No. 18-

IN THE

Supreme Court of the United States

NORFOLK SOUTHERN RAILWAY COMPANY,
Petitioner,

v.

MARK A. SUMNER,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Virginia

PETITION FOR A WRIT OF CERTIORARI

CARTER G. PHILLIPS *
TOBIAS S. LOSS-EATON
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000
cphillips@sidley.com

Counsel for Petitioner

* Counsel of Record

April 26, 2019

QUESTION PRESENTED

The Federal Employers Liability Act (FELA) provides that a railroad "shall be liable in damages" to an employee for an on-the-job injury "resulting in whole or in part from the negligence" of the railroad. 45 U.S.C. § 51. FELA embraces common-law negligence principles unless the statute contains "express language to the contrary." *Norfolk S. Ry.* v. *Sorrell*, 549 U.S. 158, 165–66 (2007). This Court has read FELA's "resulting in whole or in part" language to mean that the statute does "not incorporate any traditional common-law formulation of 'proximate causation,'" but still requires the plaintiff to show that the railroad's negligence was at least a but-for cause of his injury. *CSX Transp., Inc.* v. *McBride*, 564 U.S. 685, 694, 703–05 (2011); *Rogers* v. *Mo. Pac. R.R.*, 352 U.S. 500, 506–09 (1957).

The question presented is:

Whether FELA permits liability when the plaintiff cannot meet the common-law standard of proof for but-for causation.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioner Norfolk Southern Railway Company is a subsidiary of Norfolk Southern Corporation, a publicly traded company. No other publicly held company owns 10% or more of Petitioner's stock.

Respondent is Mark A. Sumner.

TABLE OF CONTENTS

TABLE OF CONTENTS—continued

TABLE OF AUTHORITIES

CASES Page

TABLE OF AUTHORITIES—continued

TABLE OF AUTHORITIES—continued

STATUTES

SCHOLARLY AUTHORITIES

TABLE OF AUTHORITIES—continued

OTHER AUTHORITIES

PETITION FOR A WRIT OF CERTIORARI

Norfolk Southern Railway Company respectfully petitions for a writ of certiorari to review the judgment of the Virginia Supreme Court.

OPINIONS BELOW

The Virginia Supreme Court's opinion is reported at 822 S.E.2d 809 and reproduced at Pet. App. 1a–27a. The trial court's final order and oral rulings denying Norfolk Southern's motions for a directed verdict are unpublished. They are reproduced at Pet. App. 28a–32a, 92a–93a, 114a–118a.

JURISDICTION

The Virginia Supreme Court entered judgment on January 31, 2019. Pet. App. 1a. This Court has jurisdiction under 28 U.S.C. § 1257.

STATUTORY PROVISIONS INVOLVED

Section 1 of FELA provides, as relevant:

> Every common carrier by railroad while engaging in [interstate or international] commerce . . . shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce . . . for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

45 U.S.C. § 51.

STATEMENT OF THE CASE

This case is about the injuries Mark Sumner experienced when he fell down a trackside embankment while working for Norfolk Southern. There is no dispute that part of the footpath at the top of the embankment was narrower than the industry standard. There is also no dispute that no one—including Sumner—knows how, why, or even where exactly he fell. He has no memory of it, and there were no witnesses.

Even so, when Sumner sued Norfolk Southern for negligence under FELA, the jury awarded him almost $337,000. A divided Virginia Supreme Court affirmed by a single vote, holding that "the standard of proof in [a] FELA action"—by which it meant the amount of evidence the plaintiff must produce to avoid a directed verdict—"is significantly more lenient than in a common-law tort action." Pet. App. 8a. On that basis, the majority held that the verdict was adequately supported by the jurors' "common sense," coupled with an expert's assertion that narrow footpaths can make it harder to avoid falling "if you do stumble or trip"—even though there was no evidence that Sumner did stumble or trip, much less that he did so where the footpath narrowed. *Id.* at 10a, 50a. Three Justices dissented, explaining that "despite a relaxed standard of proximate cause, the FELA retains the requirement that the plaintiff prove 'but for' causation" under "the same" principles that govern common-law tort actions. *Id.* at 17a, 25a.

This decision, eliminating the plaintiff's duty to prove even but-for causation, warrants review. FELA is not "a workers' compensation statute"; liability is "founded on common-law concepts of negligence and injury, subject to such qualifications as Congress has imported into those terms." *Consol. Rail Corp.* v.

