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

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

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TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

STATUTES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

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STATEMENT OF INTEREST OF *AMICUS CURIAE*[1]

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

[1] The parties have consented to the filing of AAR's brief. Letters expressing consent of the parties have been filed with the Clerk of the Court. Pursuant to Rule 37.6, AAR states that no person or entity other than AAR has made monetary contributions toward this brief, and no counsel for any party authored this brief in whole or in part.

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

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

This Court is reviewing a decision of the Court of Appeals for the Seventh Circuit which erroneously sanctioned the application of a relaxed standard of causation in FELA cases, a ruling that is at odds with the language of the statute, Congressional intent and prior decisions of this Court and other courts. As causation is an element of all FELA actions, this issue is relevant in virtually every FELA lawsuit, and numerous lower court decisions demonstrate that the way in which causation is interpreted can affect the outcome of a case. Thus, this case presents one of the

most significant issues for AAR members that this Court has addressed in many years.

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

STATEMENT OF THE CASE

AAR adopts the Statement of Petitioner.

SUMMARY OF THE ARGUMENT

When FELA was enacted in 1908, it incorporated proximate cause. Though Congress modified some aspects of the common law to facilitate recovery, it did not change the requirement that plaintiffs prove their injury was proximately caused by the defendant's negligence. This requirement has never been subsequently altered by Congress; nor have any prior decisions of this Court called for a different standard. Proximate cause remains the law today in FELA cases.

Though workers' compensation laws, which provide benefits to all employees suffering workplace injuries regardless of fault, now cover the vast majority of employers in the United States, Congress has retained a fault-based system for railroads. As a

fault-based compensation law, under which negligence and causation must be proved, FELA was not meant to guarantee recovery in all cases of workplace injuries. Nonetheless, during the past several decades some lower courts have watered down the causation standard, interpreting FELA in a way that all but guarantees recovery, thereby resembling a no-fault law in key respects. However, in contrast to workers' compensation laws which limit benefits in order to create an incentive for rehabilitation and return to work, FELA permits plaintiffs to recover full, uncapped tort damages. Thus, in jurisdictions that apply a relaxed standard of causation, FELA resembles a hybrid compensation law, which is at odds with prevailing compensation policy.

In 1939, Congress amended FELA to ease the path toward recovery by modifying provisions of the statute that served to prevent injured employees from recovering, either because they could not meet the strict test of interstate commerce or because the employer successfully argued that the employee had assumed the risk inherent in the employment. However, as the record clearly shows, the 1939 amendments did not address the issue of causation, leaving intact the original proximate cause requirement. Cases which suggest otherwise are incorrect.

Proximate cause has long been recognized as an essential element of the law of negligence. It remains a useful and important concept that is a necessary condition for imposing liability for the consequences of wrongful acts. Other federal statutes which permit the recovery of damages and which, like FELA, are derived from common law principles, also incorporate proximate cause. So does admiralty law, which this Court has looked to when interpreting FELA.

Moreover, though FELA has a remedial purpose, that is not a basis for relaxing the proximate cause standard. This Court has long held that except as explicitly abrogated, common law doctrines that prevailed in 1908 serve to guide interpretations of FELA, notwithstanding the statute's remedial purpose.

ARGUMENT

I. CONGRESS INCORPORATED PROXIMATE CAUSE INTO FELA AND UTILIZING A RELAXED CAUSATION STANDARD IMPROPERLY TRANSFORMS FELA INTO A NO-FAULT TYPE STATUTE WHICH IS INCONSISTENT WITH BOTH CONGRESS' INTENT AND THIS COURT'S PRIOR DECISIONS

Petitioner correctly argues that to recover under FELA a plaintiff must prove, among other things, the defendant's negligence was a proximate cause of the plaintiff's injury. Such a requirement, typical of common law negligence claims, was incorporated into FELA when it was enacted, has never been altered, and remains the law today. This Court should reaffirm its numerous earlier decisions holding that proximate cause is the standard of causation under FELA [*see* Pet. Br. at 27-30], and reverse the decision of the Court of Appeals for the Seventh Circuit which held otherwise. *McBride v. CSX Transp., Inc.*, 598 F.3d 388 (2010).[2]

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[2] Indeed, despite "declin[ing] to hold that . . . common-law proximate causation is required to establish liability under FELA," *McBride*, 598 F.3d at 406, the Seventh Circuit offered several cogent reasons why it should have reached the opposite conclusion. The Seventh Circuit acknowledged that (1) "[e]arly

Many lower courts that eschew proximate cause believe that FELA calls for plaintiffs to prevail where the evidence would not support such a result in a common law negligence action.[3] Indeed, in juris-

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FELA cases did not interpret the language 'resulting in whole or in part' as altering the common law requirement of proximate cause" *id*. at 392; (2) those "cases never have been overruled explicitly," *id*. at 393; (3) the U.S. Supreme Court "never has identified proximate causation as among those principles of common law that have been abrogated by the FELA" *id*. at 404; and (4) Justice Souter's concurring opinion in *Norfolk Southern v. Sorrell*, 549 U.S. 158, 172 (2007), critiquing lower court decisions holding proximate cause does not apply, "is not without considerable force," 598 F.3d at 404. The Court further conceded that had the *Sorrell* majority reached the substantive issue, there is some indication that "at least some members of the majority may have been sympathetic to Justice Souter's view." *Id*. at 405.

