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 FOR RESPONDENT

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QUESTION PRESENTED

Section 1 of the Federal Employers' Liability Act ("FELA") allows rail workers to recover for injuries or death "resulting in whole or in part from" their employers' negligence. 45 U.S.C. § 51. This case presents the following question:

Whether, as this Court has held repeatedly for more than 50 years, FELA § 1 enacted a uniform, relaxed causation standard distinct from the various standards of common-law "proximate cause" that courts had inconsistently applied in pre-FELA negligence cases.

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INTRODUCTION

Congress enacted the Federal Employers' Liability Act ("FELA") in 1908 to provide a uniform national negligence cause of action for rail workers against their employers. FELA abrogated certain common-law doctrines that had restricted an injured employee's ability to recover damages, such as when a fellow worker contributed to the negligence (the "fellow servant rule"), the employee himself was negligent ("contributory negligence"), or the worker assumed the risk of injury ("assumption of the risk"). For causation, Congress used special words to create a governing standard: "injury or death *resulting in whole or in part from* the negligence" of the railroad or its agents. 45 U.S.C. § 51 (emphasis added).

In both 1908 and the century that followed, courts were unable to agree on the meaning of "proximate cause" in tort cases. That disagreement reflects competing legal policy judgments as to when acts traceable to a defendant's misconduct nonetheless should not be redressable in a negligence action by an injured plaintiff. During that period of ferment for the law of torts, this Court has accommodated the idea of "proximate cause" under FELA by tying it to the words of causation explicitly chosen by Congress —"resulting in whole or in part from." Those words have no common-law antecedent and, indeed, represent a significant departure from any of the proximate-cause formulations advanced by various courts in the years before (and after) FELA's enactment. In the decades since this Court's seminal decision in *Rogers v. Missouri Pacific Railroad Co.*, 352 U.S. 500 (1957), definitively resolved FELA's causation standard, every federal and virtually every state jurisdiction has implemented *Rogers* in the same

manner in its jury instructions. Congress has not made any change to the causation language in FELA in response to that judicial consensus.

In this case, petitioner CSX seeks to upset decades of settled law on the proper jury instructions on causation in a FELA case. Petitioner asks this Court to hold that the jury instructions given in respondent's case were deficient because they did not require a finding of "proximate cause." Notably, petitioner concedes that it asks the Court not to adopt any precise formulation for "proximate cause" under FELA but rather to leave the lower courts to figure out which among the many different tests used in common-law cases is the proper one. If accepted by this Court, that approach would open thousands of cases to appellate litigation over which proximate-cause instruction best comports with Congress's intent, notwithstanding the lack of a settled common-law proximate-cause standard and Congress's decision not to incorporate any of the prevailing formulations. Given the conceptual difficulties inherent in proximate cause as a judge-made legal policy limitation, such an endeavor is bound to create confusion and disuniformity where none currently exists.

This Court should reject CSX's invitation to alter settled law so dramatically. *Rogers* has proved a stable precedent. Petitioner can point to no cases decided under the settled pattern FELA instruction —which borrows from the plain language of FELA and this Court's *Rogers* decision—that are so far outside the bounds of reasonableness that some extra-strength common-law notion of proximate cause should operate to limit liability in those rare instances. In this case, the jury attributed responsibility to both the railroad and the worker in precisely the manner

contemplated by Congress a century ago. That judgment should be upheld.

STATEMENT

Background of FELA

Congress enacted FELA "to change the common-law liability of employers of labor in this line of commerce, for personal injuries received by employees." H.R. Rep. No. 60-1386, at 1 (1908). At that time, "railroads were the largest employer in the United States." U.S. General Accounting Office, *Federal Employers' Liability Act: Issues Associated With Changing How Railroad Work-Related Injuries Are Compensated* 13 (Aug. 1996) ("*GAO Report*"). They were also among the most dangerous, just as they are today: "[i]n 1888 the odds against a railroad brakeman's dying a natural death were almost four to one," and "the average life expectancy of a switchman in 1893 was seven years." *Brotherhood of R.R. Trainmen v. Virginia ex rel. Virginia State Bar*, 377 U.S. 1, 3 (1964); *see* Dino Drudi, *Railroad-Related Work Injury Fatalities*, Monthly Lab. Rev., July/Aug. 2007, at 17 (noting that the railroad industry has a "fatal injury rate more than twice the all-industry rate"). In the late nineteenth century, President Harrison compared the plight of the railroad worker to that of "a soldier in time of war" and called it "a reproach to our civilization" that rail workers were "subjected to [such] peril of life and limb." *Johnson v. Southern Pac. Co.*, 196 U.S. 1, 19 (1904).

Congress responded with legislation that overturned harsh judge-made limitations on common-law negligence liability that routinely resulted in denying recovery to employees for railroads' failure to exercise ordinary care. FELA imposed a new statutory framework that was intended not only to compensate

injured rail workers, but also to induce self-regulation by the railroads. *See* S. Rep. No. 60-460, at 2 (1908) (indicating that FELA was designed "to allow the burden of accident and misfortune to fall, not upon a single helpless family, but upon the business in which the workman is engaged"); *Jamison v. Encarnacion*, 281 U.S. 635, 640 (1930) (FELA "is intended to stimulate carriers to greater diligence for the safety of their employees and of the persons and property of their patrons").[1]

FELA contains three principal provisions that overrode pre-existing common-law rules.

First, FELA supplanted the common-law contributory-negligence doctrine, under which a plaintiff's negligence operated as a complete bar to recovery, even if the defendant was also negligent, and instead provided that the employee's recovery would be reduced in proportion to his negligence. *See* 45 U.S.C. § 53; S. Rep. No. 60-460, at 2 ("It is the purpose of this measure to modify the law of contributory negligence.").

Second, FELA eliminated the railroads' common-law defense of "assumption of the risk." 45 U.S.C. § 54.[2] Employers may no longer avoid liability on the

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[1] Congress subsequently has reiterated its "clear intent, encouragement, and dedication . . . to the furtherance of the highest degree of safety in railroad transportation." 49 U.S.C. § 103(c).

[2] FELA originally eliminated that defense only "where the violation . . . of any statute enacted for the safety of employees contributed to the injury or death of such employee." Act of Apr. 22, 1908, ch. 149, § 3, 35 Stat. 65, 66. In 1939, Congress completely eliminated the assumption-of-the-risk defense by precluding its application "in any case where [the] injury or death resulted in whole or in part from the negligence of" the railroad's agents. Act of Aug. 11, 1939, ch. 685, § 1, 53 Stat. 1404, 1404.

ground that unsafe work conditions were known to their injured employees.

Third, FELA § 1 provided for recovery by rail workers for any "injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier." 45 U.S.C. § 51. That section is significant in two respects: (1) it abrogated the common-law fellow servant rule, under which employers were not liable "for injuries sustained by one employee through the negligence of a coemployee," S. Rep. No. 60-460, at 1, and (2) it specified the FELA causation standard by providing that employees can recover for any injury or death "resulting in whole or in part from" the negligence of the railroad or its agents.

"Proximate Causation" in Pre-FELA Negligence Law

When Congress enacted FELA's causation standard, it legislated at the apex of judicial and scholarly disagreement about the causal link required for a plaintiff to recover in tort for damages produced by another's negligence.[3] Although judges and scholars used "proximate cause" as a generic legal term for a sufficient causal nexus, that superficial consensus belied pervasive conceptual uncertainty and inconsistent judicial application.[4] For example, one treatise

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[3] *See, e.g.*, Jeremiah Smith, *Legal Cause in Actions of Tort* (I and II), 25 Harv. L. Rev. 103, 223 (1911); Joseph W. Bingham, *Some Suggestions Concerning "Legal Cause" at Common Law* (I and II), 9 Colum. L. Rev. 16, 136 (1909); Francis H. Bohlen, *The Probable or the Natural Consequence as the Test of Liability in Negligence* (I and II), 49 Am. L. Reg. 79, 148 (1901).

[4] *See*, *e.g.*, *Ehrgott v. City of New York*, 96 N.Y. 264, 280 (1884) ("These various modes of stating the rule are all apt to be misleading, and in most cases are absolutely worthless as guides to the jury."); I Thomas G. Shearman & Amasa A. Red-

observed "great confusion as to the test to be applied in determining whether defendant's wrong is the legal cause of plaintiff's ensuing injury." Francis M. Burdick, *The Law of Torts* 32 (4th ed. 1926). In 1929, the Connecticut Supreme Court remarked:

> Few subjects in the law in the past 30 years have been written upon more extensively by the greatest thinkers in the field of torts than that of "Proximate Cause." These writers differ widely in their reasoning and conclusions, but are in agreement in the conclusion that judicial reasoning and discussion of this subject has left our law in a most uncertain and unsound condition.

Mahoney v. Beatman, 147 A. 762, 764-65 (Conn. 1929).

In their struggle to define "proximate cause," judges and scholars articulated widely differing formulations for the causal link necessary for recovery in negligence. Burdick saw the "broad cleavage" as being "between those who would make one liable when his wrong is the 'direct' cause of another's harm, and those who would make foreseeability the test of liability for wrongful acts and omissions." Burdick at 32. Another treatise saw the division as between cases holding a defendant responsible for foreseeable damages, for "all damages which do in fact result from his wrongful acts," or for "damage as is known by common experience to usually follow such a wrongful act." I Shearman & Redfield at 29-

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field, *A Treatise on the Law of Negligence* 30-31 (5th ed. 1898) ("So much difficulty, indeed, has been felt in attempting to lay down a rule to cover all possible cases, that some of the ablest judges have declined to state any fixed rule, and have indicated a disposition to leave all doubtful cases to the jury.") (footnote omitted).

30 (citing cases). Writing in 1911, Jeremiah Smith identified at least five different theories of causation:

(1) "Lord Bacon's maxim," *in jure non remota causa, sed proxima, spectatur*, which attempts to distinguish an immediate cause from a remote cause;[5]

(2) "The But for Rule," under which "a defendant is not liable, unless it be true that, but for his tortious act, the damage would not have happened";[6]

(3) The test that attempts to distinguish "between a cause and a condition";[7]

(4) The "Last (or Nearest) Wrongdoer Rule," which posits that "[t]he legal cause is the last (or nearest) culpable human actor to be found in the chain of antecedents";[8] and

(5) "The Probable Consequence Rule," under which "a wrongdoer is liable for probable consequences only."[9]

25 Harv. L. Rev. at 106, 108-11, 114. Finding none of these tests satisfactory, Smith proposed a sixth—the

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[5] *See W.K. Niver Coal Co. v. Cheronea S.S. Co.*, 142 F. 402, 409-10 (1st Cir. 1905); *Louisville, N.A. & C. Ry. Co. v. Nitsche*, 26 N.E. 51, 54 (Ind. 1890).

[6] *See Washington Mills v. Cox*, 157 F. 634, 639 (4th Cir. 1907); *Sowles v. Moore*, 26 A. 629, 629-30 (Vt. 1893).

