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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 ACADEMY OF RAIL LABOR ATTORNEYS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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Question Presented

What is the standard of causation in FELA cases?

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BRIEF OF THE ACADEMY OF RAIL LABOR ATTORNEYS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

INTEREST OF AMICUS CURIAE[1]

The Academy of Rail Labor Attorneys ("ARLA") is a national organization of trial lawyers specializing in FELA litigation. Members represent both union and non-union railroad workers who have been injured, as well as their families. ARLA also provides continuing legal education for practitioners and training for other interested parties. Importantly, ARLA members play a key role in federal and state courts throughout the country. Members use their vast experience to help the judiciary navigate the sometimes-complex contours of FELA law. For example, ARLA members regularly work hand-in-hand with judges to craft jury instructions in hopes of accurately conveying FELA law without confusing jurors. That experience makes ARLA members particularly suited to comment on Petitioner's recommendation that the Court adopt an unworkable standard for causation under FELA. ARLA is convinced that the Court must reaffirm its decisions on FELA causation and reject CSX attempts to inject a legalistic term into FELA's uniform framework.

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[1] No person or entity other than the Academy of Rail Labor Attorneys ("ARLA") has made a monetary contribution toward this Brief and no counsel for any party authored this Brief in whole or in part. A letter of universal consent has been filed by the Respondent granting consent to file *amicus curiae* briefs, and a letter of consent from Petitioner has been filed.

STATEMENT OF THE CASE

ARLA adopts the Statement of the Respondent.

SUMMARY OF THE ARGUMENT

Petitioner CSX asks this Court to usher an era of uncertainty into the nation's courts by placing its desire for a legalistic, undefined label over long-settled law. The standard for causation in FELA cases has been set and relied upon for more than a century. That standard was drafted by Congress and remains part of FELA's plain language. This Court has articulated that standard as whether "employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought." This standard remains the same regardless of the label attached to it. Put simply, the causation standard for FELA was long ago determined by statute and has been consistently interpreted by the decisions of this Court many times since.

CSX asks this Court to declare common-law proximate cause the standard under FELA, without offering any definition as to what the term means. Proximate cause can be used generically to indicate some limitation on responsibility or it can be used to specifically mean common-law proximate cause. CSX would have this Court purge all of its decisions recognizing a relaxed standard of causation, and revert back to a pre-FELA common-law proximate cause standard—something not intended by Congress

or cognizable in this Court's decisions. The danger confronting FELA parties and practitioners is not in labeling the standard. Rather, the peril lies in the confusion that will engross judges, attorneys, railroads, jurors, and injured workers should the Court declare proximate cause the standard without defining what the term means in the FELA context.

The parties offer facially conflicting interpretations of this Court's previous decisions regarding FELA causation. CSX highlights cases in which this Court used the term proximate cause. McBride proffers cases in which this Court clearly states that a relaxed standard of causation applies in FELA cases. This Court's decisions, however, do not conflict. CSX mistakenly assumes that this Court was referring to common-law proximate cause and not to the term in a generic sense indicating some limitation on responsibility. But this Court's pre-*Rogers* decisions using the term "proximate cause" explicitly recognized a relaxed standard of causation.

There is a substantial body of cases issued by this Court stating, both expressly and inferably, that a relaxed standard of causation applies to FELA. Perhaps it is more appropriate to say a relaxed standard of proximate causation applies to FELA. But CSX is not asking this Court to recognize a mere generic use of the term or even to define what causation in the FELA context means. Rather, CSX asks this Court to uproot FELA's long-settled causation standard and replace it with an undefined

legal term; presumably so that the railroad industry can mold it into the standard it actually wants.

This Court may ultimately recognize both a relaxed standard and the label of proximate cause. Defining the standard as it has in the past, but labeling it as proximate cause (in the generic sense) enables the Court to interpret its facially conflicted cases in a non-conflicting manner. Doing so maintains uniformity and ensures that the correct standard of causation—which this Court has ruled on time and again—is applied across the nation's courts.

ARGUMENT

I. This Court has developed a body of FELA jurisprudence recognizing a relaxed standard of causation, this standard remains the same regardless of the label attached to it.