[3] *E.g., Hausrath v. N.Y. Cent. R.R.*, 401 F.2d 634, 637 (6th Cir. 1968) ("Congress deliberately adopted a negligence standard different from that of the common law."); *Grogg v. CSX Transp., Inc*., 659 F.Supp.2d 998, 1005 (N.D. Ind. 2009) (relying on "featherweight standard of proof required" under FELA to deny railroad's summary judgment motion despite finding that "the causation evidence . . . is tenuous"); *Gibbs v. Union Pac. R.R.*, 2009 WL 3064956, at *4 (S.D. Ill. 2009) (explaining that while the plaintiff's "first claim might not survive a motion for summary judgment in the traditional tort context, the low negligence threshold of FELA ensures that this count will live to see another day"); *Kansas City Southern Ry. Co. v. Nichols Construction Co*., 574 F.Supp.2d 590, 594 (E.D. La. 2008) ("FELA plaintiffs can survive dispositive motions by offering evidence which would be insufficient to overcome a similar motion in an ordinary civil case."); *Kreig v. CSX Transp., Inc*., 2006 WL 2792406, at *2 (W.D. Ky. 2006) (denying railroad's summary judgment motion because the "[p]laintiff's burden is significantly lighter than in an ordinary negligence case"); *Booth v. CSX Transp., Inc*., 211 S.W.3d 81, 83-84 (Ky. App. 2006) (reversing summary judgment for the railroad because "Congress intended FELA to be a departure from common law

dictions which have adopted a "slight" causation formulation, FELA has come to resemble a no-fault workers' compensation law in key respects, under which the fact of injury in the workplace becomes the basis of liability, albeit while retaining tort damages.[4] This approach has improperly transformed FELA, creating a remedy Congress never intended nor envisioned. Not only have these courts altered the compensation system Congress established for rail workers, they have done so in a way that is unsound as a matter of public policy.

A. Congress Determined That Injured Railroad Employees Should Be Compensated Under A Fault-Based Rather Than No-Fault System

In 1908, during an era when working for a railroad was quite dangerous, Congress fashioned a remedy for rail employees who were hurt on the job.[5] *See*

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principles of liability" and "plaintiffs have a lower standard of proof than plaintiffs in ordinary negligence cases").

[4] In a revealing passage, one court described the state of adjudication under FELA, all but admitting that despite protesting to the contrary, some courts have interpreted FELA to resemble more a workers' compensation law than a tort statute:

> Having accorded the customary, albeit somewhat psittacistic, deference to the non-insurer aspect of the FELA defendant, we will now proceed to discuss that statute as it is. Before doing so, we observe that while the FELA in its terms does not purport to border on a workman's compensation act, certain parallelism may be found.

Heater v. Chesapeake & Ohio Ry. Co., 497 F.2d 1243, 1246 (7th Cir. 1974).

[5] In the year ending June 30, 1907, 4,534 rail workers were killed on the job and 87,644 were injured. Interstate Commerce

Consolidated Rail Corp. v. Gottshall, 512 U.S. 532, 542 (1994) (Congress enacted FELA "[c]ognizant of the physical dangers of railroading."); *see also Johnson v. Southern Pac. Co.*, 196 U.S. 1, 19 (1904) (commenting on the dangers facing rail employees before the advent of automatic couplers). When it enacted FELA, Congress adopted what was then the universal compensation model in the United States: the law of negligence. The policy embodied in FELA was straightforward: railroads were to be liable in damages for injuries sustained by their employees in the course of their railroad employment if caused by the negligence of the railroad. 45 U.S.C. § 51.

At the time of FELA's enactment the common law had erected a number of often insurmountable barriers to recovery by workers sustaining job-related injuries. For example, recovery was denied if the worker knew the inherent dangers of a job and assumed those risks by accepting employment. *E.g., Clark v. St. Paul & Sioux City R.R.*, 9 N.W. 581 (Minn. 1881); *Gibson v. Erie Ry. Co.*, 63 N.Y. 449 (1875). In addition, the fellow servant rule, a variant of the assumption of the risk doctrine, held that among the ordinary risks of employment the employee takes upon himself is the "carelessness and negligence of those who are in the same employment," on the theory that "these are perils which the servant is as likely to know, and against which he can as effectually guard, as the master." *Farwell v. Boston & Worcester R.R.*, 4 Metc. 49, 57 (Mass. 1842). Moreover, the prevailing rule in the United States in the nineteenth century was that contributory negligence by the plaintiff completely barred recovery, even if

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Commission, Statistics of Railways in the United States 1908 41, 99 (1909).

the defendant also was at fault. *See Louisville, Nashville & Great Southern R.R. v. Fleming*, 82 Tenn. 128 (Tenn. 1884) ("In England and a majority of the States of the Union, the negligence of the plaintiff which contributes to the injury is held to be an absolute bar to the action.").