[7] *See* Francis Wharton, *A Treatise on the Law of Negligence* 73-75 (2d ed. 1878) (citing federal and state cases); *Tullis v. Lake Erie & W. R.R. Co.*, 105 F. 554, 558 (7th Cir. 1901).

[8] *See Louisville & N. R.R. Co. v. East Tennessee, V. & G. Ry. Co.*, 60 F. 993, 996-97 (6th Cir. 1894); *Miner, Read & Garrette v. McNamara*, 72 A. 138, 140 (Conn. 1909).

[9] *See Shellaberger v. Fisher*, 143 F. 937, 940 (8th Cir. 1906); *Hoag v. Lake Shore & M.S.R.R. Co.*, 85 Pa. 293, 298-99 (1877).

"substantial factor" test—which decades later would be adopted in the First Restatement of Torts. *See id.* at 109, 120; *see* Restatement of Torts § 431 (1934); Restatement (Second) of Torts § 431 (1965).

The central concern of judges and scholars who debated the meaning of "proximate cause" was the perceived need to limit a defendant's liability to the potentially infinite universe of third parties who might indirectly be affected by the defendant's wrongful conduct. *See generally* W. Page Keeton *et al.*, *Prosser and Keeton on the Law of Torts* 284-90 (5th ed. 1984) (discussing "the unforeseeable plaintiff" and *Palsgraf v. Long Island R.R. Co.*, 248 N.Y. 339 (1928)). Their disagreement reflected, at bottom, different value judgments as to the point at which courts should draw that line. *Id.* at 264 (discussing proximate cause as based on a "social idea of justice or policy").[10] From the time FELA was enacted through today, no consensus has existed among courts or scholars about the proper definition of "proximate cause" in general negligence law. *See id.* at 263 ("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."); Nicholas St. John Green, *Proximate and Remote Cause*, 4 Am. L. Rev. 201, 215 (1870) (noting that there was "no settled rule" for proximate cause in tort); *McGill v. Michigan S.S. Co.*, 144 F. 788, 792 (9th Cir. 1906) ("Many definitions of proximate cause

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[10] *See*, *e.g.*, *Palsgraf*, 248 N.Y. at 352 (Andrews, J., dissenting) ("What we do mean by the word 'proximate' is, that because of convenience, of public policy, of a rough sense of justice, the law arbitrarily declines to trace a series of events beyond a certain point. This is not logic. It is practical politics.").

have been formulated, but probably no fixed and definite rule can be applied to all cases.").

Factual Background

Respondent Robert McBride worked as a locomotive engineer for CSX. *See* App. 3a. In 2004, McBride grew interested in making "local" runs, which involves picking up individual rail cars from or delivering them to their final destinations, on either end of their long-distance journey. The process of adding and removing cars during local runs is called "switching," and it requires frequent starts and stops over short distances.

On April 12, 2004, McBride went on a qualifying local run with a supervising engineer. When McBride saw that the train he would be operating was headed by two wide-body locomotives, he grew concerned because wide-body cabs are ill-suited for switching on local runs, and he had never been trained to use one for switching. *See* App. 3a-4a, 57a, 60a. Switching involves frequent stops, and the weight of multiple locomotives in the train requires greater use of the train's hand-operated independent brake. *See* App. 2a-3a.

McBride expressed concern about the wide-body cabs to his supervisor, but he was instructed to "take them as is." *See* App. 4a. By 8:00 p.m. that day, at the end of a 10-hour day, the constant braking needed to switch using the wide-body cab had taken its toll on McBride. *See* JA20a. At the final stop, McBride slammed his hand "into the independent brake, and it felt like—like somebody threw gas on [his] hand and set it afire." App. 4a. McBride screamed in pain and immediately put his hand in his cooler. McBride's injury had lasting effects. He underwent two hand surgeries and required exten-

sive physical therapy. Even after his return to work, he "continued to experience pain, numbness and some limitations in the use of his hand." App. 5a.

District Court Proceedings

McBride brought suit against CSX under FELA. *See* JA1a. Based on the testimony of McBride, his supervisor, and a railroad expert, the jury found that CSX's way of configuring the locomotives for switching was unsafe. *See* App. 55a-56a; JA10a-11a.[11]

The district court charged the jury that, under FELA, "the railroad shall be liable in damages to the injured employee where the injury results, in whole or in part, from the negligence of any of the officers, agents or other employees of the railroad" and that McBride had to prove "1, the defendant was negligent, and 2, defendant's negligence caused or contributed to plaintiff's injuries." App. 64a-65a.

The parties disputed what further instruction the jury should receive on the causation element. *See* App. 62a-64a. McBride proposed—and the court gave—a causation instruction that followed the Seventh Circuit Pattern Instruction:

> 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.

App. 65a.[12]

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[11] The district court's instructions about that aspect of the jury's verdict are not at issue here.

[12] *See Federal Civil Jury Instructions of the Seventh Circuit*, Instruction No. 9.02 (2009 rev.) (reprinting 2008 revision of Instruction No. 9.02).

The court rejected three instructions that petitioner proposed, all of which made explicit reference to "proximate cause." Petitioner proposed the following instruction on McBride's burden of proving causation:

> In order to establish that an injury was caused by the defendant's negligence, the plaintiff must show that (i) the injury resulted "in whole or in part" from the defendant's negligence, and (ii) the defendant's negligence was a proximate cause of the injury.

App. 73a.

Likewise, petitioner proposed the following instructions regarding contributory negligence and "proximate cause":

> When I use the expression "contributory negligence," I mean negligence on the part of the plaintiff that contributed in whole or in part to and proximately caused the alleged injury.

App. 72a.

> When I use the expression "proximate cause," I mean any cause which, in natural or probable sequence, produced the injury complained of. It need not be the only cause, nor the last or nearest cause. It is sufficient if it concurs with some other cause acting at the same time, which in combination with it, causes the injury.

App. 71a.

The jury returned a verdict for McBride, but it reduced his damages because it found him 33% at fault for his injuries. *See* App. 45a. The court rejected petitioner's challenges to the jury verdict and entered judgment for McBride. *See* App. 41a-44a.

The Decision Below

On appeal, the Seventh Circuit conducted a thorough review of this Court's cases interpreting FELA § 1 and found no error in the district court's instructions. *See* App. 9a-12a.

The court observed that some of this Court's early cases spoke in the language of "proximate cause" in describing the "nexus between the negligence and the injury." App. 11a-12a. It also noted, however, that other cases recognized a broader causation standard, *see* App. 12a-15a, and that *Rogers* held that "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," App. 18a (internal quotations omitted).

The Seventh Circuit then reviewed post-*Rogers* FELA cases in this Court and the courts of appeals. *See* App. 18a-26a. It found that this Court's precedents reaffirming *Rogers* were "entitled to great weight." App. 35a (internal quotations omitted). It also noted that every court of appeals uniformly agrees "that *Rogers* relaxed the proximate cause requirement." App. 23a (citing cases).[13] The court below recognized that Justice Souter's concurring opinion in *Norfolk Southern Railway Co. v. Sorrell*, 549 U.S. 158 (2007), disagreed with that interpretation of *Rogers*. *See* App. 30a-31a. It reasoned that this Court in *Sorrell* "did not address, much less

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[13] The court rejected petitioner's contention that only five circuits have "stated that a FELA plaintiff need not prove proximate cause," App. 24a-25a nn.5-6, and determined that only three of the seven states petitioner cited actually "adhere[d] to the requirement of proximate cause in FELA cases," App. 34a n.7.

decide, th[at] issue" in holding that FELA applies the same causation standard to both railroad negligence and a plaintiff's contributory negligence. App. 36a.

Given the "prior pronouncements" of this Court in *Rogers* and *Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532 (1994), the uniform view of the other circuits, and Congress's longstanding acquiescence to *Rogers* and subsequent cases, the court of appeals reaffirmed that common-law proximate causation is not "required to establish liability under the FELA." App. 34a-40a. The Seventh Circuit therefore held that the district court properly refused petitioner's proposed jury instructions regarding proximate cause and properly instructed the jury by "paraphras[ing] the Supreme Court's own words in *Rogers*." App. 39a.

SUMMARY OF ARGUMENT

I. FELA provides that a rail worker may recover damages for any harm "resulting in whole or in part from" the employer's negligence. 45 U.S.C. § 51. In choosing those words, Congress did not adopt common-law "proximate causation" standards but instead embraced a more flexible approach that permits rail workers to recover upon a showing that their employers' negligence was partly to blame for their injuries. The legislative record confirms the text's plain meaning; it contains no evidence that Congress intended to adopt any of the myriad formulations of common-law proximate cause expressed by courts when FELA was enacted.

In the decades following FELA's passage, this Court repeatedly recognized that the Act avoids the intractable proof problems posed by the more stringent common-law rules and imposes liability for injuries that a defendant's negligence had any part

in bringing about. In *Rogers*, the Court definitively resolved the proper test for legally sufficient causation under FELA: the "resulting in whole or in part" test is met when the employer's negligence "played any part" in producing the injury or death. 352 U.S. at 508. In the 50 years since *Rogers*, this Court consistently has reaffirmed its core holding that common-law notions of proximate cause do not apply in FELA actions.

FELA's more relaxed causation standard furthers Congress's objective to hold railroads fully responsible when their negligent conduct injures or kills their employees. The decision below should be affirmed because the district court correctly instructed the jury that petitioner was liable under FELA for any injuries "resulting in whole or in part" from CSX's negligence.

II. Petitioner's contention that FELA incorporates common-law proximate cause is incorrect because Congress did not use common-law terminology, but instead provided an alternative causation standard tailored to the context of rail-worker injuries. The widespread confusion regarding the meaning of "proximate causation" when Congress enacted FELA further undermines petitioner's argument that, without saying so, Congress incorporated some common-law understanding of that concept.

Petitioner's characterizations of this Court's precedents are equally erroneous. *Rogers* squarely addressed and rejected the notion of proximate cause for which petitioner advocates, and petitioner's efforts to cloud that conclusion are unpersuasive. The pre-*Rogers* cases petitioner cites largely reflect offhand references to an undefined notion of "proximate

cause," not a well-settled rule that common-law proximate cause applies in FELA cases.

III. For more than half a century, *Rogers* has represented this Court's definitive ruling regarding FELA's causation standard. Countless juries have been instructed accordingly. Notably, petitioner cannot identify a single case where that well-accepted instruction has led to an unreasonable result.

Petitioner invites the Court to endorse "common law" "proximate causation," even as it declines to identify or advocate which among the various standards recognized in common-law cases Congress should be presumed to have adopted. To overturn FELA's well-settled causation standard and replace it with a vague and unspecified notion of "proximate cause" will confuse juries and spawn voluminous federal and state litigation for decades to come. The doctrine of statutory *stare decisis* strongly militates against casting aside a stable, well-functioning legal standard without any sound justification or substitute.