This Court has built a body of precedent specific to FELA, as "it is up to the Court to develop and administer a fair and workable rule of decision." *Norfolk & W. Ry. Co. v. Ayers*, 538 U.S. 135, 176 (2002) (Kennedy, J., concurring). This relaxed standard courses through the veins of FELA's plain language and this Court's body of jurisprudence. The standard is derived from this Court's interpretation of FELA's "in whole or in part" statutory language. *See Consol. Rail Corp. v. Gottshall,* 512 U.S. 532, 543 (1994); *Crane v. Cedar Rapids & Iowa City Ry. Co.*, 395 U.S. 164, 166 (1969) (injured rail worker was "not

required to prove common-law proximate causation, but only that his injury resulted in 'whole or in part' from the railroad's violation of the Act"); *Gallick v. Balt. & Ohio R.R. Co.*, 372 U.S. 108, 120-21 (1963); *Rogers v. Mo. Pac. R.R. Co.,* 352 U.S. 500, 506 (1957). This Court has also referred to the term proximate cause in FELA decisions, albeit almost entirely in pre-*Rogers* decisions and without any analysis. All references by this Court to proximate cause as part of FELA have come in passing reference without fully exploring the legitimacy of the term "proximate cause" in FELA. Because those decisions also recognize a relaxed standard, logic implies that this Court's pre-*Rogers* decisions used the term in the generic sense to indicate a limitation applied, not in recognition of a common-law standard. But regardless of whether FELA causation is labeled "proximate cause," "legal cause," or "cause," the standard remains the same: whether "employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought."

A. This Court has repeatedly interpreted FELA as having a relaxed standard of causation.

FELA has incorporated a relaxed standard of causation since its inception. Many courts, commentators, and practitioners point to *Rogers* as the impetus for FELA's departure from common-law proximate cause. Complete reliance on *Rogers* for this proposition, however, is not needed. Instead,

drawing on this Court's earlier decisions, *Rogers* either simply restated the causation standard for FELA or defined a generic proximate cause standard as it applies to only FELA.

Looking at (1) this Court's pre-*Rogers* decisions and (2) this Court's post-*Rogers* decisions reveals that this Court has routinely recognized a relaxed causation standard under FELA.

1. *This Court recognized a relaxed standard of causation under FELA before deciding* Rogers.

This Court's recognition of a relaxed standard comes in the form of statutory interpretation. Principles of *stare decisis* are given their most profound deference when statutory interpretation is involved. *Ill. Brick Co. v. Illinois*, 431 U.S. 720, 736 (1977). Accordingly, this Court should follow the FELA relaxed causation standard which it has molded out of FELA's plain language.

Before *Rogers*, this Court interpreted FELA as requiring a relaxed causation standard. In *Coray v. Southern Pacific Co.*, the Court criticized the Utah Supreme Court for distinguishing between "'proximate cause' in the legal sense, deemed sufficient to impose liability, and 'cause' in the 'philosophical sense' deemed insufficient to impose liability." 335 U.S. 520, 523 (1949). The Court provided:

> The language Congress selected to fix liability in FELA is simple and direct. Consideration of its meaning by the introduction of dialectical subtleties can serve no useful interpretive purpose. [FELA] declares that railroads shall be responsible for their employees' deaths 'resulting in whole or in part' from defective appliances such as were here maintained.

Id. at 524.

Coray was not a novel decision. Ten years after FELA was enacted, this Court reviewed a jury instruction asking if a defect had contributed "in whole or in part" to a rail worker's injury. *Union Pac. R.R. Co. v. Huxoll*, 245 U.S. 535, 537 (1918). The Court held that the trial court charged the issue to the jury correctly. *Id.* at 538. A few months later, the Court decided *Union Pacific Railroad Co. v. Hadley*, 246 U.S. 330 (1918). In *Hadley*, the Court held that although the plaintiff's contributory negligence was deemed the last and most significant cause, "it would be emptying [FELA] of its meaning" to say that the plaintiff's harm "did not result in part" from the negligence of the railroad. *Id.* at 333. *Bailey v. Central Vermont Railway* also addressed the standard of causation for FELA claims. 319 U.S. 350 (1943).

Bailey, unskilled and unfamiliar with "hopper cars," died while opening a hopper car. *Id.* at 351-52. While opening the car, the wrench he was using spun and threw him into the road. *Id.* *Bailey* explicitly

stated, "Sec. 1 of the Act makes a carrier liable in damages for any injury or death 'resulting in whole or in part from the negligence' of any of its 'officers, agents, or employees.'" *Id.* at 353. Applying the written standards supplied by Congress, this Court concluded that the jury had sufficient evidence to find the defendant liable to Bailey. *Id.* at 354.