With the goal of improving the lot of rail workers, while embracing the concept of common law negligence, FELA expressly modified some of the harsher aspects of nineteenth century common law. In an effort to promote recovery, the assumption of the risk and the fellow servant defenses were eliminated. 45 U.S.C. § 54; *See also Chesapeake & Ohio Ry. Co. v. De Atley*, 241 U.S. 310, 313 (1916).[6] Additionally, in what, for the time, was a significant innovation in tort law, FELA incorporated the doctrine of comparative fault. Rather than completely barring recovery, if the employee's negligence contributed to the injury damages are reduced in proportion to the employee's negligence. 45 U.S.C. § 53. Moreover, no reduction of damages for contributory negligence is made if the injury is caused by violation of a safety statute. *Id*. Finally, FELA included a provision that invalidated any "contract, rule, regulation or device" the purpose of which was to exempt a railroad employer from liability under FELA. 45 U.S.C. § 55; *see Philadelphia, B. & W. R.R.*, 224 U.S. 603 (1912). *See generally* S. Rep. No. 460, at 1-3 (1908), describing how FELA

[6] Initially, FELA eliminated the assumption of the risk defense only in cases where the railroad violated a safety statute. In 1939, Congress amended FELA to eliminate the assumption of the risk defense in all FELA cases. Act of Aug. 11, 1939, c. 685, §1, 53 Stat. 1404; *see Tiller v. Atlantic Coast Line R.R.*, 318 U.S. 54, 65 (1943).

"revises the law as now administered in the courts in the United States in four important particulars."

However, beyond these explicit alterations to prevailing legal doctrines, Congress adopted the common law, incorporating into FELA the law of negligence as it existed in the early twentieth century, *see Sorrell*, 549 U.S. at 168; *Gottshall*, 512 U.S. at 543-44; *Urie v. Thompson*, 337 U.S. 163, 182 (1949), including the requirement that plaintiffs had to prove the defendant's negligence was the proximate cause of their injury. [*See* Pet. Br. at 21.] As the Report of the House of Representatives accompanying FELA explained, FELA "makes each party responsible for his own negligence and requires each to bear the burden thereof." H.R Rep. No. 1386, at 1 (1908). *See Southern Ry. v. Gray*, 241 U.S. 333, 339 (1916) (The "rights and obligations" under FELA depend upon "applicable principles of common law. . . . Negligence by the railway company is essential to a recovery."). Congress clearly believed that apportioning liability based on traditional concepts of negligence would lead to a fairer and safer rail industry. "What can be more fair than that each party shall suffer the consequences of his own carelessness? . . . By the responsibility imposed, both parties will be induced to the exercise of greater diligence, and as a result the public will travel and property will be transported in greater safety." H.R Rep. No. 1386, at 5-6. Though FELA undoubtedly improved the opportunity for rail employees to be compensated when injured on the job, by enacting a fault-based compensation system, Congress never meant to guarantee recovery of damages for all work-related injuries. *See Phillips v. Penn. R.R.*, 283 F. 381, 382-83 (7th Cir. 1922) (abolition of the fellow servant doctrine "does not mean that interstate carriers must in all events pay

for injuries to their servants"); *see also Gottshall*, 512 U.S. at 543; *Ellis v. Union Pac. R.R.*, 329 U.S. 649, 653 (1947) (FELA "does not make the employer the insurer of the safety of his employees while they are on duty."); *Terminal R.R. Ass'n v. Howell*, 165 F.2d 135, 138 (8th Cir. 1948) ("There is no absolute duty on the part of the employer to furnish a safe place in which his employee is required to work . . . .").

B. Congress Retained FELA Even as Industry in General Moved to Workers' Compensation Laws, Which Take A Fundamentally Different Approach to Providing Compensation for Workplace Injuries

Even as FELA was being enacted, the philosophy and approach for compensating employees who were injured on the job began to change. Shortly after FELA was enacted, individual states began to adopt no-fault compensation laws, designed to provide insurance-type benefits, as the means of compensating workplace injuries. Most states enacted workers' compensation laws of general application between 1910 and 1920; by 1930 all but four states had enacted a workers' compensation law.[7] Congress followed suit, enacting a no-fault compensation statute for employees of the federal government in 1916, Federal Employees' Compensation Act, 5 U.S.C. § 8101 *et seq.*, and, in 1927, a no-fault compensation statute to cover harbor workers, Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901

[7] Price V. Fishback and Shawn Everett Kantor, *The Adoption of Workers' Compensation in the United States*, 41 J.L & Econ. 305, 319-20 (1998). In 1948, Mississippi became the last state to adopt a workers' compensation law. *Id*.

et seq. GENERAL ACCOUNTING OFFICE, WORKERS' COMPENSATION: SELECTED COMPARISONS OF FEDERAL AND STATE LAWS 1 (April 1996) ("GAO Report").