ARGUMENT

I. FELA'S RELAXED CAUSATION STANDARD PERMITS RAILROAD WORKERS TO RECOVER FOR INJURIES OR DEATH "RESULTING IN WHOLE OR IN PART" FROM THE DEFENDANT'S NEGLIGENCE

A. FELA's Plain Language Is Inconsistent With Incorporation Of Common-Law Standards Of "Proximate Causation"

This Court's analysis of FELA starts with the statutory text and, if it is clear, ends there as well. *See*, *e.g.*, *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 438 (1999). "The language selected by Congress to fix liability in cases [under FELA] is simple and direct." *Coray v. Southern Pac. Co.*, 335 U.S. 520, 524 (1949). Congress provided in FELA § 1 that a worker or his or her family may recover damages for any injuries or death "resulting in whole or in part from" the defendant's negligence. The ordinary meaning of "resulting from" is "brought about by." *See Webster's Third New International Dictionary* 1937 (2002) (defining "result from" as "arise as a consequence, effect, or conclusion"). As petitioner concedes (at 38), the phrase "in whole or in part," which modifies "resulting," plainly provides that an injury is compensable if it is in *any* part a consequence of the negligence. And the phrase "in part" means "partly," or "in some measure or degree." *Webster's* at 1645 (defining "in part"), 1648 (defining "partly"). Thus, the statute's plain language permits recovery for workplace injuries or death that are brought about *to some degree* by the railroad's negligence.

Other sections of the Act confirm § 1's plain language. Congress reiterated in §§ 2 and 4 the "resulting in whole or in part" standard for liability ex-

pressed in § 1. Congress's repeated use of that key phrase confirms its deliberate word choice, and those words should be given effect. Also, in FELA § 3, Congress provided that the damages for an employee who is contributorily negligent shall be reduced in proportion to his negligence, except "in any case where the violation by [the] common carrier of any statute enacted for the safety of employees *contributed to* the injury or death of such employee." 45 U.S.C. § 53; *see Webster's* at 496 (defining "contribute" as to "have a share in any act or effect"). Because § 3's exception parallels § 1's liability standard for employer negligence, § 3 confirms that the phrase "resulting in whole or in part" simply requires that the defendant's negligence have contributed to some degree to the employee's injuries or death.

Congress's enactment of the phrase "resulting in whole or in part" is inconsistent with the incorporation into § 1 of the various formulations of proximate cause then percolating in the judicial system.[14] First, in enacting § 1, Congress did not use the phrase "proximate cause," even though petitioner contends (at 52) that the term was "well-established" when Congress enacted FELA. Nor did Congress qualify the word "resulting" with any of the myriad linguistic formulations—like "directly," "substantially," "fore-

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[14] "Proximate cause" can be used "to label generically the judicial tools used to limit a person's responsibility for the consequences of that person's own acts." *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258, 268 (1992). FELA does not disavow proximate cause in that "generic[]" sense. Those tools, however, must be informed by FELA's text, history, and purposes, all of which indicate that the Act adopted a more straightforward, lenient standard than those prevalent in common-law negligence cases. *See Sorrell*, 549 U.S. at 178-79 (Ginsburg, J., concurring in the judgment).

seeably," "naturally," or "probably"—that courts had widely but inconsistently used in an effort to articulate the amorphous requirements of "proximate" causation. *See supra* pp. 5-9. The absence of any of the hallmark language of common-law proximate causation indicates that Congress did not intend to incorporate into FELA those concepts in the forms then prevailing in general tort cases.

Second, Congress's imposition of liability for injuries attributable "in whole or in part" to a defendant's negligence cannot be squared with prevailing common-law concepts of "proximate causation." As discussed above, the requirement that plaintiffs could recover only for damages that were "direct," "substantial," "foreseeable," or "probable" expressed a policy judgment that defendants should be responsible only for effects in which their negligence played a significant role. In FELA, however, Congress itself spoke to that policy question by providing that railroad workers can recover for injuries or death if the employer's negligent conduct brought about the harm even "in part." It thus relaxed the common law's proximate-causation rule and instead imposed liability for injuries that were brought about to some degree by employer negligence. That standard provided additional protection for railroad workers from their employers' failure to exercise due care. Imposition of common-law proximate-cause requirements would countermand Congress's clearly expressed intent to adopt a more flexible causation standard. *See Neder v. United States*, 527 U.S. 1, 24-25 (1999) (Court will not incorporate common-law rules that are "inconsistent with the statutes Congress enacted").

Third, the phrase "in whole or in part" cannot be limited, as petitioner asserts (at 24), to situations involving "multiplicity of causes" as opposed to "[t]he necessary directness of a cause." The plain meaning of "in part" is "in some measure or degree." *Webster's* at 1645. As petitioner concedes (at 37), a defendant's negligence can be responsible "in part" for injuries if it is one of several direct causes. A defendant's negligence also can be "in part" responsible if it produces the injury or death indirectly. Even causes that are "indirect," "slight," or "improbable" nonetheless may contribute in some "measure or degree" to the result. *See Eglsaer v. Scandrett*, 151 F.2d 562, 566 (7th Cir. 1945) (noting that a "cause which sets in motion the second cause which was the immediate, the direct cause of the accident" is a "partial cause"). Thus, the phrase "in whole or in part" serves two distinct purposes: (1) it makes clear that recovery is permitted even though the defendant's negligence was not the *sole* cause of the injuries or death; and (2) it precludes defendants from escaping liability on the ground that their negligence did not contribute to the injury or death to the degree the more stringent common-law rule would have required.[15]

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[15] Petitioner's citation (at 25 n.5) of cases using "in whole or in part" alongside "proximate" does not show that the phrase had a special meaning limited to multiple causation. Cases often used the phrase without reference to "proximate cause," consistent with the phrase's ordinary meaning of "in some measure or degree." *See*, *e.g.*, *Forsythe v. Los Angeles Ry. Co.*, 87 P. 24, 26 (Cal. 1906) ("appellant must show that it was not guilty of any negligence which, in whole or in part, caused the injury"); *Meaney v. City of Boston*, 80 N.E. 522, 522 (Mass. 1907) ("the accident was not caused in whole or in part by want of care on the part of the plaintiff").

B. Legislative History Confirms FELA's Plain Meaning

FELA's legislative history provides additional support for that interpretation of the statute's text. The legislative record reveals no evidence that Congress actually meant to incorporate the more restrictive "proximate cause" limitations judges had imposed in run-of-the-mill negligence cases. Moreover, the legislative record contains no indication that Congress adopted, in substance, any particular understanding of "proximate cause" among the multiple, conflicting conceptions being fiercely contested at the time. Like the statute's text, the legislative history evinces no affirmative indication of congressional intent to adopt a common-law conception of "proximate cause."

Instead, Congress's core purpose in FELA was "to *change* the common-law liability of employers . . . for personal injuries received by employees," thereby increasing railroad safety and providing just compensation for workers injured or killed on the job, as well as their families. H.R. Rep. No. 60-1386, at 1 (emphasis added). Consistent with § 1's "in whole or in part" language, Congress intended that "[t]he master should be made *wholly responsible* for injury to the servant by reason of the negligence of a coservant." *Id.* at 2 (emphasis added). Similarly, Congress intended "that a *strict rule of liability* of the employer to the employee for injuries received by defective machinery [would] greatly lessen personal injuries on that account." *Id.* (emphasis added). By making the employer fully responsible for its negligence, Congress sought to induce the employer "to exercise the highest degree of care . . . for the safety of [all employees] in the performance of their duties." *Id.*

Congress confirmed its rejection of the various common-law formulations of proximate cause when, in 1939, it added § 4 to FELA, abolishing entirely the "assumption of risk" defense. The 75th Congress considered two versions of the 1939 amendments. The House version would have provided that the "assumption of risk" defense did not apply "where the negligence of such common carrier, its officers, agents, or employees, *proximately contributed* to the injury or death" of the employee. 42 Cong. Rec. 10,709-10 (1939) (emphasis added); *see also* H.R. Rep. No. 75-2153, at 1 (1938). However, the phrase "proximately contributed" was stripped from the final legislation. *See* 53 Stat. 1404. Instead, Congress adopted the Senate's language, which paralleled FELA § 1, thus eliminating the assumption-of-risk defense where the injury or death "resulted in whole or in part" from the negligence of any of defendant's agents. *Id.* (codified at 45 U.S.C. § 54). Section 4 unquestionably eliminated the assumption-of-risk defense in cases where the defendant is liable for negligence of its agents under § 1. *See Tiller v. Atlantic Coast Line R.R. Co.*, 323 U.S. 574, 580 (1945). Given the parallel "in whole or in part" language that Congress mirrored in § 4, and its explicit rejection of "proximate cause" language in that amendment, it would be implausible for this Court to conclude that Congress intended the same linguistic formulation in § 1 to have incorporated a proximate-cause standard about which courts have never agreed.

C. This Court's Precedents Confirm That FELA Departed From Common-Law Proximate-Cause Standards

Consistent with FELA's text and legislative history, numerous decisions of this Court over the past

century have "long settled" that Congress did not intend to incorporate any of the various common-law proximate-cause standards into FELA. *Sorrell*, 549 U.S. at 177 (Ginsburg, J., concurring in the judgment). Decisions early in the twentieth century expressly recognized that FELA's "resulting in whole or in part" language constituted a departure from the proximate-cause standards applied by courts in common-law negligence cases. Those cases culminated in *Rogers*, which definitively recognized that a more straightforward and relaxed causation standard applies in FELA cases. Since *Rogers*, this Court has reaffirmed that holding numerous times.

1. Pre-*Rogers* precedents recognized FELA's departure from common-law proximate-causation standards

In the first four decades after FELA's enactment, this Court repeatedly recognized that the "resulting in whole or in part" language of § 1 effectuated a relaxation of proximate-causation standards applicable in common-law negligence cases. Although petitioner touts 20 cases of this Court that mention "proximate causation," those references were in *dicta* and/or contained little or no elaboration of the content of that term. *See infra* pp. 47-49. In contrast, the cases that actually examined FELA's causation standard steadfastly rejected the applicability of the stricter common-law "proximate cause" formulations.

In *Spokane & Inland Empire Railroad Co. v. Campbell*, 241 U.S. 497 (1916), this Court affirmed a jury verdict for the plaintiff and emphasized that § 1 "imposes a liability for injury to an employee 'resulting *in whole or in part* from'" the defendant's negligence. *Id.* at 509. It also stressed § 3's elimination of contributory negligence in any case where the defen-

dant's violation of the Safety Appliance Act ("SAA") "*contributed to*" the employee's injury or death. *See id.* at 510. Although the Court found it "unnecessary to say the effect of the statute is *wholly* to eliminate the question of proximate cause," it "agree[d]" that FELA, by the foregoing terms, "eliminated" "the element of proximate cause" at the very least "where concurring acts of the employer and employee contribute to the injury or death of the employee." *Id.* (emphasis added). Thus, this Court early on recognized that FELA abandoned the common-law "sole proximate cause" rule.