This Court further affirmed the relaxed causation standard of FELA claims shortly after *Coray* in *Carter v. Atlanta & St. Andrews Bay Railway Co.,* 338 U.S. 430 (1949). In *Carter*, this Court reversed a Fifth Circuit Court of Appeals case upholding a directed verdict for the defendant because the cause "was the remote, not proximate, cause of the plaintiff's injuries." *Id.* at 433. "Congress has directed liability if the injury resulted 'in whole or in part' from defendant's negligence or its violation of the Safety Appliance Act." *Id.*

Lower courts have also followed the guidance of the Supreme Court regarding a more relaxed causation standard before *Rogers*. In *Hodgman v. Sandy River & Rangeley Lake Railroad* the Maine Supreme Court stated that upon showing a defect under the Safety Appliance Act, the plaintiff needed to show that the defect "contributed in whole or in part" to produce the harm. 107 A. 30, 31 (1919). South Carolina's Supreme Court concluded that liability attaches under the Safety Appliance Act when a defect contributes "in whole or in part" to the plaintiff's harm. *Barton v. S. Ry. Co.* 171 S.E. 5, 6-7

(S.C. 1933). The *Barton* court recognized that the doctrine was "firmly established by decisions of the Supreme Court of the United States." *Id.* at 7. The Third Circuit Court of Appeals concluded that a defendant is liable under FELA for harm to a plaintiff "if it resulted 'in whole or in part' from the defendant's negligence." *Bartkoski v. Pittsburgh & Lake Erie R. Co.*, 172 F.2d 1007, 1009 (3d Cir. 1949). These cases demonstrate that the causation standard before *Rogers* had already been relaxed to reflect FELA's plain language.

In fact, so common was this view that in 1956, a year before *Rogers*, two prominent legal publications recognized that the most important deviation FELA made from the common law was implementing a relaxed standard of causation. Professor Leon Green, a nationally recognized tort scholar, wrote for the Yale Law Journal, and another article appeared in the Harvard Law Review.[2] An overview of these respective articles offers insight into the state of FELA causation before *Rogers*:

Yale Law Journal:

- The "proximate cause" issue in [cases] under the statute is restricted to causal relation "in whole or in part."

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[2] This article was relied upon in *Rogers* for the proposition that lower courts' failure to recognize FELA's departure from the common law has required this Court to review a large number of cases to correct the problem. *See Rogers*, 353 U.S. at 509-10, n.24.

- The endless and useless confusion developed by many of the common law courts about the term "proximate cause" is sedulously avoided.

Leon Green, *Jury Trial and Mr. Black*, 65 Yale L.J. 482, 489-90 (1956).

Harvard Law Review:

- The Court has relaxed the requirements for submission of a case to the jury with respect to the kind of conduct which violates the railroad's duty of care to the employee and to which the employee's injury may be attributed.

- Traditionally . . . a verdict may be directed if the judge believes a reasonable jury could not find proximate cause. However, recent FELA decisions indicate that the jury must now be given wider latitude.

- The Court has justified its position by reference to the liberal policy toward the worker which underlies FELA.

Note, *Supreme Court Certiorari Policy in Cases Arising Under the FELA*, 69 Harv. L. Rev. 1441, 1148-50 (1956).

CSX obscures this pre-*Rogers* framework by plucking portions out of Justice Souter's concurrence in *Sorrell* to support the proposition that *Rogers* did not remove proximate cause from FELA. But this Court's pre-*Rogers* cases had already interpreted

FELA as having a relaxed standard of causation. *Rogers*, if anything, merely illuminated this Court's earlier decisions. Because the focus in *Sorrell* was not on FELA causation, the parties devoted little or no attention to this Court's pre-*Rogers* string of cases. Without the issue before it and without the advantage of the parties briefing the subject, the Court in *Sorrell* saw little need to reexamine its pre-*Rogers* cases. Justice Souter's comment that "*Rogers* is an authority for nothing less than that proximate cause applies to FELA cases," does not conflict with these earlier decisions. Rather it merely confirms that if a concept such as proximate cause belongs in FELA, it must be defined within the confines of FELA's plain language and this Court's FELA jurisprudence.

2. *A relaxed standard has been continuously recognized in this Court's post-*Rogers *decisions.*[3]

This Court never renounced a relaxed standard after *Rogers*. In fact, quite the opposite occurred. For example, in *Crane v. Cedar Rapids & Iowa City Railway Co.*, this Court explicitly said injured workers are "not required to prove common-law proximate causation but only that his injury resulted 'in whole or in part' from the railroad's" negligence." 395 U.S. at 166. Many other cases, e.g. *Gottshall, Ayers,* and *Gallick*, restate the same principle.

[3] Because the parties extensively briefed this Court's post-*Rogers* decisions, they are not reanalyzed here.