Gottshall, 512 U.S. 532, 543 (1994); see *Norfolk S. Ry.* v. *Sorrell*, 549 U.S. 158, 165–66 (2007). The Court has thus held that FELA does not require common-law proximate causation, because the statute's "resulting in whole *or in part*" language signals a departure from those standards. *CSX Transp., Inc.* v. *McBride*, 564 U.S. 685, 705 (2011) (emphasis added); see *Rogers* v. *Mo. Pac. R.R.*, 352 U.S. 500, 506–09 (1957). But a plaintiff still must show at least but-for causation. See *McBride*, 564 U.S. at 704; *id.* at 706 (Roberts, C.J., dissenting). The mere "fact that injuries occur" on the job is not a basis for liability. *Gottshall*, 512 U.S. at 543.

The court below erred in holding that FELA imposes a lower standard of proof than the common law. Although FELA's language allows liability based on a less-direct causal connection than the common law, *McBride*, 564 U.S. at 705, it nowhere suggests that less evidence is needed to establish that causal connection (or any other element). Because there is no such "express language," the standard of proof should be "determined by reference to the common law." *Sorrell*, 549 U.S. at 165–66. The dissenters below were thus correct that Sumner must satisfy the traditional common-law standard, which he did not do. Pet. App. 17a, 25a.

The Virginia court suggested that its rule protects a FELA plaintiff's right to a jury trial. But that is not what it does. Instead, it simply insulates unsupported jury verdicts from review. Those are the only cases that would make it to trial under the decision below but not under the common law, which already requires a trial whenever fair-minded jurors could disagree under the preponderance standard that would govern at trial. There is no justification for this bizarre rule.

The Virginia Supreme Court is unfortunately not alone in this mistake. It is common for courts to say that a FELA plaintiff can reach a jury—and a verdict for the plaintiff must stand—so long as he presents even "featherweight" evidence. These statements usually can be traced back, as here, to *Rogers*, 352 U.S. 500. But as *McBride* clarified, *Rogers* dealt with the statute's substantive proximate-causation standard, not the standard of proof. *McBride*, 564 U.S. at 693–99. Still, eight years after *McBride*, courts remain confused and divided. Some courts apply this lower standard of proof to causation alone; some apply it to negligence as well; and a few courts correctly apply common-law rules to determine whether the plaintiff's evidence could support a jury verdict. This Court's guidance is urgently needed to resolve this conflict.

This issue is important. Hundreds of FELA suits are filed every year in the federal courts alone, and hundreds more are filed under the Jones Act, which incorporates FELA's substantive provisions. 46 U.S.C. § 30104. Many more FELA suits are filed in state courts. If these statutes incorporate not only a relaxed standard of causation, but also a "featherweight" standard of proof, their reach will grow far beyond what Congress intended. That is true especially if, as many courts hold, the lower standard of proof applies not only to causation but also to negligence. "FELA 'does not make the employer the insurer of the safety of his employees while they are on duty,'" *Gottshall*, 512 U.S. at 543, and the courts are not free to expand the statute until it does.

A. Factual Background.

On February 26, 2013, Sumner was working as the conductor on a northbound Norfolk Southern freight train passing through Danville, Virginia. Around

8:30 a.m., the train stopped north of the Danville railyard so the crew could leave a set of railcars, called a "cut," on a side track. Pet. App. 60a. The train stopped on the main, northbound line so that the last car in the cut was south of the switch for the side track. *Id.*

Sumner separated the rear of the cut from the remaining railcars, and then rode north on last railcar as the locomotive pulled past the switch for the side track. He then climbed down from the car and walked south on the footpath running alongside the track toward the switch. Sumner does not remember anything after dismounting the locomotive. Pet. App. 61a. A state inspector saw Sumner dismount and start to walk south, but lost sight of him as he continued along the path. The path, composed of ballast—gravel or coarse stone that forms the bed of a railroad track—ran between the track, on one side, and a 35-foot wooded embankment, on the other.

Sumner testified that, ordinarily, he would "knock" the switch timer (which prevents the switch from opening improperly), walk south about 200 feet more to release the derail (which prevents cars from moving on the side track), and then walk north again to throw the switch so the engineer could back the cut onto the side track. Pet. App. 68a–69a. None of that happened.

Instead, the engineer, who grew concerned when Sumner did not answer his radio, found Sumner at the bottom of the embankment, about 60 feet north of the derail. Sumner was "very disoriented," had bitten through his tongue, and suffered a concussion, a broken clavicle, and multiple broken ribs. Pet. App. 3a. He asked, "What are we doing here? What happened?" *Id.* He had no memory of what happened,

and no one saw him between when the inspector lost sight of him and when the engineer found him.