Two years later, Justice Holmes's unanimous opinion in *Union Pacific Railroad Co. v. Hadley*, 246 U.S. 330 (1918), swept away the common-law proximate-causation rule that limits liability to the last culpable actor in a causal chain. That rule—often known by the maxim that the common law does not "go beyond the first step" in assessing liability—was recognized by many courts and, in fact, had been enunciated by this Court per Justice Holmes in a non-FELA case earlier that same year. *See Southern Pacific Co. v. Darnell-Taenzer Lumber Co.*, 245 U.S. 531, 533-34 (1918); *see also supra* p. 7 n.8. In *Hadley*, however, the Court squarely rejected that common-law rule under FELA. The railroad had appealed a jury verdict on the ground that the plaintiff, who was killed in a train crash, was himself negligent in failing to warn the oncoming train, and that his own negligence was therefore the proximate cause of his own death. 246 U.S. at 333. Affirming the judgment below, the Court said that, "even if Cradit's negligence should be deemed the logical last [*i.e.*, the proximate cause under the last-actor approach], it would be emptying the statute of its meaning to say

that his death did not 'result in part from the negligence of any of the employés' of the road." *Id.*

As the Seventh Circuit later noted in *Eglsaer v. Scandrett*, FELA had "enlarged" the common-law concept of proximate cause:

> Under the old concept of proximate cause, that cause must have been direct, the complete, the responsible, the efficient cause of the injury. Contributing and remotely related causes were not sufficient. Now, if the negligence of the railroad has "causal relation,"—if the injury or death resulted "*in part*" from defendants' negligence, there is liability.
>
> The words "in part" have enlarged the field or scope of proximate causes—in these railroad injury cases.

151 F.2d at 565-66.

The same Term as *Hadley*, this Court in *Union Pacific Railroad Co. v. Huxoll*, 245 U.S. 535 (1918), unanimously approved a jury instruction that the defendant was liable under FELA if a defective power brake "contributed 'in whole or in part' to cause the death of deceased." *Id.* at 538; *see id.* at 537 (quoting jury instruction to the same effect). Moreover, in holding that the jury's verdict for the plaintiff should be affirmed, the Court held that the evidence was sufficient to show that the defective brake "contributed in part, at least, to the fatal result." *Id.* at 540. Consistent with *Hadley*, the Court nowhere indicated that FELA required the plaintiff's death to be the "direct," "foreseeable," "natural," or "probable" consequence of the defect.[16]

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[16] Numerous other FELA cases do not mention "proximate" causation. *See*, *e.g.*, *Moore v. Chesapeake & O. Ry. Co.*, 340 U.S.

In *Coray v. Southern Pacific Co.*, this Court again rejected incorporation of common-law proximate-cause requirements into FELA. The Court held that, under FELA, a plaintiff is entitled to recovery "if [the defendant's] defective equipment was the *sole or a contributory proximate cause*" of the death or injury. 335 U.S. at 523 (emphasis added); *see also Carter v. Atlanta & St. Andrews Bay Ry. Co.*, 338 U.S. 430, 435 (1949) (referring to "contributory proximate cause"). In applying that test, the *Coray* Court expressly rejected the common-law distinctions between "causes" and mere "conditions," and "substantial" and "insignificant" causes. 335 U.S. at 523; *see Coray v. Southern Pac. Co.*, 185 P.2d 963, 968 (Utah 1947), *rev'd*, 335 U.S. 520 (1949); *see also supra* pp. 6-8 (explaining these distinctions in common-law proximate-cause doctrines). The Court stressed that consideration of these "dialectical subtleties," which pervaded common-law proximate-cause analyses, could "serve no useful interpretative purpose" under FELA. 335 U.S. at 524. Rather, the Court held that "Congress . . . for its own reasons imposed *extraordinary safety obligations* upon railroads and . . . commanded that if a breach of these obligations *contributes in part* to an employee's death, the railroad must pay damages." *Id.* (emphases added; citing

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573, 575 (1951) (an employee must "prove negligence of [the employer] which caused the . . . accident"); *Atchison, T. & S. F. Ry. Co. v. Toops*, 281 U.S. 351, 354 (1930) ("The negligence complained of must be the cause of the injury."); *Chicago, M. & St. Paul Ry. Co. v. Coogan*, 271 U.S. 472, 476 (1926) (employer is liable if employer's negligence "caused or contributed to cause" the injury); *Baltimore & O. R.R. Co. v. Groeger*, 266 U.S. 521, 528 (1925) (employer "is liable for any negligence chargeable to it which caused or contributed to cause decedent's death").

FELA §§ 1 and 3). Recognizing that railroad accidents often involved multiple contributing events that are "inseparably related to one another in time and space," the Court held that the jury properly could have imposed liability if it "found that decedent's death resulted from any or all of the foregoing circumstances." *Id.*

2. *Rogers* definitively recognized FELA's relaxed causation standard

By the time *Rogers* reached this Court, prior decisions already had rejected most of the various common-law formulations of "proximate cause": the "sole proximate cause" test (*Campbell*), the "last culpable actor" test (*Hadley*), and the distinctions between "causes" and "conditions" and "substantial" and not "substantial" causes (*Coray*). Nonetheless, lower federal and state courts continued to invoke common-law strictures to deny workers a jury trial, contrary to FELA's text and purposes. *See Rogers*, 352 U.S. at 509-10 ("In a relatively large percentage of the cases reviewed, the Court has found that lower courts have not given proper scope to this integral part of the congressional scheme."); *see id.* at 543-44 & Appendices A & B (Frankfurter, J., dissenting) (cataloguing dispositions of pre-*Rogers* cases).

Against that backdrop, this Court in *Rogers* definitively resolved the proper test for legally sufficient causation under FELA: the "resulting in whole or in part" standard of § 1 is satisfied if the employer's negligence "played any part" in producing the injury or death. *Id.* at 508.[17] As every federal court of

[17] *Rogers* did not "overrul[e]" this Court's prior decisions on FELA causation, Pet. Br. 34-35, because it was consistent with them.

appeals subsequently has recognized, *Rogers* made clear that FELA did not adopt the more restrictive common-law conceptions of proximate causation.[18]

The Court granted certiorari in *Rogers* to review a Missouri Supreme Court decision overturning a jury verdict for the employee on the ground of insufficient evidence that his injuries resulted from the railroad's negligence. Rogers, a laborer, was walking alongside the railroad tracks using a hand-held torch to burn weeds and other vegetation from the adjoining land. When he heard the whistle of an oncoming train, he receded as instructed to a position off the tracks near a culvert and watched the oncoming train for "hot-boxes" (smoke, sparks, or fire near the wheels). While standing at the designated spot, he became enveloped in smoke and flames because "[t]he passing train had fanned the flames of the burning vegetation and weeds, carrying the fire to the vegetation around his position." *Id.* at 502. As he retreated from the engulfing flames, he slipped on loose gravel and fell from the culvert, suffering serious injuries. Rogers alleged that the defendant was negligent in numerous respects, including requiring employees to stand so close to burning vegetation in the vicinity of oncoming trains and failing to maintain the gravel in the area around the culvert. *See id.* at 502-03. The railroad, in turn, alleged that Rogers himself had

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[18] *See* Br. in Opp. 16-24 (cataloguing cases); *see also Ammar v. American Export Lines, Inc.*, 326 F.2d 955, 959 (2d Cir. 1964) (*Rogers* eliminated "the question of remoteness of damages"); *Comeaux v. T.L. James & Co.*, 702 F.2d 1023, 1024 (5th Cir. 1983) (per curiam) (FELA encompasses "any cause regardless of immediacy"). Contrary to petitioner's contention (at 46), the First Circuit "recognize[s] the considerably relaxed standard of proof in FELA cases." *Moody v. Maine Cent. R.R. Co.*, 823 F.2d 693, 695 (1st Cir. 1987); *see* App. 24a.

negligently caused the spread of the fire by failing to attend to it. *See id.* at 503-04.

This Court reversed the lower court's directed verdict for the defendant, finding that "the evidence was sufficient to support the jury finding" of causation. *Id.* at 503. The Court's reasoning elucidates the "simple and direct" causation standard applicable under FELA § 1. *Coray*, 335 U.S. at 524. The Court first concluded that there was sufficient evidence the defendant negligently put Rogers in an unsafe work environment, citing "testimony that the burning off of weeds and vegetation was ordinarily done with flame throwers from cars on the tracks" rather than by "a workman on foot using a crude hand torch," as well as "uncontradicted testimony" that Rogers assumed his position near the tracks "in furtherance of explicit orders to watch for hotboxes." *Rogers*, 352 U.S. at 503. The Court then held there was sufficient evidence of causation under FELA because a jury could find, based on "[c]ommon experience," that the defendant's negligence in ordering Rogers to stand in the vicinity of an open fire and a passing train "played a part in [Rogers'] injury." *Id.* Having reached that conclusion, the Court held, "it was an *irrelevant consideration* whether the *immediate* reason for his slipping off the culvert was the presence of gravel negligently allowed by respondent to remain on the surface, or was some cause not identified from the evidence." *Id.* (emphases added). The Court thus expressly disavowed any need under § 1 to test whether the defendant's negligence or "some [other] cause" was the "immediate" cause of the resulting injuries, as would have been required in many jurisdictions in ordinary negligence cases. Consistent with § 1's plain language, the Court held

the proper standard to be whether the defendant's negligence "played a part in the petitioner's injury." *Id.*

Rogers reiterated that holding numerous times in rejecting the Missouri Supreme Court's contrary reasoning, which rested on that court's view that Rogers' own inattention to the fire, not the defendant's negligence, was the legal cause of his injuries. *Id.* at 503-04. The lower court reasoned that the "immediate cause" of Rogers' fall was "that loose gravel on the surface of the culvert rolled out from under him," but it held that his injuries were "something extraordinary, unrelated to, and disconnected from" any defects in the gravel because it was Rogers' "inattention to the fire" that caused him to "move blindly away and fall." *Id.* at 504 (internal quotations omitted).

This Court rejected that reasoning on two grounds, both of which relied on FELA's relaxed standard of causation. First, the Court held that the evidence did not conclusively prove Rogers' own conduct was the "sole cause" of the accident. *Id.* Rather, the Court held that the "decision was exclusively for the jury to make" because the evidence was sufficient for the jury reasonably to conclude that Rogers' "injury resulted *at least in part* from the respondent's negligence." *Id.* at 504-05 (emphasis added).