Congress recognized that no-fault concepts were replacing negligence law as the prevailing means of addressing workplace injuries, but has nonetheless retained FELA for the railroad industry. Congress did consider moving the railroad industry to a workers' compensation model on a number of occasions. Just a few years after FELA's enactment, a commission established by Congress recommended that FELA be replaced with a system based not on fault but on the fact of injury. REPORT OF COMMISSION TO INVESTIGATE THE MATTER OF EMPLOYERS' LIABILITY AND WORKMEN'S COMPENSATION, S. DOC. NO. 338, 62nd Cong., 2d Sess. 15 (1912). An ensuing effort to replace FELA with a workers' compensation system made it as far as a conference committee, where it ultimately died. Subsequent similar efforts were undertaken during the 1930s which also never reached fruition. Thomas E. Baker, *Why Congress Should Repeal the Federal Employers' Liability Act of 1908*, 29 HARV. J. ON LEGIS. 79, 91 (1992). Though the subject occasionally continues to pique the interest of Congress, *see* GENERAL ACCOUNTING OFFICE, FEDERAL EMPLOYERS' LIABILITY ACT: ISSUES ASSOCIATED WITH CHANGING HOW RAILROAD WORK-RELATED INJURIES ARE COMPENSATED (August 1996), it has left the fault-based FELA intact.[8] For better or worse, Congress has opted to retain a fault-based system for the railroad industry, even as workers' compensation has become firmly established for virtually all other

[8] Bills to replace FELA with the state workers' compensation systems were introduced in both Houses of Congress in 1990 but did not advance. Baker at 80.

industries.[9] *See Gottshall*, 512 U.S. at 543 (FELA "is [not] a workers' compensation statute.").

Workers' compensation takes a fundamentally different perspective than tort laws like FELA. Under a tort system, "only injuries that are due to the wrongful actions of another are actionable . . . and there is no assumption that all injured workers should be compensated." TRANSPORTATION RESEARCH BOARD, SPECIAL REPORT 241: COMPENSATING INJURED RAILROAD WORKERS UNDER THE FEDERAL EMPLOYERS' LIABILITY ACT 49 (1994) ("TRB Report"). In contrast, under workers' compensation, the right to compensation is dependent on whether "the employee's injury is caused by the employment," regardless of whether the employer was at fault. *Id*. at 50. Moreover, under workers' compensation, benefits generally are paid only for injuries that affect the ability of the worker to continue working. GAO Report at 2.

Workers' compensation embodies a significant tradeoff: the right of the employee to seek a full recovery is removed in exchange for the certainty of more limited benefits, as there is no need to prove employer fault. PETER M. LENCSIS, WORKERS' COMPENSATION: A REFERENCE AND GUIDE 9 (1998). Under workers' compensation, the amount of compensation for disability generally depends on the worker's previous earnings level, and most acts award a percentage of the injured worker's wages—typically two-thirds—subject to a maximum and minimum. GAO REPORT AT 12-14. Moreover, workers' compensation systems generally do not allow for non-

[9] Other than the railroad industry, only the maritime industry is covered by a fault-based compensation system. 46 U.S.C. §30104.

economic (pain and suffering) damages, though they typically provide a fixed benefit to account for a permanent partial disability or loss of use of a bodily part or function, in most cases based on a schedule. GAO Report at 25-26.

In contrast, FELA damages are not limited by the caps and other restrictions that typically characterize workers' compensation laws. Instead, juries hearing FELA cases are given wide discretion to make determinations of fact, including the extent of damages suffered. *See e.g., Schirra v. Delaware, L. & W. R.R.*, 103 F.Supp. 812, 823 (M.D. Pa. 1952) ("[T]he jury would be justified in awarding plaintiff a substantial sum of money to fairly compensate him for past and future pain, suffering and inconvenience, and the amount to be awarded is peculiarly within the discretion of the jury, provided it is within reason."); *Seaboard Coast Line R.R. v. Gillis*, 321 So.2d 202, 208 (Ala. 1975) ("The extent of damages under FELA is peculiarly a fact question for the jury."). Jury damage awards will be overturned or subject to remittitur only where jurors have "committed some very gross and palpable error, or have acted under some improper bias, influence or prejudice, or have totally mistaken the rules of law by which damages are to be regulated." *Fiskratti v. Penn. R.R.*, 147 F.Supp. 765, 767 (S.D.N.Y. 1957). Thus, seven figure FELA awards are not uncommon, *e.g., DeBiasio v. Illinois Cent. R.R.*, 52 F.3d 678 (7th Cir. 1995) ($4.2 million award affirmed), *cert. denied*, 516 U.S. 1157 (1996); *Frazier v. Norfolk & Western Ry. Co.*, 996 F.2d 922 (7th Cir. 1993) ($2.3 million award not excessive); *Hensley v. CSX Transp., Inc.*, 278 S.W.3d 282 (Tenn. App. 2008) ($5 million verdict), *rev'd*, 556 U.S. ___, 129 S.Ct. 2139 (2009) (per curium), and a verdict will be deemed excessive only if it

"shock[s the] judicial conscience." *Schneider v. Nat'l R.R. Pass. Corp.*, 987 F.2d 132, 137 (2d Cir. 1993) ($1.75 million verdict, including over $1 million in intangible damages, not excessive). Indeed, AAR members report that FELA verdicts and settlements in excess of $1 million are not uncommon, and AAR is aware of several recent eight-figure verdicts.