No justification exists for this Court to overturn its substantial jurisprudence defining FELA's causation standard. Justice Souter's concurrence even went to lengths to limit the discussion to only *Rogers*. *Sorrell*, 549 U.S. at 177 (Souter, J., concurring). This Court's pre-*Rogers* decisions were sparsely briefed in *Sorrell* and, unsurprisingly, received only a glance in Justice Souter's concurrence. Limited discussion of one case within one concurrence does not provide justification for overturning a century's worth of jurisprudence.

3. *FELA's relaxed standard of causation does not equate to an unrestrained "but for" causation test.*

FELA employs a relaxed standard of causation; it does not dispense with need to prove causation. CSX and the railroad industry argue that FELA constitutes an unrestrained framework for injured rail workers, resembling a workers' compensation scheme. But a relaxed standard is still a standard, and FELA resembles nothing of a "no-fault system" as the railroad industry claims. For example, in *Inman v. Baltimore & Ohio Railroad Co.*, this Court recognized FELA's relaxed standard, but upheld a reversal based on the lack of a sufficient causal relationship. 361 U.S. 138, 139-40 (1959). *Inman* recognized some slight evidence of causation, but concluded that it was "so thin that, on judicial appraisal, the conclusion must be drawn that negligence on the part of the railroad could have

played no part in petitioner's injury." *Id.* at 140. The Ninth Circuit, after recognizing that FELA causation is "less than it is in a common law tort action," concluded that plaintiff still needed to prove a causal relationship between the railroad's negligence and his injuries. *Claar v. Burlington N. R.R. Co.*, 29 F.3d 499, 503 (9th Cir. 1994). But the court noted, "this does not mean, however, that FELA plaintiffs need make no showing of causation . . . FELA plaintiffs still must demonstrate some causal connection between a defendant's negligence and their injuries." *Id.* Another example is *Higgins v. Metro-North Railroad Co.*, 318 F.3d 422, 426 (2d Cir. 2003), where the trial court granted summary judgment in Metro-North's favor because an employee's actions were too remote to apply under FELA's relaxed standard. While these cases resulted in a finding of no causation because the plaintiffs' claims were too remote, they also restated that a relaxed standard applies in FELA. More importantly, they show that that FELA's relaxed standard cuts off claims which are too remote. Decisions like these show that FELA has not morphed into a quasi-workers' compensation scheme.

B. This Court's decisions recognizing a relaxed causation standard do not conflict with pre-*Rogers* decisions using the phrase "proximate cause."

At first glance, it appears the parties' arguments are inherently conflicted. McBride argues for a

relaxed standard. CSX argues that proximate cause is the standard. CSX then takes the position that if proximate cause is the standard then McBride's proffered jury instruction was erroneous. This simply is not the case.

If at all possible, this Court's decisions must be reconciled, even if facially conflicted. *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 99-100 (1990) (White, J., concurring) ("the doctrine of *stare decisis* demands that we attempt to reconcile our prior decisions rather than hastily overrule some of them"). Here the parties' positions are logically reconcilable.

Courts use the term "proximate cause" to "label generically the judicial tools used to limit a person's responsibility for the consequences of that person's own acts." *Holmes v. Sec. Investor Prot. Corp.*, 503 U.S. 258, 268 (1992). This generic label of proximate cause does not conflict with FELA's relaxed standard of causation. Rather, it is correctly read that any references in this Court's pre-*Rogers* decisions to the term were to the generic concept of proximate cause. Any reference to proximate cause, even in this generic sense, must be limited to how it has been *specifically defined in this Court's FELA decisions only*.

For CSX's argument that McBride's instruction was erroneous to hold true, proximate cause in the FELA-specific context must not be a relaxed standard. Even if this Court were to follow Justice

Souter's concurrence from *Sorrell*—that *Rogers* did not eliminate proximate cause—the Court must not ignore its holdings both pre- and post-*Rogers*. Instead, the Court should look to its decisions, e.g., *Crane*, *Gallick*, and *Gottshall*, to determine whether a relaxed standard applies.

But these decisions need not have excised the generic concept of proximate cause from FELA for a relaxed to standard to apply. "It would be more accurate . . . to recognize that *Rogers* describes the test for proximate causation applicable in FELA suits. That test is whether 'employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought.'" *Sorrell*, 549 U.S. at 812-13 (Ginsburg, J., concurring). The statements of this Court are easily reconciled by viewing its holdings as recognizing a generic concept of proximate cause, merely that there is some limitation for recovery based on remoteness.

At this point, nothing is gained by labeling FELA standard of causation "proximate cause," even in the generic sense. Doing so only invites misuse of the term which defies FELA's long-settled causation standard. Contrary to CSX's position, the FELA causation standard is what matters, not the label attached to it.