Rogers also rejected the lower court's conclusion that Rogers' case could not go to a jury because his conduct "was at least as probable a cause for his mishap as any negligence of the respondent." *Id.* at 505. This Court held that the court below had improperly adopted "language of proximate causation which makes a jury question dependent upon whether the jury may find that the defendant's negligence was

the sole, efficient, producing cause of injury." *Id.* at 506. Because "[t]he statute expressly imposes liability upon the employer to pay damages for injury or death due 'in whole or *in part*' to its negligence," the Court held, it "does not matter" that "other causes, including the employee's contributory negligence," may have played a role (even a greater role) in bringing about the injuries. *Id.* at 506-07.

Rogers repeatedly concluded that the "single inquiry" under § 1 is whether "negligence of the employer played any part at all in the injury or death." *Id.* at 507; *see also id.* at 508 (the "single question" is "whether negligence of the employer played any part, however small, in the injury or death which is the subject of the suit"). FELA does not require a further showing that the defendant's negligence played a "substantial" or "direct" role. As *Rogers* explained, Congress enacted a more flexible rule because it was "dissatisfied with the common-law duty of the master to his servant." *Id.* at 507. FELA "supplants that duty with the far more drastic duty of paying damages for injury or death at work *due in whole or in part to the employer's negligence*." *Id.* (emphasis added). Consistent with § 1's plain language and this Court's prior interpretations of that provision, *Rogers* held that workers can recover under FELA if the defendant's negligence contributes to any degree to the plaintiff's injuries or death.

Rogers' holding was not limited to the issue of contributory negligence or "multiple causes." The Court's statement that it was "irrelevant" under the "resulting in whole or in part" standard whether the negligently maintained gravel or some other factor was the "immediate" cause of Rogers' injuries, *id.* at 503, plainly relaxed the common-law standard regard-

ing the directness of the cause. By disavowing any need to determine the "immediate" cause of Rogers' injuries, the Court held that FELA's "resulting in whole or in part" causation standard relaxed the stricter requirement under some common-law cases that the defendant's negligence be the "immediate" or "direct" cause of the plaintiff's injuries. *See supra* pp. 6-7.

Moreover, in many situations like *Rogers* itself, the distinction between "multiple" causes and "indirect" causes falls apart. The *Rogers* Court characterized the causation issue in terms of both exclusiveness (whether Rogers or the railroad was the "sole" cause of the injury) and directness (whether the unsafe working conditions were the "immediate" cause of Rogers' injury compared to other factors like his own conduct). And it rejected as contrary to FELA's terms *both* the lower court's contention that the defendant's negligence had to be the "sole, efficient, producing cause of injury," 352 U.S. at 506, *and* its belief that the defendant's negligence had to be the "immediate" cause, *id.* at 504. Thus, although *Rogers*' relaxation of FELA's causation standard certainly encompasses multiple causation, including comparative fault, it cannot plausibly be read as limited to overriding only the multiple-cause aspects of common-law proximate cause. *See also Webb v. Illinois Cent. R.R. Co.*, 352 U.S. 512, 515-16 (1957) (applying *Rogers* to facts raising no issue of multiple concurrent causes).[19]

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[19] Petitioner incorrectly asserts (at 39) that the *Rogers* standard equates to "but for" cause. The more relaxed *Rogers* standard allows courts and juries to find in extreme cases that the causal nexus between the defendant's negligence and the injury is so attenuated that it does not reflect "[c]ommon experience,"

3. This Court's post-*Rogers* precedents repeatedly have reaffirmed *Rogers*' causation standard

In the half-century since *Rogers*, this Court consistently has reaffirmed its holding that a plaintiff need not demonstrate common-law proximate causation under FELA to recover for the defendant's negligence. By contrast, not a single decision of this Court has cast any doubt on the correctness of *Rogers*' settled holding.

Rogers had a significant impact from the moment it was decided. That same day, in *Ferguson v. Moore-McCormack Lines, Inc.*, 352 U.S. 521 (1957), this Court adopted the *Rogers* standard as the "standard of liability under the Jones Act," *id.* at 523 (plurality op.), which incorporated FELA by reference, *see* 46 U.S.C. § 30104. The following year, in *Kernan v. American Dredging Co.*, 355 U.S. 426 (1958), this Court likewise cited *Rogers* and held that a defendant is liable under FELA and the Jones Act "if [a] defect or insufficiency in equipment *contributes in fact* to the death or injury in suit." *Id.* at 433 (emphasis added); *see id.* at 439 (Jones Act incorporates

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Rogers, 352 U.S. at 503, to conclude that the negligence played *any* part in producing the injury. *See Inman v. Baltimore & O. R.R. Co.*, 361 U.S. 138, 138, 140 (1959) (holding, under "the Rogers yardstick," that defendant's negligence "could have played no part in petitioner's injury," which was suffered "when an intoxicated automobile driver ran into him one midnight when he was on duty flagging traffic for a passing train"); *Nicholson v. Erie R.R. Co.*, 253 F.2d 939, 940, 941 (2d Cir. 1958) (although under the "modest requirements" of *Rogers* defendant's negligence "need not be the proximate cause of the injury," "[i]t is not enough . . . that the injury would not have happened 'but for' the negligence"; affirming dismissal because the "cause and effect here were too far removed from one another in space and time").

"the entire judicially developed doctrine of liability" under FELA). Since *Ferguson* and *Kernan*, the *Rogers* standard repeatedly has been applied by lower courts as the causation standard under the Jones Act. *See*, *e.g.*, *Alholm v. American S.S. Co.*, 144 F.3d 1172, 1178 (8th Cir. 1998); *Gautreaux v. Scurlock Marine, Inc.*, 107 F.3d 331, 335 (5th Cir. 1997) (en banc); *Miller v. Farrell Lines, Inc.*, 247 F.2d 503, 506 (2d Cir. 1957).[20]

Subsequent cases from this Court have reaffirmed and applied *Rogers*. In *Gallick v. Baltimore & Ohio Railroad Co.*, 372 U.S. 108 (1963), eight Justices reiterated that the question for the jury under FELA is whether "employer negligence . . . played *any* role in producing the harm." *Id.* at 116. The employee in that case had suffered serious injury after being bitten by a large, disease-carrying insect while working near a stagnant pool of water "in and about which were dead and decayed rats and pigeons, or portions thereof." *Id.* at 109. Siding with the railroad, the court of appeals had held that the "'chain of causation [was] too tenuous * * * to support a conclusion of liability.'" *Id.* at 112 (quoting 173 N.E.2d 382, 388 (Ohio Ct. App. 1961)) (ellipsis in original). This Court reversed, and in so doing both rejected the appeals court's adherence to common-law proximate-

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[20] The United States also has affirmed repeatedly FELA's relaxed causation standard in Jones Act cases. *See* Appellee Br. 16, *Callbreath v. United States*, 42 F. App'x 969 (9th Cir. 2002) (No. 00-35478) ("the shipowner-employer may be found liable if its negligence played even the slightest part in causing plaintiffs injuries"); Appellee Br. 9, *Danos v. United States*, 211 F.3d 125 (5th Cir. 2000) (No. 98-31372) ("[A Jones Act plaintiff] may recover if defendant's negligence played even the slightest part in causing the injury."); Appellee Br. 11, *Lopez v. United States*, 77 F.3d 477 (5th Cir. 1995) (No. 95-30216) (same).

cause standards and quoted at length from *Rogers*. *See id.* at 117; *id.* at 126 (Stewart, J., dissenting) (agreeing with the majority on the application of *Rogers* but dissenting on other grounds); *see also Dennis v. Denver & Rio Grande W. R.R. Co.*, 375 U.S. 208, 210 (1963) (per curiam) (reversing lower court's entry of judgment notwithstanding the verdict for defendant based on *Rogers*).

In *Crane v. Cedar Rapids & Iowa City Railway Co.*, 395 U.S. 164 (1969), the Court again stated unambiguously that an injured railroad employee "is not required to prove common-law proximate causation but only that his injury resulted 'in whole or in part' from the railroad's" negligence. *Id.* at 166. The Court expressly contrasted the relaxed causation standard under FELA with the more rigorous common-law standards applicable to a state-law negligence action brought by a non-employee. *See id.*

Similarly, in *Consolidated Rail Corp. v. Gottshall*, this Court noted that it had "liberally construed FELA to further Congress' remedial goal" and, as part of that construction, reaffirmed *Rogers*' holding "that a relaxed standard of causation applies under FELA." 512 U.S. at 543. Quoting *Rogers*, the Court reiterated that, under FELA, "'the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought.'" *Id.* (quoting 352 U.S. at 506); *accord Atchison, T. & S. F. Ry. Co. v. Buell*, 480 U.S. 557, 561-62 & n.8 (1987).[21]

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[21] Petitioner (at 43-44) dismisses the statements in *Crane* and *Gottshall* as mere "dictum," but those decisions are "entitled to great weight" because they are links in an unbroken chain of cases reaffirming *Rogers*' holding. App. 35a (internal

And in *Norfolk & Western Railway Co. v. Ayers*, 538 U.S. 135 (2003), this Court reaffirmed *Rogers*' holding that it was "'irrelevant'" "'whether the immediate reason' for an employee's injury was the proven negligence of the defendant railroad or 'some cause not identified from the evidence.'" *Id.* at 161-62 (quoting *Rogers*, 352 U.S. at 503); *see also id.* (noting *Rogers*' holding that "'[t]he inquiry in these cases today rarely presents more than the single question whether negligence of the employer played any part, however small, in the injury or death which is the subject of the suit'") (quoting *Rogers*, 352 U.S. at 508).

In sum, in numerous cases spanning nearly a century, this Court has recognized that FELA's standard for legally sufficient causation is what the statute says: a defendant is liable to its workers for injuries or death that "result[] in whole or in part" from the defendant's negligence.

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quotations omitted); *County of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573, 668 (1989) (Kennedy, J., concurring in the judgment in part and dissenting in part) (*stare decisis* commands adherence "not only to the holdings of our prior cases, but also to their explications of the governing rules of law"). Petitioner also contends (at 43-44) that these statements relate only to multiple causation. But § 1's "resulting in whole or in part" language and *Rogers*' "played any part" holding foreclose limitations based on the supposed lack of "directness" between the negligence and the injury. Finally, petitioner says (at 44) that *Gottshall* is "especially dubious authority" because it reiterated the importance of common-law principles in interpreting FELA. But there is no inconsistency between *Rogers*' and *Gottshall*'s methodology for interpreting FELA. *See infra* pp. 39-40. *Gottshall*'s reaffirmance of *Rogers* confirms that *Rogers*' holding is "long settled," *Sorrell*, 549 U.S. at 177 (Ginsburg, J., concurring in the judgment), and should continue to be followed under the principle of statutory *stare decisis*. *See infra* pp. 51-55.