The only evidence of what happened came from Sumner's reports to others after the accident. An EMT who treated Sumner on the embankment recorded that Sumner said he lost his balance on the wet gravel and fell. But later that day and the next day, Sumner told three doctors that, before his fall, he had passed out or blacked out. One doctor recorded Sumner saying that he "essentially had some blurred vision and then blacked out and woke up at the bottom of the railroad embankment . . . [H]e states that he felt funny prior to blacking out, and although in various places he has or has not had some blurring of his vision, he states to [me] he did have some blurring of his vision." Pet. App. 133a. Sumner similarly told a Norfolk Southern supervisor who visited him in the hospital that "he wasn't sure [what happened], that he was walking along and then he blacked out." *Id.* at 103a.

B. Proceedings Below.

1. Sumner sued Norfolk Southern under FELA in a Virginia state court. His theory was that the trackside footpath, which Norfolk Southern built and maintained, was negligently narrow, causing his injuries.

At trial, Sumner confirmed that he did not remember his fall and could not explain how it happened. In fact, he could not remember anything after getting off the locomotive to disconnect the cut from the rest of the train. Pet. App. 61a. It was "like somebody flipped a switch," and "nobody can tell" him what happened. *Id.* Sumner also claimed that he did not remember telling anyone that he had fainted or blacked out before the accident, did not know how his

doctors came by that information, and in fact did not remember his hospital stay at all. *Id.* at 62a, 64a–65a. The next thing he remembered after getting off the train was seeing the engineer's face, presumably at the bottom of the embankment. *Id.* at 63a. He had no memory of walking on the footpath beside the track. *Id.* at 67a.

Sumner's case thus hinged on the testimony of his expert, Raymond Duffany. Duffany testified as an expert in railroad engineering practices and operations. Pet. App. 5a. His central contention was that the footpath running along the side track, at the top of the embankment, was too narrow. He testified that, under the "prevailing practices in the railroad industry," the "minimum width that would be considered safe for a walkway would be 24 inches." *Id.* at 37a. And the "walkway area [should] be relatively flat," with a slope of no more than seven degrees. *Id.* Based on a site visit conducted about 20 months after the accident, the expert concluded that a stretch of the footpath, starting at the derail and running about 70 feet north toward the switch, was 15 inches wide. *Id.* at 46a–47a. North of that point, the path broadened; at the switch, it was around four feet wide. *Id.* at 47a. (The point where Sumner was found on the embankment was about 60 feet north of the derail, *id.*, but there was no evidence of where he left the path.) Duffany thus concluded that the path was "not safe" and did not comply with industry standards. *Id.*

Duffany also testified, over objection, that a wider walkway (in the words of Sumner's counsel) "may have reduced the likelihood of the risk of an accident in this case." Pet. App. 49a. Duffany said: "If you try to walk in a 15-inch wide area, you would have a difficult time trying to do that . . . and knowing that you are walking on that large ballast, which moves

and tends to roll under foot traffic, *if you do stumble or trip*, [a 24 inch width] gives you that extra margin you have to recover from a possible fall or an area to fall in other than over the cliff." *Id.* at 50a (emphasis added). That is, a wider walkway "give[s] you an adequate place to walk *if you do stumble on the ballast or trip*, [so] you have room to recover." *Id.* at 53a–54a (emphasis added). There was no testimony that Sumner stumbled or tripped. And on cross-examination, Duffany conceded that he had "no idea what role, if any, that [the] walk path could have played" in Sumner's accident. *Id.* at 18a.

At the close of Sumner's case, Norfolk Southern moved to strike the evidence and enter judgment in its favor. Pet. App. 78a. Norfolk Southern did not dispute that Duffany's testimony about the path's width created a triable issue on negligence, but it argued that Sumner "cannot show how or why this accident occurred." *Id.* at 80a. Indeed, "We don't even know where the Plaintiff was" when he fell; "He doesn't know where he was." *Id.* In response, Sumner's attorney argued that the evidence was sufficient for the jury to "decide that that walkway didn't comply with [industry] standards and had it complied, it was less likely that this man would be injured." *Id.* at 87a. He also asserted that "the FELA was meant as [an] alternative or substitute for workers' compensation." *Id.* at 88a.

The trial judge denied the motion. He concluded that Duffany provided sufficient evidence that Norfolk Southern was negligent in maintaining the path because it was too narrow. On causation, he determined that Duffany's testimony supported a fair inference "from circumstantial evidence . . . that a wider path gives an individual margin for error": "It's foreseeable that a wider path would prevent [a per-

son] from falling down. So I think there's sufficient grounds to take the case to the jury." Pet. App. 93a.

The jury found for Sumner and awarded him $336,923.00. The trial judge denied Norfolk Southern's post-trial motion to set aside the verdict. Pet. App. 114a–118a; see *id.* at 28a–32a.