C. The Seventh Circuit, through its model jury instructions, already has a system reconciling the term "proximate cause" with FELA's relaxed standard; this Court should follow the Seventh Circuit's lead.

The Court need only look to the Seventh Circuit, from whence this case came, to see that the label proximate cause is area-of-law specific and can easily be reconciled with this Court's FELA jurisprudence.

To begin, the Seventh Circuit refuses to provide a model instruction for proximate cause. The Committee Comments specify several reasons for this:

- The Committee included no general instruction regarding "proximate cause" because these terms are not uniformly defined. 7th Cir. Pattern Civil Jury Instr. § 1.30 cmt. a. (2009 rev.) (reprinting 2008 revision of Instruction No. 9.02).

- There is no consistent causation standard for either federal or state claims. *Id.*

- The state law standards on causation vary widely and are subject to change. *Id.*

- Therefore, a court must use only the correct definition for the issues before it. *Id.*

The Seventh Circuit, consistent with its recognition that causation standards must be specific to the

issues before it, offers a FELA-specific causation instruction. The trial court correctly used this FELA-specific causation instruction. That instruction reads:

> Defendant "caused or contributed" to Plaintiff's injury if Defendant's negligence played a part—no matter how small—in bringing about the injury. The mere fact that an injury occurred does not necessarily mean that the injury was caused by negligence. 7th Cir. Pattern Civil Jury Instr. § 9.02 (2009).

Again, instructing the jury on the proper standard is what is important; not labeling that standard. The Seventh Circuit has expressly defined FELA's causation standard and implemented that definition into its jury instructions.

Several states have followed a similar approach. The Iowa Supreme Court noted that the standard is whether the railroad's "negligence proximately caused, in whole or in part, the accident . . . or more precisely enough to justify a jury's determination that employer negligence had played *any* role in producing the harm." *Snipes v. Chi., Cent. Pac. R.R. Co.,* 484 N.W.2d 162, 165 (Iowa 1992). The Kentucky Supreme Court has expressed its concern regarding the term proximate cause in its jury instructions, noting that only the standard—not a label—should be given to jurors. *CSX Transp., Inc. v. Begley*, 313 S.W.3d 52, 63-64 (Ky. 2010).

The Seventh Circuit's direction provides this Court with a clear, logical pathway for reconciling the common-law term proximate cause with FELA's relaxed standard of causation. Put simply, FELA's causation standard is a more relaxed standard than common-law proximate cause. This relaxed standard is specific to FELA, and this Court need not make any comment or judgment on its interpretation of proximate cause in other contexts.

Further, even if the FELA causation standard were properly labeled "proximate cause" in the generic sense, the jury below was instructed correctly because the Seventh Circuit correctly tracked FELA's plain language and this Court's articulation of that plain language. Because the jury was instructed on the correct causation standard, not labeling it "proximate cause" was not reversible error. *See Boyd v. Ill. State Police*, 384 F.3d 888, 894 (7th Cir. 2004) (we review jury instructions only to determine if taken as a whole they correctly informed the jury of the applicable law).

II. CSX asks this Court to supplant a stable, uniform standard and replace it with turmoil by attaching an undefined label to FELA causation.

One of the core objectives of Congress in enacting FELA was to secure a uniform framework for protecting injured rail workers. *Chi. Milwaukee & St. Paul Ry. Co. v. Coogan*, 271 U.S. 472, 474 (1926).

This objective has been readily accomplished. In the statutory context, *stare decisis* is vital where this Court's decisions have been acted upon to create a uniform standard and changing that standard would dislodge settled rights and expectations. *Hilton v. S.C. Pub. Ry. Comm'n*, 502 U.S. 197, 202 (1991). Introducing a tortured concept such as proximate cause without defining it would do just that.

It cannot legitimately be argued that proximate cause has engendered anything less than a plagued history or that courts have not struggled with defining the concept. Declaring proximate cause the standard without first defining it will have a disparate, harsh impact on injured rail workers. This is exactly the result Congress sought to avoid by establishing FELA.

The following exemplify the uniformity FELA currently enjoys: (a) the model jury instructions crafted by the federal appellate circuits and individual states; (b) the apposite cases from each federal appellate circuit; and (c) the apposite cases from the majority of states.

A. The pattern jury instructions of all Federal Circuits and States recognize a relaxed standard of causation.

Currently, five Federal Circuits have constructed model or pattern FELA jury instructions. All five of these instruction sets recognize a relaxed standard of causation:

- Fifth Circuit Court of Appeals: "Negligence is a legal cause of damage if it played any part, no matter how small, in bringing about or actually causing the injury or damage." 5th Circuit Pattern Jury Instr. – Civil 5.1 (2009).