D. FELA's Relaxed Causation Standard Effectuates Congress's Remedial Purposes

The causation standard embodied in FELA § 1 is integral to the statute's core purposes. As this Court consistently has recognized, FELA's provisions should be construed liberally "to further Congress' remedial goal." *Gottshall*, 512 U.S. at 543; *see also*, *e.g.*, *Jamison*, 281 U.S. at 640 ("The Act is not to be narrowed by refined reasoning or for the sake of giving 'negligence' a technically restricted meaning. It is to be construed liberally to fulfill the purposes for which it was enacted[.]"). The crux of that remedial goal was "to extend further protection to employees" by "extend[ing] and enlarg[ing] the remedy provided by law to employees engaged in interstate commerce in cases of death or injury to such employees while engaged in such service." H.R. Rep. No. 61-513, at 3 (1910). Congress intended "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 . . . 'measurably control their causes.'" S. Rep. No. 61-432, at 2 (1910); *see also Gottshall*, 512 U.S. at 542 ("Cognizant of the physical dangers of railroading that resulted in the death or maiming of thousands of workers every year, Congress crafted a federal remedy that shifted part of the 'human overhead' of doing business from employees to their employers").[22]

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[22] FELA has been extremely effective. *See Railroad Safety Programs: Hearings Before the Subcomm. on Transportation and Hazardous Materials of the H. Comm. on Energy and Commerce*, 102d Cong. 244 (1991) (Arnold B. McKinnon, Chairman, President, and CEO of Norfolk Southern Corp., testifying that FELA was "one of the things that drove us to our current safety programs," which were "success[ful] . . . in reducing accidents, reducing injuries, and consequently reducing potential for FELA claims").

As this Court has recognized, "dialectical subtleties" such as those that persistently confounded the common-law doctrine of proximate cause (both in 1908 and today) conflict with those core congressional objectives. *Coray*, 335 U.S. at 524. To ensure that railroad workers receive appropriate compensation for injuries attributed to their employers' negligence, this Court has "rejected many of the refined distinctions necessary in common-law tort doctrine for the purpose of allocating risks between persons who are more nearly on an equal footing as to financial capacity and ability to avoid the hazards involved." *Kernan*, 355 U.S. at 438; *see Urie v. Thompson*, 337 U.S. 163, 186 (1949).

Imposing common-law concepts of "proximate causation" also is inappropriate because Congress achieved the main purposes of the common-law "proximate cause" doctrine through other statutory means. Unlike the common law of negligence, FELA already restricts the statutory cause of action to rail workers or their families. *See Kelley v. Southern Pac. Co.*, 419 U.S. 318, 324-25 (1974). There is thus no danger that, without common-law proximate-cause limitations, railroads will be exposed to suit by an open-ended class of unknown plaintiffs, or that they will be held liable for "remote consequences" that "go forward to eternity." Pet. Br. 21-22 (internal quotations omitted). Petitioner's hypotheticals (at 23) involving implausible claims by strangers far removed from the defendant are irrelevant given that FELA does not permit such remote plaintiffs to sue. Moreover, a jury properly instructed under *Rogers* certainly could use its common sense and experience to decide that the injuries in those hypotheticals did not

result, even in part, from the defendant's negligence. *See supra* p. 31 n.19.

Re-injecting common-law proximate-causation standards into FELA thus would undermine Congress's core objectives and undo nearly 100 years of effort by this Court to effectuate them. This Court's historical role in FELA cases since the statute's enactment has been a bulwark against decisions by state and lower federal courts that invoked "the refined distinctions" of common-law tort doctrine to limit the statute's scope and to restrict a worker's right to have the case heard by a jury. *Kernan*, 355 U.S. at 438; *Rogers*, 352 U.S. at 509-10. The "simple and direct" causation standard long recognized by this Court, *Coray*, 335 U.S. at 524, is critical to the continued achievement of Congress's fundamental goal of ensuring that employers are "wholly responsible" to their employees for the consequences of their negligence. H.R. Rep. No. 60-1386, at 2.

E. The Jury Instructions Below Correctly Articulated FELA's Causation Standard

The district court's jury charge precisely tracked FELA's language and this Court's decisions interpreting it. The court used the Seventh Circuit pattern FELA jury instruction on causation, which states that "Defendant 'caused or contributed to' Plaintiff's injury if Defendant's negligence played a part—no matter how small—in bringing about the injury." JA31a; *see Rogers*, 352 U.S. at 508 (jury question is "whether negligence of the employer played any part, however small, in the injury or death which is the subject of the suit"). That pattern instruction, uniformly followed by federal courts of appeals, *see infra* p. 51 n.31, was correct, and the decision below should therefore be affirmed.

II. PETITIONER'S ARGUMENTS FOR OVERTURNING THE WELL-ESTABLISHED FELA CAUSATION STANDARD ARE UNPERSUASIVE

A. FELA Does Not Incorporate Any Of The Various Traditional Common-Law Conceptions Of Proximate Cause

1. Petitioner argues (at 18) that common-law proximate causation should be imported into the statute "under the established methodology for interpreting FELA." Petitioner's analysis mischaracterizes and misapplies this Court's well-settled methodology for statutory construction.

As this Court held in *Carter v. United States*, 530 U.S. 255 (2000), "[t]he canon on imputing common-law meaning applies only when Congress makes use of a statutory *term* with established meaning at common law." *Id.* at 264. Congress's codification of an established common-law term is a critical predicate for inferring intent to incorporate the whole body of judicial decisions associated with that term. Here, that predicate is missing: petitioner admits (at 23) that FELA's text does not contain the words "proximate causation" (or any variant of that term), and it denies (*id.*) that FELA contains any other language referring to any notion of proximate cause (as that term was variously understood at common law).

In the cases on which petitioner relies (at 19-21), the Court rooted its incorporation of common-law rules in FELA's codification of the terms "negligence," "injury," and "damages." *See Michigan Cent. R.R. Co. v. Vreeland*, 227 U.S. 59, 70-74 (1913) (considering whether the term "damages" is limited to pecuniary losses); *Urie*, 337 U.S. at 180 ("whether

silicosis is an 'injury' within the meaning of that term as used in [FELA]"); *Monessen Sw. Ry. Co. v. Morgan*, 486 U.S. 330, 336, 337-38 (1988) (whether "damages" includes prejudgment interest); *Gottshall*, 512 U.S. at 542 ("[o]ur task today is determining under what circumstances emotional distress may constitute 'injury' resulting from 'negligence'") (quoting 45 U.S.C. § 51); *Ayers*, 538 U.S. at 145-59 (whether the term "injury" allows recovery for fear of cancer). The absence of any affirmative textual indication of congressional intent to invoke common-law causation concepts undermines the argument for incorporation.

Moreover, this Court has held it inappropriate to adopt the common-law wholesale when doing so would be inconsistent with statutory language. Thus, in *Neder v. United States*, the Court explained that, because the mail-fraud statute, 18 U.S.C. § 1341, "prohibit[s] the 'scheme to defraud,' rather than the completed fraud," the "common-law requirements of 'justifiable reliance' and 'damages'" are "incompatible" with the statute's "language" and thus "plainly have no place" in a prosecution under that provision. 527 U.S. at 24-25; *see Bridge v. Phoenix Bond & Indem. Co.*, 553 U.S. 639, 648-49 (2008) (relying on *Neder* to hold that mail fraud does not include common-law reliance requirement); *id.* at 650-53 (rejecting incorporation of common-law reliance requirement into civil RICO action).

In this case, the principles set forth in *Neder* and *Bridge* foreclose incorporation of any of the various limitations imposed by the competing common-law proximate-cause standards existing when Congress enacted FELA. *See supra* pp. 6-8. Because Congress expressly declined to adopt those common-law stan-

dards in FELA's text, they "have no place" in a FELA action. *Neder*, 527 U.S. at 25. Petitioner cites no decision of this Court incorporating common-law rules that contradict a statute's plain language.

Sorrell was not a departure from this Court's well-settled interpretive methodology. Consistent with *Carter*, *Neder*, and *Bridge*, this Court looked to the common law to determine whether the causation standard for "contributory negligence" in FELA § 3 was the same as applies to employer negligence under the statute. *See* 549 U.S. at 166. Because FELA § 3 incorporated the common-law term "contributory negligence" and the statutory text was otherwise "silent" as to the causation standard, the Court concluded that, consistent with the common-law approach, "the same standard of causation applies" under FELA § 3 as under FELA § 1. *Id.* at 171. The Court specifically declined to determine the *content* of that causation standard, however, because the issue was not properly presented. On that question, FELA is not "silent"; its language forecloses incorporation of common-law proximate-causation standards. Accordingly, "the canon on imputing common-law meaning has no bearing." *Carter*, 530 U.S. at 264, 267.

2. The fact that there was no consensus on the meaning of proximate cause at common law when Congress enacted FELA further undermines petitioner's interpretive theory. The pervasive disagreement and uncertainty over "proximate causation" requirements plagued judicial efforts to give coherent meaning to "proximate cause" and rendered the term "absolutely worthless" as a practical guide to courts and juries. *Ehrgott*, 96 N.Y. at 280. Such uncertainty negates any reliable inference courts can

make about what legal concepts Congress incorporated. *See Bruesewitz v. Wyeth LLC*, No. 09-152, slip op. 18-19 (U.S. Feb. 22, 2011) (Congress cannot be said to incorporate courts' usage unless "all (or nearly all) of the relevant judicial decisions have given a term or concept a consistent judicial gloss") (internal quotations omitted); *Moskal v. United States*, 498 U.S. 103, 115-17 (1990) (rejecting reliance on "'common-law meaning' principle" where party "failed to demonstrate that there was, in fact, an 'established' meaning" of the concept in question "at common law").

Indeed, it is implausible that Congress *sub silentio* incorporated into FELA such a heavily contested concept that *limits* a defendant's liability given the clear statutory purpose to *broaden* railroads' liability for negligence to workers. And for Congress to have done so without providing one word's worth of guidance about the content of that standard or how it should be applied is especially unpersuasive. Indeed, the best petitioner can offer is that, "whatever its precise formulation, proximate causation under FELA has the same basic meaning that it had at common law." Br. 19 n.3. But, given that proximate causation's "basic meaning" had not been determined, petitioner's theory is no guidance at all.

B. Petitioner's Efforts To Distinguish *Rogers* Are Unavailing

Petitioner asserts (at 39) that *Rogers* only relaxed the common-law proximate-cause standard in the context of "multiple causes" and "assumed that FELA requires" common-law proximate causation for the "directness" of the cause. Petitioner argues that this Court and every federal court of appeals misread

Rogers in this regard. None of petitioner's arguments is persuasive.

First, as explained above, *see supra* pp. 28-29, petitioner's reading of *Rogers* is contrary to the Court's holding that the "immediate" cause of the accident was "irrelevant" once it was determined that the defendant's negligence "played any part" in causing the accident. Petitioner completely ignores that aspect of the Court's opinion. The respondent in *Sorrell* also did not call the Court's attention to this critical aspect of *Rogers*, and it was not addressed in Justice Souter's concurrence.