C. The Move Towards A No-Fault System Was the Product of Judicial Construction of FELA By Some Lower Courts Rather Than Congressional Action

1. As the workers' compensation systems matured and became an established part of the legal landscape, not unaware of the contrasting policy objectives of FELA and the workers' compensation systems, members of this Court openly debated the implications of maintaining a unique, fault-based compensation law for rail workers. In *Bailey v. Vermont Cent. Ry.*, 319 U.S. 350, 354 (1943), Justice Douglas opined that FELA was "crude, archaic, and expensive as compared with the more modern systems of workmen's compensation." Justice Frankfurter expressed frustration with FELA cases which "derive largely from the outmoded concept of 'negligence' as a working principle for the adjustment of injuries inevitable under the technological circumstances of modern industry." *Wilkerson v. McCarthy*, 336 U.S. 53, 65 (1949) (Frankfurter, J., concurring). Noting that "[t]his cruel and wasteful mode of dealing with industrial injuries has long been displaced in industry generally by the insurance principle that underlies workmen's compensation laws," he nonetheless reminded his colleagues of "the duty of courts to enforce the Federal Employers'

Liability Act, however outmoded and unjust in operation it may be." *Id*. at 65-66.[10]

Indeed, this Court has never construed FELA to be anything but a negligence statute; nor has it ever abrogated proximate cause. [*See* Pet. Br. at 34-42] However, as petitioner explains [*see* Pet. Br. at 33-34], some lower courts have viewed this Court's decision in *Rogers v. Missouri Pac. R.R.*, 352 U.S. 500 (1957) as countenancing a departure from proximate cause, and as a result have effectively blurred the conceptual differences between FELA and workers' compensation, ascribing to Congress an intention that it has never manifested. *See e.g*., *McBride*, 598 F.3d at 395 (A "new conception of proximate cause 'crystallized' in *Rogers"*); *Richards v. Consolidated Rail Corp.*, 330 F.3d 428, 433 (6th Cir.) (*Rogers* "announced a relaxed test for establishing causation in FELA cases."), *cert. denied*, 540 U.S. 1096 (2003); *Summers v. Missouri Pac. R.R. Sys*., 132 F.3d 599, 606 (10th Cir. 1997) ("During the first half of this century, it was customary for courts to analyze liability under the FELA in terms of proximate causation," but *Rogers* "definitively abandoned this approach."); *Magelky v. BNSF Ry. Co.*, 579 F.Supp.2d 1299, 1305 (D.N.D. 2008) ("FELA's most distinctive departure from the common law is in the area of causation. . . . To impose liability on the defendant,

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[10] Justice Frankfurter's primary concern with this Court's FELA jurisprudence was over what he perceived as the Court's overuse of its discretion to review FELA cases denying recovery in order to weigh in on sufficiency of the evidence issues. "Despite the mounting burden of the Court's business, this is the thirteenth occasion in which a petition for certiorari has been granted during the past decade to review a judgment denying recovery under the Federal Employers' Liability Act in a case turning solely on jury issues." 336 U.S. at 67.

the negligence need not be the proximate cause of the injury."). These courts "have effectively reduced the standards of proof required to demonstrate negligence on the part of the employer" in FELA cases. TRB Report at 2. Of course, not all courts have so succumbed, as a number of lower courts continue to enforce FELA as it was intended, including requiring that plaintiffs prove proximate cause. *E.g., CSX Transp., Inc. v. Miller*, 46 So.3d 450 (Ala. 2010); *Raab v. Utah Ry.*, 221 P.3d 219 (Utah 2009); *Snipes v. Chicago, Cent. & Pac. R.R.*, 484 N.W.2d 162 (Iowa 1992); *Marazzato v. Burlington N. R.R.*, 817 P.2d 672 (Mont. 1991).

2. Courts that read *Rogers* as eliminating the element of proximate cause have taken an improperly expansive view of the right of FELA plaintiffs to recover. For example, in *Richards*, the plaintiff was the conductor on a train which experienced an unexpected application of the air brake system. This caused the train to stop, safely, after which the plaintiff alighted, again without incident. He was injured later when he lost his footing and slipped on ballast while walking alongside the train to inspect it. The plaintiff's theory was that the train stop was caused by a defective valve in the brake system, and but for that defect he would not have been walking alongside the train at that time. It was not alleged that any negligence by the railroad directly caused him to slip.

In *Norfolk Southern Ry. Co. v. Schumpert*, 608 S.E.2d 236 (Ga. App. 2004), *cert. denied*, 546 U.S. 1025 (2005), a missing pin resulted in a knuckle (part of a train's coupling system) falling to the ground without causing any harm. Subsequently, the plaintiff injured his back as he lifted the knuckle while in

the process of replacing it. He claimed his injury was caused in part by another employee's negligent failure to notice the pin was missing—which resulted in the knuckle being on the ground—even though he admitted that lifting a knuckle, the act which directly caused the injury, was a routine task which he had performed many times in the past. *Id*. at 238.