- Seventh Circuit Court of Appeals: "Defendant 'caused or contributed' to Plaintiff's injury if Defendant's negligence played a part—no matter how small—in bringing about the injury. The mere fact that an injury occurred does not necessarily mean that the injury was caused by negligence. 7th Cir. Pattern Civil Jury Instr. § 9.02 (2009).

- Eighth Circuit Court of Appeals: "Such negligence resulted in whole or in part in injury to the plaintiff." 8th Cir. Civil Jury Instr. § 7.01 (2008).

- Ninth Circuit Court of Appeals: "Negligence is a cause of an injury if it played any part, no matter how slight, in bringing about the injury or damage, even if the negligence operated in combination with the acts of another, or in combination with some other cause." 9th Cir. Civil Jury Instr. § 6.4 (2007).

- Eleventh Circuit Court of Appeals: "[N]egligence is a 'legal cause' of damage if it played any part, no matter how small, in bringing about or actually causing the injury or damage." 11th Cir. Pattern Jury Instr. § 7.1 (2005).

Currently, seven States have model FELA instructions. All of these instructions recognize a relaxed standard of causation:

- Alabama: "[S]uch negligence must be the proximate cause, in whole or in part, of the injury . . . damages must be caused, in whole or in part, as a direct result of the negligence complained of." Ala. Pattern Jury Instr. Civil 2d. 17.12 (2009).
- California: "[A]n act of omission that plays any part, no matter how small, in actually bringing about the injury, is a cause of that injury." Cal. Civil Jury Instr. 11.14 (2010).
- Illinois: "[W]henever an employee of a railroad is injured . . . the railroad shall be liable in damages where the injury results in whole or in part from the negligence [of the railroad]." Ill. Pattern Instr. – Civil 160.01 (2009)
- Kansas: The railroad "shall be liable for damages whenever . . . injury results in whole or in part from the negligence [of the railroad]." Pattern Instr. Kan. – Civil 132.01 (2008).
- Missouri: "[S]uch negligence resulted in whole or in part in injury of [the plaintiff]." Mo. Approved Jury Instr. 24.01 (2011).
- Montana: "For purposes of this case, an act or failure to act is the cause of an injury if it plays

a part, no matter how small, in bringing about the injury. Mont. Pattern Instr. Civil 6.05 (2003).

- New York: "[T]hat the negligence play some part, however slight, in causing the incident in which [plaintiff was injured]." N.Y. Pattern Jury Instr. 2:180 (2011).

B. Seminal cases in all Federal Circuits have held that a relaxed standard of causation applies to FELA.

Every Federal Appellate Court that hears FELA cases has had the opportunity to decide the causation standard in FELA cases. Taking its cue from this Court, every circuit recognizes that a relaxed standard belongs in FELA:

- *Moody v. Bos. and Me. Corp.*, 921 F.2d 1, 4 (1st Cir. 1990): "The test for . . . causation is 'whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury."

- *Ulfick v. Metro-N. Commuter R.R.*, 77 F.3d 54, 58 (2d Cir. 1996): The test is whether "employer negligence played any part, even the slightest, in producing the injury . . . Thus, an employer may be held liable under FELA for risks that would otherwise be too remote to support liability at common law."

- *Pehowic v. Erie Lackawanna R.R. Co.*, 430 F.2d 697, 699 (3d Cir. 1970): Citing *Rogers*, the court stated that an employer is liable if the injury was caused in whole or in part by its negligence.

- *Aldridge v. Balt. & Ohio R.R. Co.*, 789 F.2d 1061, 1065 (4th Cir. 1986): The court was unable to find error in the trial court not ruling that, as a matter of law, the railroad's negligence did not "play [] *any* role in producing the harm."

- *Comeaux v. T.L. James & Co.*, 702 F.2d 1023, 1024 (5th Cir. 1983) (*per curiam*): FELA's relaxed standard "incorporates any cause regardless of immediacy."

- *Szekeres v. CSX Transp., Inc.*, 617 F.3d 424, 430 (6th Cir. 2010): "On the question of causation, courts 'focus on whether a reasonable jury could conclude that the defective appliance played *any* part, even the slightest, in bringing about the plaintiff's injury.'"

- *Coffey v. Ne. Ill. Reg'l Commuter R.R. Corp.*, 479 F.3d 472 (7th Cir. 2007): Court affirmed that relaxed standard applies to causation but not negligence.

- *Wright v. Ark. & Mo. R.R. Co.*, 574 F.3d 612 (8th Cir. 2009): Court held that relaxed

causation jury instructions did not abuse trial court's discretion since the same standard of causation applied to plaintiff and defendant.

