1977); *McCalley v. Seaboard Coast Line R. Co.*, 265 So. 2d 11 (Fla. 1972); *cf. Tyree v. N.Y. Cent. R.R.*, 382 F.2d 524, 529 (6th Cir.), *cert. denied*, 389 U.S. 1014 (1967) (“[I]t would be better in [FELA] cases if no mention of proximate cause whatever was made to the jury.”).

unfortunate word, which places an entirely wrong emphasis upon the factor of physical or mechanical closeness.”).

Torts scholars agree that there is general disagreement on even a basic definition of proximate cause:

There is perhaps nothing in the entire field of law which has called forth more disagreement, or upon which the opinions are in such a welter of confusion. Nor, despite the manifold attempts which have been made to clarify the subject, is there yet any general agreement as to the best approach.

W. Page Keeton, et al., *Prosser & Keeton on Torts* § 41, at 263 (5th ed. 1984).

The *Restatement* authors have eschewed use of the term altogether. See *Restatement (Second) of Torts* § 431 (1965). The reporters for the third restatement of torts flatly declare:

There may be no legal term in as widespread usage as proximate cause that has been as excoriated as it has. One searches in vain to find a defender of the term; its critics are legion.

Restatement (Third) of Torts: Liability for Physical Harm § 29, Reporters Note comment a. Dean Prosser declared that proximate cause “remains a tangle and a jungle, a palace of mirrors and a maze”; it is “a complex term of highly uncertain meaning” which

“covers a multitude of sins.” William Prosser, *Proximate Cause in California*, 38 Cal. L. Rev. 369, 375 (1950); *see also* Leon Green, *Jury Trial and Proximate Cause*, 35 Tex. L. Rev. 357, 358 (1957) (“The ‘proximate cause’ doctrine, with all of its variations in meaning, is the most imprecise and most confusing of all tort-law doctrines.”).

And, as Justice Ginsburg has aptly noted, If the term “proximate cause” is confounding to jurists, it is even more bewildering to jurors.” *Norfolk S. Ry. v. Sorrell*, 549 U.S. 158, 180 (2007) (Ginsburg, J., concurring). *See also* Jane Stapleton, *Legal Cause: Cause-in-Fact and the Scope of Liability for Consequences*, 54 Vand. L. Rev. 941, 987 (2001) (the “inadequacy and vagueness of jury instructions on ‘proximate cause’ is notorious”).

As the California Supreme Court has explained:

[W]hen jurors hear the term ‘proximate cause’ they may misunderstand its meaning or improperly limit their discussion of what constitutes a cause in fact. . . . Webster’s Third New International Dictionary (1981) page 1828, defines proximate as “very near,” “next,” “immediately preceding or following.” Yet, proximity in point of time or space is no part of the definition of proximate cause.

Mitchell v. Gonzales, 819 P.2d 872, 877 (Cal. 1991) (quotation and citation omitted). The court also quoted a leading critic of California’s proximate cause jury instruction: “There are probably few

judges who would undertake to say just what this means, and fewer still who would expect it to mean anything whatever to a jury.” *Id.* (quoting Prosser, *Proximate Cause in California*, 38 Cal. L. Rev. at 424).

Indeed, an empirical study of jury instructions found that the proximate cause instruction produced “the most misunderstanding among lay persons.” Robert P. Charrow & Veda R. Charrow, *Making Legal Language Understandable: A Psycholinguistic Study of Jury Instructions*, 79 Colum. L. Rev. 1306, 1353 (1979). *See also* Walter W. Steele & Elizabeth G. Thornburg, *Jury Instructions: A Persistent Failure to Communicate*, 67 N.C.L. Rev. 77, 84 (1988) (less than half of juries in study correctly interpreted proximate-cause instructions).

In fact, a growing number of states have rejected use of the term “proximate cause” in pattern jury instructions used in common law tort actions. *See, e.g.*, Alabama Pattern Jury Instructions Civil No. 33.00 (2010); California BAJI 3.76 (2010); Florida Pattern Jury Instruction 5.1 (2010); Hawaii Jury Instruction—Civil 6.3 (1999); Indiana Model Instruction 2105 (2010); Oklahoma Uniform Jury Instructions—Civil 9.1 (2008); Pennsylvania Suggested Standard Civil Jury Instructions, 3.15 (Civ) (2008).

Moreover, many states that employ the term “proximate cause” in jury instructions do not ask jurors to distinguish but-for causation. A survey of standard jury instructions indicates that “in most states the jury is not given instructions that separate the proximate cause question from the cause-in-fact question.” Patrick J. Kelley, *Restating Duty, Breach,*

and Proximate Cause in Negligence Law: Descriptive Theory and the Rule of Law, 53 Vand. L Rev. 1039, 1054 & n.8 (2001).

There is no persuasive reason for this Court to discard its settled precedents and adopt a common limitation on tort remedies at a time when many common law courts are rejecting that limitation.

CONCLUSION

For the above reasons, the decision of the Seventh Circuit Court of Appeals below should be affirmed.

Respectfully submitted,

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March 1, 2011

No. 10-235

IN THE
Supreme Court of the United States

CSX TRANSPORTATION, INC.,

Petitioner,

v.

ROBERT MCBRIDE,

Respondent.

**On Writ Of Certiorari to the
United States Court of Appeals
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**AMICUS CURIAE BRIEF OF THE
AMERICAN ASSOCIATION FOR JUSTICE
IN SUPPORT OF RESPONDENT**

CERTIFICATE OF WORD COUNT

As required by Supreme Court Rule 33.1(h), I, Jeffrey White, a member of the Bar of this Court, certify that the accompanying document, Brief of Amicus Curiae of The American Association For Justice In Support Of Respondent, contains 8,574 words, excluding the parts of the documents that are exempted by Supreme Court Rule 33.1(d).

/S/
Jeffrey White
Counsel for Amicus AAJ

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CERTIFICATE OF SERVICE

I, Jeffrey White, a member of the Bar of this Court, hereby certify that on this 1st day of March, 2011, three copies of the Brief of Amicus Curiae of The American Association For Justice In Support Of Respondent, in the above-entitled case were sent via United Parcel Service for overnight delivery, to counsel listed below. I further certify that all parties required to be served have been served.

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