Second, petitioner posits (at 39-40) that *Rogers* implicitly approved the trial court's instruction that the jury should find for the railroad if the employee's "negligence, if any, was the sole proximate cause of his injuries" and if those injuries "were not directly contributed to or caused by any negligence of the defendant." 352 U.S. at 505 n.9 (quoting jury instruction). But *Rogers* signaled no approval of that quoted instruction.[23] The Court referred to the instruction given only to reject the Missouri Supreme Court's conclusion "that the [employee]'s conduct was the sole cause of his mishap." *Id.* at 504. The Court merely pointed out that the jury had been "instructed to return a verdict for the [railroad] if it was found that negligence of the [employee] was the sole cause of his mishap." *Id.* at 504-05. Because the jury returned a verdict for the employee, and because the Court assumes "the verdict was obedient to the trial judge's charge," "the jury [necessarily] found that" the employee's "injury resulted at least in part from

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[23] Indeed, *Rogers* faulted the trial court for failing to instruct "that contributory negligence, if any, was to be considered merely in diminution of any damages." 352 U.S. at 505 n.9.

the [railroad]'s negligence," contrary to the Missouri Supreme Court's conclusion. *Id.* at 505.

Third, petitioner asserts (at 40) that the employee in *Rogers* "did not ask this Court to abandon proximate causation." In fact, Rogers' briefs repeatedly advocated a "*broadened* concept of 'proximate cause' under [FELA]." Pet. Br. 24, *Rogers*, *supra* (filed Aug. 22, 1956) (emphasis added); *see id.* at 25 (advocating that FELA abandoned the directness requirement under the "old concept of proximate cause"); *id.* at 12 ("under [FELA], the concept of proximate cause is *broadened*") (emphasis added). And he criticized the Missouri Supreme Court for "fail[ing] to recognize the broadened concept of 'proximate cause' under [FELA]" in overturning the jury's verdict. *Id.* at 27.

Although Rogers also argued that the railroad's negligence was the proximate cause of his injury, his argument was that FELA's broader causation standard had been satisfied—not that his claim should be tested under any of the various common-law proximate-cause formulations then being debated, which would have *limited* his opportunity for recovery. *See id.* at 24 (point heading asserting that "Respondent's Negligence Was the Proximate Cause of Petitioner's Injury *Under the Federal Employers' Liability Act*") (emphasis added). Moreover, the railroad in *Rogers* cited no authority from this Court for the proposition that FELA incorporated a common-law conception of proximate cause, despite what petitioner here claims are more than 20 pre-*Rogers* cases so holding. *See* Resp. Br. 22-25, *Rogers*, *supra* (filed Sept. 15, 1956) (relying on cases from the Third, Fourth, and Eighth Circuits in arguing that proximate cause was lacking).

Fourth, petitioner argues that *Rogers* could not have intended to recognize a relaxed proximate-cause standard in FELA because it cited prior FELA decisions that supposedly "'recognized proximate cause as the standard applicable in FELA suits.'" Br. 40-41 (quoting *Sorrell*, 549 U.S. at 175-76 (Souter, J., concurring)). But there is no inconsistency between *Rogers*' holding and the cases it cited. *Coray* supported the *Rogers* Court's understanding of FELA's causation standard. *See supra* pp. 25-27.[24] The other two cases, *Carter* and *Tiller*, were cited for holdings unrelated to causation. *See Rogers*, 352 U.S. at 507 n.13 (citing *Carter*'s holding that "[p]roof of violation of certain safety-appliance statutes" establishes negligence as a matter of law); *id.* at 507-08 & n.16 (citing *Tiller* for proposition that FELA "strip[s]" railroad of its "common-law defenses"). Although the words "proximate cause" appear in the opinions in those cases, neither analyzed the meaning of those words, let alone established a causation standard inconsistent with *Rogers*' holding. Petitioner's suggestion that *Rogers*' citation to *Carter* and *Tiller* for wholly unrelated points implied wholesale approval of passing references to proximate causation in those opinions has no merit.

Fifth, petitioner contends (at 41-42) that the dissenting justices in *Rogers* and its companion cases believed the Court was applying settled law to particular factual circumstances. On the contrary, Justice Harlan argued that the Court's discussion of "the element of causation" incorrectly "departed

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[24] The respondent in *Sorrell* did not discuss the most relevant passages of *Coray* or cite any of the other pre-*Rogers* cases that departed from the common-law proximate-causation requirement.

from" "common-law rules." 352 U.S. at 564 (Harlan, J., concurring and dissenting). For his part, Justice Frankfurter appeared to recognize the correctness of the Court's analysis of FELA causation in *Rogers*. He explained that, "on the question of casualty," FELA did not reflect a "statutory absorption of the common-law concept." *Id.* at 538 & n.7 (Frankfurter, J., dissenting). Rather, in his view, FELA addressed "the requirement of a causal relation with the language that the injury must result 'in whole or in part' from the employer's negligence." *Id.*

Unlike petitioner today, contemporary readers of *Rogers* readily grasped the holding. The Association of American Railroads ("AAR")—an *amicus* in support of petitioner here—submitted an *amicus* brief supporting the railroad's rehearing petition in *Rogers*. Although AAR took issue with several aspects of this Court's decision in *Rogers*, it did not dispute that FELA's causation standard did *not* incorporate traditional common-law notions of proximate cause:

> There was, of course, much metaphysical formalism in the development of the common-law principle of "proximate causation," in the talk about "*causa causans*," "sole, active, efficient, proximate cause," and other like expressions. Unquestionably Congress, by writing the words "in whole or in part" into this statute, made very substantial modifications in the common-law doctrine of proximate causation. One can hardly confine causation to what is "proximate" in the common-law sense when the statute imposes liability for negligence from which the casualty resulted "in whole or in part."

AAR Amicus Br. in Support of Said Pet. for Rehearing 11, *Rogers*, *supra* (filed Apr. 22, 1957).

In sum, petitioner's arguments that *Rogers* did not reject common-law notions of proximate cause are unpersuasive.

C. The Pre-*Rogers* Cases On Which Petitioner Relies Do Not Support Its Argument

Contrary to petitioner's claim (at 27-33), this Court's pre-*Rogers* FELA jurisprudence had not developed a settled understanding of FELA causation that *Rogers* could have "overruled" (Pet. Br. 34). The pre-*Rogers* cases that focused on the issue interpreted FELA to adopt a causation standard that does *not* include common-law notions of proximate cause. *See supra* pp. 22-26 (discussing *Campbell*, *Huxoll*, *Hadley*, and *Coray*).

The remaining cases contain no sustained analysis of proximate cause. In some, "proximate cause," or some variant of it, appears in the Court's opinion, but the decision turns on a different issue.[25] In others, the Court used the words "proximate cause" while determining that any negligence of the railroad was too factually attenuated because the harm would have occurred for some other reason regardless of the

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[25] *See Brady v. Southern Ry. Co.*, 320 U.S. 476, 483 (1943) (holding that equipment in question was fit for ordinary use and therefore that railroad satisfied its duty of "due care"); *New York Cent. R.R. Co. v. Ambrose*, 280 U.S. 486, 489 (1930) ("[T]here must be a reversal because the evidence fails to establish negligence on the part of the railroad company."); *Delaware, L. & W. R.R. Co. v. Koske*, 279 U.S. 7, 11-12 (1929) ("[t]he evidence is not sufficient to warrant a finding that defendant was guilty of any breach of duty owed to plaintiff"); *Lang v. New York Cent. R.R. Co.*, 255 U.S. 455, 459-60 (1921) (holding that employee could not base his claim on railroad's violation of the SAA because his injury was not of a kind the Act was intended to prevent).

railroad's conduct.[26] Such cases are fully consistent with the relaxed form of FELA proximate cause recognized in *Rogers* and subsequent cases. *See supra* p. 31 n.19. Some cases indicated approval of some generic notion of "proximate cause," but they contained no discussion of the content of those words in a FELA action.[27] Finally, in many of the cases petitioner cites, the Court upheld jury verdicts for employees or reversed directed verdicts for railroads, making any mention of "proximate cause" unnecessary to the outcome.[28]

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[26] *See St. Louis-San Francisco Ry. Co. v. Mills*, 271 U.S. 344, 346-47 (1926) (stating that there was no evidence that failure to provide an additional guard to protect decedent from violence by striking workers was "the proximate cause of decedent's death," because there was no evidence that an additional guard would, in fact, have prevented the death); *St. Louis, Iron Mountain & S. Ry. Co. v. McWhirter*, 229 U.S. 265, 281-82 (1913) (finding "no proof tending to show a connection between" violation of the safety regulation and employee's death).

[27] *See Reynolds v. Atlantic Coast Line R.R. Co.*, 336 U.S. 207, 208-09 (1949) (per curiam) (summarily concluding that lower court did not err in holding that "the facts alleged did not show that the accident resulted proximately, in whole or in part, from [railroad's] negligence"); *Northwestern Pac. R.R. Co. v. Bobo*, 290 U.S. 499, 503-04 (1934) (holding that employee "assumed any alleged risk"; also stating that, if railroad was negligent, "there is nothing whatsoever to show that this was the proximate cause of the unfortunate death").

[28] *See Carter*, *supra*; *O'Donnell v. Elgin, J. & E. Ry. Co.*, 338 U.S. 384 (1949); *Urie*, *supra*; *Tennant v. Peoria & P. U. Ry. Co.*, 321 U.S. 29 (1944); *Tiller*, *supra*; *Brady v. Terminal R.R. Ass'n of St. Louis*, 303 U.S. 10 (1938); *Swinson v. Chicago, St. P., M. & O. Ry. Co.*, 294 U.S. 529 (1935); *Minneapolis, St. P. & S.S.M. Ry. Co. v. Goneau*, 269 U.S. 406 (1926); *Davis v. Wolfe*, 263 U.S. 239 (1923); *Louisville & N. R.R. Co. v. Layton*, 243 U.S. 617 (1917); *Norfolk & W. Ry. Co. v. Earnest*, 229 U.S. 114 (1913).

Tennant, which petitioner cites (at 27, 32-33), is illustrative of the passing usage of "proximate cause" in many cases invoked by petitioner. There, the court of appeals had reversed a jury verdict for the employee on the ground that "there was no substantial proof that [the railroad's] negligence was the proximate cause of Tennant's death." 321 U.S. at 30. This Court, in turn, reversed, holding that there was sufficient proof of "proximate cause." The Court's opinion provided no definition of "proximate cause." And, in weighing the evidence, it conflated "proximate cause" with "but for" cause, concluding that the evidence supported "[t]he ultimate inference that Tennant would not have been killed *but for* the [railroad's negligence]." *Id.* at 34 (emphasis added).

These cases exemplify the reasons for this Court's well-settled rule that passing *dicta* should not be given precedential effect. Because these cases did not focus on the meaning of proximate cause under FELA, they cannot establish that Congress incorporated common-law proximate cause as an element of a FELA claim.