- *Armstrong v. Burlington N. R.R. Co.*, 139 F.3d 1277, 1279 (9th Cir. 1998): Under FELA, liability may be imposed on an employer where their negligence played any part, even the slightest, in producing the injury.

- *Standard v. Union Pac. R.R. Co.*, 34 Fed. App'x 629, 632 (10th Cir. 2002): The court stated that negligence and causation is established in a FELA if the defendant's acts played any part "even the slightest" in producing the injury.

- *Nichols v. Barwick*, 792 F.2d 1520 (11th Cir. 1986): The burden on the plaintiff for "proximate cause" under the Jones Act is very light.

- *Nat'l R.R. Passenger Corp. v. McDavitt*, 804 A.2d 275, 283 (D.C. 2002): "FELA allows a railroad employee to recover damages for work-related injuries 'resulting in whole or in part' from the negligence of the railroads's agents or from 'any defect or insufficiency' in the railroad's equipment due to its negligence."

C. The majority of State supreme courts have held that a relaxed standard of causation applies to FELA and those States with pattern FELA instructions all recognize a relaxed standard of causation.

The vast majority of the highest courts in each State recognize relaxed FELA causation. Even after *Sorrell*, all but one State supreme court has found that a relaxed standard applies to FELA:

- *Cheff v. BNSF Ry. Co.*, 243 P.3d 1115, 1122 (Mont. 2010): "An employee is entitled to recover damages under FELA as long as his or her employer's negligence played any role in producing his or her injuries."

- *CSX Transp., Inc. v. Miller*, 46 So. 3d 434, 461 (Ala. 2010): "Under this statute the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought."

- *Kennedy v. Ill. Cent. R.R. Co.*, 30 So. 3d 333, 336 (Miss. 2010): "FELA supplants an employer's common law duty with a far more drastic duty of paying damages for injury or death at work due in whole or in part to the employer's negligence."

- *Deviney v. Union Pac. R.R. Co.*, 786 N.W.2d 902, 906 (Neb. 2010): "Under FELA, railroad companies are liable in damages to any

employee who suffers injury during the course of employment when such injury results in whole or in part due to the railroad's negligence."

- *CSX Transp., Inc. v. Begley*, 313 S.W.3d 52, 63-64 (Ky. 2010): Upholding a jury instruction which advised "It is not enough to show that the Defendant's negligence, if any, was an indirect or remote cause of his injury." (internal quotation marks omitted).

- *Mills v. CSX Transp., Inc.*, 300 S.W.3d 627, 634 (Tenn. 2009): "[C]laimant [must] prove that the employer's negligence 'played any part, even the slightest, in producing the injury . . . for which damages are sought."

- *Montgomery v. CSX Transp., Inc.*, 656 S.E.2d 20 (S.C. 2008): Distinguishing between the standard for causation and negligence, court that FELA causation has a relaxed standard, but negligence does not.

- *Sorrell v. Norfolk S. Ry. Co.*, 249 S.W.3d 207 (Mo. 2008): On remand, Missouri's Supreme Court noted that they had approved new jury instructions due to this Court's ruling in *Sorrell*. The pattern instructions which were crafted after this Court's Sorrell decisions now instruct the jury that causation of both parties is to apply "in whole or in part."

- *Martin v. CSX Transp., Inc.*, 922 N.E.2d 1022 (Ohio Ct. App. 2009): The court refused to change from a relaxed causation standard to

proximate cause unless this Court expressly overrules relaxed causation under FELA.

- *Wilson v. BNSF Ry. Co.*, 215 P.3d 648 (Kan. App. 2009): Holding for relaxed causation.

These cases are merely the tip of the iceberg. Recorded and unrecorded decisions at the trial level relying on a relaxed standard are too numerous to review here. Indeed, this is where the impact of an undefined causation standard would be felt the most. Every case faces this issue. An undefined proximate cause standard would create countless controversies in trial courts and embroil appellate courts with waves of FELA cases. Ultimately, this Court might be forced to review the issue again if it is not thoroughly decided here.

III. Because this Court's decisions have evoked a uniform reliance on a relaxed standard of causation, declaring proximate cause the standard would result in turmoil.

The issue before this Court is one of pure "statutory construction, where the doctrine of *stare decisis* is most compelling." *Hilton*, 502 U.S. at 205. The doctrine has added force when people have acted in reliance on previous decisions. *Id.* at 202. Specifically, the issue presented to this Court is whether it should reexamine its longstanding statutory interpretation of FELA as requiring a relaxed standard of causation. Given the unreserved

reliance on this standard by courts, practitioners, railroads, and most importantly, injured workers, giving the utmost deference to the principles of *stare decisis* is warranted. This is particularly true given the consequences of accepting CSX's proposal.