In both *Richards*, 330 F.3d at 433, and *Schumpart*, 608 S.E.2d at 239 (which relied heavily on *Richards*), the court permitted recovery, applying a "relaxed" standard of causation allegedly mandated by the *Rogers* decision, an unlikely outcome in courts that have more faithfully enforced FELA's proximate causation standard. *See Phillips*, 283 F. at 382 (affirming defense verdict, finding that a defective component "was merely the occasion, and not the proximate cause, of the accident"). Surely the plaintiffs in *Richards* and *Schumpert* both would have received benefits under a workers' compensation system, as the injuries in both cases were job-related; however, it is a far stretch to argue those injuries were proximately caused by employer negligence. Indeed, as a matter of public policy, paying compensation, without the need for "years of unedifying litigation," *Stone v. N.Y. Cent. & St. L. R.R.*, 344 U.S. 407, 411 (1953) (Frankfurter, J., dissenting), may have been preferable.[11] But Congress has not chosen that course for railroad workers.

3. There are important reasons for the differences between FELA and workers' compensation, and easing the plaintiff's path to recovery through incor-

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[11] Schumpert's case finally concluded over six years after he was injured when this Court denied certiorari. 546 U.S. 1025 (2005). Richards' case concluded four years after he was injured, also with a denial of certiorari. 540 U.S. 1096 (2005).

poration of no-fault concepts into FELA not only is improper as a legal matter, it undermines the goals of both systems. In a traditional negligence action, the right to uncapped damages is balanced by the rule that recovery of damages is conditioned on proving the defendant's fault. In contrast, under workers' compensation all those suffering work-related injuries are assured of benefits to sustain them through the period of disability, but with limitations designed to promote a primary objective of workers' compensation, rehabilitation and return to gainful employment. GAO Report at 29. Limiting workers' compensation wage loss benefits is consistent with the widely accepted view that if compensation exceeds, matches, or even approaches the employee's entire wage loss there will be little incentive to seek rehabilitation and to return to work promptly. *Id*. at 23 ("If workers' compensation benefits replace too much after-tax income, there are disincentives to return to work following recovery from a job-related injury.").[12]

No-fault compensation systems only achieve their goal of promoting prompt return to the job if they are characterized by reasonable limitations on benefits. Construing FELA, with its potential for full tort damages, to all but guarantee a recovery surely does not achieve that goal. Under FELA, the greater the

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[12] *See also* John Burton, *Disabled Workers' Compensation Programs: Providing Incentives for Rehabilitation and Reemployment*, 8 JOHN BURTON'S WORKERS' COMPENSATION MONITOR (No.4) 6 (1995) ("Most studies find that higher workers' compensation benefits lead to more workers' compensation claims and to longer duration of benefits. . . . [H]igher benefits result in more workers missing work for longer spells of time, which may conflict with the objective of rehabilitation.").

loss the plaintiff can show, the larger the potential damages award. This often creates an incentive for FELA plaintiffs to allege they are permanently disabled from working while their claim is being adjudicated, rather than returning to the job or undergoing rehabilitation. In some cases, once the litigation is concluded—particularly if the award is less than anticipated, or is quickly dissipated (attorneys' fees and litigation expense come off the top)—the same worker may claim to have recovered completely from the disability and seek to return to employment with the railroad. *See e.g., Lewandowski v. Nat'l R.R. Pass. Corp*., 882 F.2d 815, 817 (3d Cir. 1989) (plaintiff's attorney "hammered home on the seriousness of the injury and his permanent inability to return to Amtrak" only to have plaintiff seek "to return to work" just four days after the end of the trial at which he was awarded damages).[13]

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[13] *See also Morawa v. Consolidated Rail Corp*., 819 F.2d 289 (6th Cir. 1987) (position set forth in plaintiff's trial brief, which "asserted that he was disabled from the only type of employment for which he was suited and requested damages for the loss of his ability to earn a living from the time of his injury until his normal retirement at age 70," held to be "clearly inconsistent with" his current position "that he is able to return to work"); *Jones v. Cent. of Georgia Ry. Co*., 331 F.2d 649, 650 (5th Cir. 1964) (plaintiff "alleged that he would be unable in the future to perform railroad work as a switchman or to perform any other type of manual work" only to seek to return to his former job three years later); *Scarano v.Cent. R.R. of New Jersey*, 203 F.2d 510, 511 (3d Cir. 1953) (plaintiff's witness "testified that plaintiff was 'totally disabled' and that his 'condition will become progressively worse should he attempt' any work involving 'the normal range of use of the back that is usually required in any physical effort,'" but plaintiff nonetheless sought to return to his job less than a month after the railroad paid him a settlement reached during the post-trial

Rather than being interpreted as a hybrid system between tort and compensation it was never meant to be, FELA must be interpreted in accordance with Congress' intent. Plaintiffs are entitled to full compensatory damages, but only in cases where they can prove all the elements of a common law negligence case, including that their injury was proximately caused by the defendant's negligence. Watering down that requirement in the context of a system that offers full tort damages simply is inconsistent with prevailing compensation theory. At the same time, maintaining the opportunity for a full tort recovery while relaxing the requirement that proximate cause, as an element of negligence, must be properly proved does not meet the goal of fairness as between employer and employee that Congress sought to achieve in FELA. *See* H.R. No. 1386, at 5 ("What can be more fair than that each party shall suffer the consequences of his own carelessness?").