D. Petitioner's Analogies To Other Statutes Are Unpersuasive

Petitioner's reliance (at 47-48) on proximate-cause requirements in antitrust, civil RICO, and securities-fraud actions is misplaced. First, none of those statutes contains FELA's "in whole or in part" language, which is inconsistent with common-law proximate-cause limitations. Indeed, much of this Court's recent proximate-cause case law in those areas rests on *Southern Pacific*'s maxim that the common law does not look beyond the "first step" in the causal chain. *See Holmes*, 503 U.S. at 271 (internal quotations omitted); *Associated Gen. Contractors of Cali-*

fornia, Inc. v. California State Council of Carpenters, 459 U.S. 519, 534 (1983). Yet this Court rejected that standard in *Hadley* based on FELA § 1's plain text. *See supra* pp. 23-24.

Moreover, FELA § 1 differs fundamentally from those statutory rights of action. Antitrust, RICO, and securities-fraud violations "may be expected to cause ripples of harm to flow through the Nation's economy." *Associated Gen. Contractors*, 459 U.S. at 534 (internal quotations omitted). Because those statutes do not expressly limit the plaintiffs authorized to bring suit, an expansive interpretation of causation risks "fill[ing] the courts with endless litigation" by a theoretically infinite number of indirectly affected parties. *Holmes*, 503 U.S. at 266 n.10 (internal quotations omitted). It was thus unsurprising that the Court found evidence in the legislative history of each statute of congressional intent to limit the class of affected parties eligible to bring claims under it. *See Associated Gen. Contractors*, 459 U.S. at 531, 533-34; *Holmes*, 503 U.S. at 267-68.

FELA's structure is wholly different. Railroad negligence does not typically create broad-based harm to large numbers of people. Moreover, FELA limits the class of potential plaintiffs to rail workers. *See* 45 U.S.C. § 51. Unsurprisingly, therefore, FELA's legislative history—unlike the Clayton Act's and RICO's—contains no indication that Congress intended courts to engraft common-law requirements onto the statutory cause of action to further limit the class of employees who may recover for injuries caused by their employers' negligence.[29]

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[29] The Court's related concern in *Dura Pharmaceuticals, Inc. v. Broudo*, 544 U.S. 336 (2005), which led it to require plaintiffs

III. STATUTORY *STARE DECISIS* SUPPORTS ADHERENCE TO THE *ROGERS* STANDARD

For more than 50 years, *Rogers* has provided a stable, workable standard for causation in FELA cases. Based on *Rogers* and FELA § 1's text, every federal circuit has held that FELA requires a more relaxed causation standard than common-law proximate cause. *See supra* p. 27 n.18. The overwhelming majority of states have done the same.[30] Jurisdictions across the country have adopted pattern jury instructions for FELA cases that track *Rogers*.[31] And

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to prove "loss causation" (which the Court described as an aspect of "proximate cause"), is inapposite for the additional reason that it dealt with "the contours of a *judicially implied* cause of action," *id.* at 345 (emphasis added)—not, as here, an express statutory right of action.

[30] *See* App. 34a-35a n.7 (rejecting petitioner's arguments regarding Iowa, Minnesota, and Ohio, and concluding that only Utah, Montana, and West Virginia apply common-law proximate cause in FELA cases). Petitioner now erroneously cites Alabama law. *See CSX Transp., Inc. v. Miller*, 46 So. 3d 434, 461 (Ala. 2010) ("'the test of a jury case is simply whether . . . employer negligence played any part, even the slightest, in producing the injury or death'") (quoting *Gottshall*, 512 U.S. at 543).

[31] *See, e.g.*, *Fifth Circuit Pattern Jury Instructions—Civil*, Instruction No. 5.1 (2009); *Manual of Model Civil Jury Instructions for the District Courts of the Eighth Circuit*, Instruction No. 7.01 (2011); *Ninth Circuit Manual of Model Jury Instructions—Civil*, Instruction No. 6.4 (2007); *Eleventh Circuit Pattern Jury Instructions (Civil Cases)*, Instruction No. 7.1 (2005); 5 *Modern Federal Jury Instructions—Civil*, Instruction 89-2 (2009); *California Civil Jury Instructions (BAJI)*, Civ. 11.14 (2010); *Judicial Council of California Civil Jury Instructions*, CACI No. 2903 (2010); *Illinois Pattern Jury Instructions—Civil*, No. 160.01 (2009); *New York Pattern Jury Instructions—Civil*, PJI 2:180 (2010); *Draft Pattern Jury Instructions for Cases of Railroad Employee Personal Injury for the District Courts of the*

numerous courts have rejected jury instructions founded on common-law precepts of "proximate cause."[32] Thus, the relaxed standard of causation that this Court recognized in *Rogers* has become entrenched in FELA jurisprudence.[33]

The purpose of *stare decisis* is to "promote[] stability, predictability, and respect for judicial authority." *Hilton v. South Carolina Pub. Rys. Comm'n*, 502 U.S. 197, 202 (1991) (calling the doctrine of "fundamental importance to the rule of law") (internal quotations omitted). Petitioner does not purport to offer any "compelling justification" for disturbing this well-settled rule of law. *Id.* It offers no "intervening development of the law [that] has 'removed or weakened the conceptual underpinnings from the prior decision,'" and no reason to believe that the *Rogers* test has become unworkable. *Neal v. United States*, 516 U.S. 284, 295 (1996) (quoting *Patterson v. McLean Credit Union*, 491 U.S. 164, 173 (1989)). Notably, petitioner offers no case demonstrating that the *Rogers* standard has led to unreasonable results.

Moreover, "*[s]tare decisis* has added force when the legislature, in the public sphere, and citizens, in the private realm, have acted in reliance on a previous

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United States Court of Appeals for the First Circuit, Instruction No. 1.1 (July 15, 2010).

[32] *See*, *e.g.*, *Page v. St. Louis Sw. Ry. Co.*, 312 F.2d 84, 91-92 (5th Cir. 1963); *DeLima v. Trinidad Corp.*, 302 F.2d 585, 587-88 (2d Cir. 1962) (Marshall, J.); *Hoyt v. Central R.R.*, 243 F.2d 840, 843 (3d Cir. 1957) ("Any instructions to the jury on the element of proximate causation must necessarily define liability to include a greater area than that at common law.").

[33] *See also* William H. DeParcq, *Litigation Under the Federal Employers' Liability Act* § 180 (1966) ("it is now error to instruct a jury, in the traditional language of proximate cause").

decision, for in this instance overruling the decision would dislodge settled rights and expectations or require an extensive legislative response." *Hilton*, 502 U.S. at 202 (upholding application of FELA to state-owned railroads). Such reliance interests are at stake here. Rail workers are not covered by any workers' compensation scheme and have relied for decades on FELA and its relaxed causation standard to compensate them for injuries resulting from railroad negligence. *See id.* (noting that many state workers' compensation laws exclude rail workers on "the assumption that FELA provides adequate protection"); *GAO Report* at 12. If this Court alters FELA's long-settled causation standard, it will "dislodge" rail workers' settled expectations regarding compensation for workplace injuries and necessitate "an extensive legislative response" at both the state and federal levels. *Hilton*, 502 U.S. at 202.

There is no reason to take that drastic step. The *Rogers* standard has promoted stability and predictability by avoiding the varied and confusing common-law proximate-causation instructions. *See Sorrell*, 549 U.S. at 180 & n.2 (Ginsburg, J., concurring in the judgment) ("If the term 'proximate cause' is confounding to jurists, it is even more bewildering to jurors.") (citing authorities); Robert P. Charrow & Veda R. Charrow, *Making Legal Language Understandable: A Psycholinguistic Study of Jury Instructions*, 79 Colum. L. Rev. 1306, 1353 (1979) (noting that 23% of subjects interpreted "proximate cause" as "'approximate cause,' 'estimated cause,' or some fabrication," and that "the phrase 'in natural and continuous sequence' produced a whole variety of misunderstandings"). In contrast to the uniformity in FELA instructions, none of the federal circuits has

promulgated model jury instructions for common-law proximate cause; the Seventh Circuit has expressly declined to do so because "[t]here is no consistent causation standard for either federal or state claims."[34] State-law proximate-cause standards vary and are subject to change.[35] Accepting petitioner's invitation (at 19 n.3) to upend *Rogers* in favor of a "proximate causation" standard with some unknown "common law" meaning will create disuniformity and embroil rail workers, railroads, and the courts in unnecessary and protracted litigation about the proper causation instructions under FELA. For example, instructing juries to find for the defendant if its negligence was not a "substantial factor" in the employee's injury would create tremendous confusion. Under FELA § 3, employee negligence reduces, but does not eliminate, recovery under the Act, even where the employer's negligence played a relatively small role. However, a "substantial factor" proximate-cause instruction may lead the jury not to find proximate causation (and thus deny liability altogether) in such a situation, contrary to FELA's text and structure.

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[34] *Federal Civil Jury Instructions of the Seventh Circuit*, Instruction No. 1.30 (2009 rev.).

[35] For example, a Nebraska plaintiff must show that "the injury is the natural and probable result of the negligence" and that "there is no efficient intervening cause." *Heatherly v. Alexander*, 421 F.3d 638, 641-42 (8th Cir. 2005). A Tennessee plaintiff must show that the tortfeasor's conduct was "a 'substantial factor' in bringing about the harm"; "there is no rule or policy that should relieve the wrongdoer from liability because of the manner in which the negligence had resulted in harm"; and the harm "could have reasonably been foreseen or anticipated by a person of ordinary intelligence and prudence." *Kellner v. Budget Car & Truck Rental, Inc.*, 359 F.3d 399, 406 (6th Cir. 2004) (internal quotations omitted).

Adherence to *Rogers*' correct interpretation of FELA § 1 is especially appropriate given that Congress has had more than 50 years to express its disapproval of that well-settled standard. *See Patterson*, 491 U.S. at 172-73 (for statutory construction, "the burden borne by the party advocating the abandonment of an established precedent is greater" because "Congress remains free to alter what [the Court] ha[s] done"). Despite wide-ranging debate regarding whether FELA should be abandoned for workers' compensation, Congress never has seen fit to do so. *See Hilton*, 502 U.S. at 202 (relying on 30 years of congressional acquiescence); *Federal Employers' Liability Act: Hearing Before the Subcomm. on Transportation and Hazardous Materials of the H. Comm. on Energy and Commerce*, 101st Cong. 131-38 (1989) (testimony that relaxed FELA causation standard meant substitute rail workers' compensation scheme unwarranted). In *Hilton*, this Court upheld another longstanding interpretation of FELA in *Parden v. Terminal Railway of Alabama State Docks Department*, 377 U.S. 184 (1964), citing parties' reliance on that decision and Congress's acquiescence to it over nearly three decades. This Court should reach the same conclusion here.[36]

CONCLUSION

The judgment of the court of appeals should be affirmed.

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[36] If the Court concludes that the district court should have instructed the jury regarding proximate cause, respondent should be permitted to argue on remand (as he did in the court below) that the failure to give petitioner's proposed instruction was harmless error.

Respectfully submitted,

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