CSX's proposition of declaring proximate cause the standard under FELA without defining is chilling. Proclaiming an undefined proximate cause as the FELA standard would have one of two dire consequences.

The first possible consequence is that State and Federal courts would be attempting to discern what proximate cause meant when FELA was enacted in 1908. This is a particularly daunting task considering courts have struggled fiercely with defining the slippery concept of proximate cause. This was particularly true before the New York Court of Appeals decided *Palsgraf v. Long Island Railroad* in 1928. 162 N.E. 99 (N.Y. 1928). It is impossible to imagine any scenario in which diverse courtrooms across the nation would interpret the 1908 common law uniformly. Additionally, were this possible, it would place a significant, unnecessary burden on the judges, practitioners, railroads, and injured rail workers who currently enjoy a uniform standard.

The second possible consequence is that every jurisdiction will interpret proximate cause based on its own definition. This will have the unintended consequences of both ignoring the common law at the

time FELA was enacted and ensuring a complete lack of uniformity across the nation. Ultimately, FELA cases will be tried based on each individual State's common law. This, of course, conflicts with the intent of the statute and disrupts the deference federal statutes are due over State common law. *Hilton*, 502 U.S. at 206.

Under both scenarios, juror confusion will be a problem. Jurors sifting through instructions will struggle with the term, just as judges and practitioners have. This warns strictly against using even the generic term of "proximate cause." "Noting the difficulty of defining proximate cause clearly in FELA cases . . . it would be better if no mention of proximate cause whatever was made to the jury. *Begley*, 313 S.W.3d at 63. Instead simply instructing the jury on the FELA causation standard is appropriate, that is: whether "employer negligence played any part, even the slightest, in producing the injury" complained of. *Id*.

CSX and the railroad industry essentially seek to enlist confusion as their ally in their assault on FELA by introducing an undefined term into an existing, stable framework. CSX even argues against applying its own proposed proximate cause instruction. The remedial nature of FELA will be ruthlessly undermined if railroads are allowed to cultivate favorable proximate cause instructions and introduce them within the framework of FELA. Like an exotic species invading a stable environment, introducing

harsh definitions into FELA could steadily replace the existing causal framework and significantly alter FELA's remedial nature and, in practice, abolish notions of pure comparative fault.

For example, in jurisdictions defining proximate cause as a "substantial" or "significant" cause, considerable danger threatens FELA's pure comparative fault requirements. The problem occurs in cases in which the plaintiff is appreciably, but not completely, at fault. For instance, in cases in which the plaintiff is 90% at fault, it is easy to imagine jurors confusing "significant" or "substantial" causation language as requiring non-recovery for the plaintiff.

The railroad industry goes a step further by meandering around any issue properly before this Court and instead blatantly begging for FELA to be replaced by a workers' compensation system. Apparently unsatisfied with its attempts at asking Congress to rewrite FELA, it is now asking this Court to do so. CSX and the railroad industry should not be allowed to utilize this case as a vehicle to fundamentally alter the governing principles of FELA. The reliance placed on this Court's previous decisions only heightens the peril.

CONCLUSION

CSX and the railroad industry ask this Court to introduce chaos into our courts. FELA practitioners, judges, railroads, and injured railroad workers rely on FELA's uniform relaxed causation standard. This Court shaped this standard by interpreting FELA's plain language, which Federal and state jury instructions now uniformly integrate. CSX would have this Court label the causation standard as "proximate cause" without defining the term. Proximate cause is a legal term of art which has confounded both bench and bar, and not least of all jurors. CSX and the railroad industry are attempting to use confusion as an instrument to declaw the FELA. Essentially, CSX asks this Court to do what Congress has repeatedly refused to do: rewrite FELA.

A relaxed standard was recognized before *Rogers* and has been consistently recognized by this Court since. Principles of *stare decisis* are at their apex in situations such as this where this Court is asked to reexamine its longstanding interpretation of statutory language. The Seventh Circuit provides a framework for reconciling this Court's facially conflicting statements regarding a generic concept of proximate cause and FELA's relaxed causation standard. Courts and practitioners can safely use the label proximate cause only if the term is used in the generic sense and it can be expressly tailored to accurately reflect the plain language of the statute. This Court has repeatedly defined FELA causation as

relaxed. There is no justification for deviating from this definition. Attaching a label to FELA causation does not change that standard.

Respectfully submitted,

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