II. THE PROXIMATE CAUSE STANDARD WHICH CONGRESS INCORPORATED INTO FELA WAS LEFT INTACT BY THE 1939 AMENDMENTS

The Seventh Circuit suggested that amendments to FELA enacted in 1939 called for a more expansive view of the common law requirements that this Court had applied in earlier cases. *See McBride*, 598 F.3d at 395 (quoting Justice Douglas' observation that judicial interpretations in the "spirit" of the 1939 amendments had led to a "gradual liberalization" of FELA, with courts eschewing the "narrow technical

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motion phase). Typically, these efforts are foreclosed by judicial estoppel, leaving the former plaintiff with neither a job nor financial security.

approach of earlier years").[14] To the contrary, however, the 1939 amendments to FELA—enacted primarily to remove two specific obstacles to recovery by plaintiffs—did not purport to address, let alone modify, the standard of causation.

Though Congress never replaced FELA with a no-fault system under which rail workers would be guaranteed benefits if injured on the job, it did eventually take action to address specific aspects of FELA which were impeding the ability of injured workers to recover. In 1939, Congress amended FELA to ease the path toward recovery by modifying provisions of the statute that served to prevent some injured employees from recovering, either because they could not meet the strict test of interstate commerce or because the employer successfully argued that the employee had assumed the risk inherent in the employment. Prior to 1939, in order to recover, "the employee, at the time of the injury," had to be "engaged in interstate transportation, or in work so closely related to it as to be practically a part of it." *Shanks v. Delaware, Lackwanna & Western R.R.*, 239 U.S. 556, 558 (1916). In many cases, this enabled defendants to argue that the plaintiff did not come within the scope of FELA's protection. In addition, employer assertion of the assumption of the risk defense, which initially remained intact in other than safety law violation cases, often undermined the

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[14] *See also Richards*, 330 F.3d at 434 ("The *Rogers* Court adopted this relaxed standard in order to effectuate Congress' intent when it amended FELA in 1939."); *Morrison v. N.Y. Cent. R.R.*, 361 F.2d 319 (6th Cir. 1966) (stating that a charge to the jury on causation was consistent with the 1939 amendments to FELA).

comparative fault feature of FELA. *See Tiller*, 318 U.S. at 63-64.

Adding a provision to section 1 of FELA, the 1939 amendments expanded the scope of FELA's coverage so that workers would no longer have to prove they were engaged directly in interstate commerce at the time they were injured. Act of Aug. 11, 1939, c. 685, § 1, 53 Stat. 1404; *see* S. Rep. No. 661, at 2-3 (1939); *see also Southern Pac. Co. v. Gileo*, 351 U.S. 493 (1956); *Reed v. Pennsylvania R.R.*, 351 U.S. 502 (1956).[15] In addition, the 1939 amendments eliminated the defense of assumption of the risk in all cases. Act of Aug. 11, 1939, c. 685, § 1. The 1939 amendments also increased the statute of limitations under FELA from two to three years, *id.* at § 2, and prohibited railroads from establishing and enforcing rules which penalized employees for giving information concerning an accident to the injured person or his representative. *Id*. at § 3.

Tellingly, during the debate over the 1939 amendments a railroad employees' representative made it clear that in his view Congress had not eliminated the need for employees to prove proximate cause when it enacted FELA in 1908, nor did he urge Congress to do so in 1939. In testimony before the House of Representatives, the General Counsel of the Brotherhood of Railroad Trainmen commented that it

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[15] This amendment added the following language:

> Any employee of a carrier, any part of whose duties as such employee shall be in furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter.

was unnecessary to add the word "proximately" to a provision of the Act, explaining that such language would be "pure surplusage, because unless the negligence proximately caused the injury there can be no recovery."[16]

Congress incorporated common law proximate cause into FELA in 1908. That standard has not evolved, and there is no basis for suggesting that Congress or this Court intended that rail employees would have a lesser burden of proving causation 50 or 100 years after FELA was enacted than they had at the time of enactment.

III. PROXIMATE CAUSE REMAINS AN IMPORTANT AND VIABLE LEGAL CONCEPT WHICH CONTINUES TO APPLY TO BOTH FELA AND OTHER FEDERAL STATUTES

Proximate cause has long been recognized as an essential element of the law of negligence. "There is an underlying principle applicable to all cases of negligence, ... That is that the negligence proved against the defendant must, in order to justify recovery, be the direct or proximate cause of the injury, directly or proximately contributing to its result." *Florida Cent. & Peninsular R.R. v. Williams*, 20 So. 558, 563 (1896). Consistent with FELA's replacement of the traditional contributory negligence rule with a comparative negligence scheme (*supra* at p. 9), employer negligence need not be the sole proximate cause, but must be a proximate cause, of the injury.

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[16] *Hearings on H.R. 4988 and H.R. 4989 Before the Senate Comm. on the Judiciary*, 76th Cong., 1st Sess. 5 (1939) (statement of Tom J. McGrath, General Counsel, Brotherhood of Railroad Trainmen).

Funseth v. Great Northern Ry. Co., 399 F.2d 918, 920 (9th Cir. 1968) (approving jury instruction defining proximate cause as "a cause which in a direct, unbroken sequence produces the injury").

Not only has this Court held on numerous occasions that proximate cause applies in FELA cases [*see* Pet. Br. at 27-30], it has described that standard as requiring a degree of directness between a negligent act and the harm caused. In *Davis v. Wolfe*, 263 U.S. 239 (1923), this Court explained that "on the one hand, an employee cannot recover" if the employer's negligence or failure to comply with a safety statute

> 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. Twenty years later, this Court described the "proximate cause" standard as requiring a finding "that the injury was the natural and probable consequence of the negligence or wrongful act," adding that "[e]vents too remote to require reasonable prevision need not be anticipated." *Brady v. Southern Ry. Co.*, 320 U.S. 476, 483 (1943).

The requirement that there be a direct relationship between negligent conduct and the harm is not a technicality of a bygone era. Rather, proximate cause remains a useful and important concept that is a necessary condition for imposing liability for the consequences of wrongful acts. Other federal statutes which permit the recovery of damages and which,

like FELA, are derived from common law principles, incorporate proximate cause. This is so even where the statutory language can be broadly read and does not specifically refer to proximate cause.

For example, the federal antitrust laws, enacted during the same general time period as FELA, require a showing that the defendant's anticompetitive conduct proximately caused the plaintiff's harm. *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519 (1983). Similarly, proximate cause is an element of securities fraud and RICO claims. *Dura Pharm., Inc. v.* Broudo, 544 U.S. 336 (2005); *Holmes v. Sec. Investor Prot. Corp.*, 503 U.S. 258 (1992); *see also Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451, 461 (2006) ("When a court evaluates a RICO claim for proximate causation, the central question it must ask is whether the alleged violation led directly to the plaintiff's injuries.").

This Court also has held that proximate causation, and the related superseding cause doctrine, applies in admiralty cases. *Exxon Co., U.S.A. v. Sofec, Inc.*, 517 U.S. 830 (1996). Like FELA, admiralty adopts comparative fault principles, and this Court found proximate cause to be consistent with admiralty law's comparative negligence scheme. That suits in admiralty require a showing of proximate cause is particularly relevant to FELA, as this Court has looked to admiralty in determining the applicable principles in FELA cases. *See Norfolk & Western Ry. Co. v. Ayers*, 538 U.S. 135, 163 (2003) (citing the fact that joint and several liability was the traditional rule in admiralty as support for holding that FELA incorporates the doctrine of joint and several liability).

When FELA was enacted in 1908, Congress clearly intended to establish a remedial system to promote recovery. That is precisely why Congress chose explicitly to modify several of the existing common law doctrines that impeded recovery. But this Court has made it clear on more than one occasion that FELA's remedial purpose does not necessarily call for elimination of common law limitations on recovery unless there is a statutory basis for doing so. *See Sorrell*, 549 U.S. at 171 ("It does not follow, however, that this remedial purpose requires us to interpret every uncertainty in the Act in favor of employees.").

For example, in *Gottshall*, this Court rejected the Third Circuit's decision to disregard common law limitations on recovery for negligent infliction of emotional distress in order to promote FELA's preference for a liberal recovery. Instead, the Court held that FELA requires application of the common law zone of danger test, a test which ultimately resulted in both plaintiffs' claims being rejected. In *Metro North Comm. R.R. v. Buckley*, 521 U.S. 424 (1997), consistent with the policy considerations underlying the common law limitations on emotional distress claims, this Court denied recovery for negligent infliction of emotional distress to an asymptomatic plaintiff who was exposed to asbestos, rejecting plaintiff's argument that the "'humanitarian' nature of the FELA warrants" recovery. *Id*. at 438. Earlier, in *Monessen Southwestern R.R. v. Morgan*, 486 U.S. 330 (1988), this Court rejected the argument that to foster FELA's humanitarian purposes, prejudgment interest be permitted even though it was not available at common law when FELA was enacted.

* * *

When adjudicating FELA cases, courts and juries are obligated to undertake their tasks in accordance with the system enacted by Congress. This includes requiring plaintiffs to prove their injury was proximately caused by the defendant's negligence. The Seventh Circuit's failed to do so, as have many other lower courts over recent decades. This Court should reverse the decision below and issue instructions to lower courts clarifying that FELA must be interpreted to require that plaintiffs prove proximate cause as an element of their claim.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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