2. A divided Virginia Supreme Court affirmed. The majority recognized that negligence was undisputed, and thus the case turned on causation. Pet. App. 10a–11a. The majority concluded that FELA reduces the plaintiff's burden to show causation, compared to the common law, in two ways: "[T]he standard of proof in [a] FELA action is significantly more lenient than in a common-law tort action," and "[t]he issue of proximate cause is also treated more leniently in FELA cases than in common-law tort actions." *Id.* at 8a (citing *Norfolk & W. Ry.* v. *Hughes*, 439 S.E.2d 411, 413 (Va. 1994), and *Rogers*, 352 U.S. at 506).

Applying these standards, the majority held that Sumner produced enough evidence to support the verdict. It concluded that Duffany's testimony that a narrow walkway presents a risk of slipping or tripping was appropriate, and in any event was "merely declaratory of matters within the common knowledge and experience of the jury." Pet. App. 10a. And on the ultimate question of causation, the majority reiterated that there is "a significant difference between FELA cases and common-law tort actions." *Id.* at 11a. It cited decisions from this Court and the Virginia Supreme Court "in which a railroad worker suffered injury or death while performing his duties where there were no eyewitnesses to the event." *Id.* Based on these cases, the majority held that "[t]here was evidence to support the inference that the defendant's negligence played a part, however small, in

causing the fall which was the source of the plaintiff's injury," which "create[d] a jury issue." *Id.* at 14a. The majority never said what that evidence was.

Three Justices dissented. They explained that "the plaintiff's evidence failed to establish the foundational 'but for' causation that is required to establish the railroad's liability." Pet. App. 16a. "The plaintiff's theory was that the railroad was negligent in that it provided only 15 inches of level walkway instead of 24 inches," and "the extra nine inches in width would have allowed the plaintiff to recover his step and avoid the fall. No evidence, however, supported this theory. No witness established where the plaintiff was standing or how he fell." *Id.*

Causation, the dissenters described, normally requires two steps: Factual (but-for) causation, and proximate causation. FELA relaxes the usual common-law proximate causation standard. Pet. App. 17a (citing *McBride*, 564 U.S. at 700). But "the plaintiff's burden of proving 'but for' causation remains intact." *Id.* Indeed, this minimum requirement was common ground in *McBride*, where all members of this Court agreed that "despite a relaxed standard of proximate cause, the FELA retains the requirement that the plaintiff prove 'but for' causation—that is, that the plaintiff's harm would not have occurred but for the negligence of the defendant." *Id.* (citing *McBride*, 564 U.S. at 699–700 (majority), 706 (Roberts, C.J., dissenting)). And "the 'but for' causation principles at issue are the same" under FELA as under the common law. *Id.* at 25a.

Those principles, the dissent explained, should have precluded liability here. "No evidence established 'but for' causation": "The evidence establishes only that the plaintiff fell. No evidence establishes where the plaintiff was situated when he fell. He

could have been walking in the middle of the path, on the edge of the path, or off of the path altogether. No evidence establishes how he fell, or why he fell." Pet. App. 18a. All of the FELA cases the majority cited, by contrast, involved at least enough evidence to "permit[] the jury to draw a logical inference" that the railroad was responsible for the plaintiff's injury. *Id.* at 22a.

In closing, the dissent acknowledged that "some FELA cases have been submitted to juries based upon evidence 'scarcely more substantial than pigeon bone broth.'" Pet. App. 27a (quoting *Williams* v. *Nat'l R.R. Passenger Corp.*, 161 F.3d 1059, 1061 (7th Cir. 1998)). "Here, the watery broth does not contain even pigeon bones." *Id.*

REASONS TO GRANT THE PETITION

I. THE DECISION BELOW CONFLICTS WITH THIS COURT'S PRECEDENTS.

The Virginia Supreme Court's holding that "the standard of proof in [a] FELA action is significantly more lenient than in a common-law tort action," Pet. App. 8a, conflicts with the statutory text and this Court's precedents, which make clear that FELA follows the common law unless Congress has expressly directed otherwise. Because Congress has not done so here, the common-law standard of proof governs. The precedents on which the lower court relied are not to the contrary. And the result of the decision below is that unsupported jury verdicts are insulated from review.[1]

---

[1] This petition uses the term "standard of proof" because most courts to discuss this issue do so, including the court below. But strictly speaking, this case is about the "burden of production," *i.e.*, whether a FELA plaintiff has "introduce[d] enough evi-

A. "In response to mounting concern about the number and severity of railroad employees' injuries, Congress in 1908 enacted FELA to provide a compensation scheme for railroad workplace injuries, preempting state tort remedies." *Sorrell*, 549 U.S. at 165. But "[u]nlike a typical workers' compensation scheme, which provides relief without regard to fault . . . FELA provides a statutory cause of action sounding in negligence." *Id.* But also unlike workers' compensation schemes, there is no cap on how much a FELA plaintiff can recover. The statute says simply that a railroad "shall be liable in damages to any person suffering injury while he is employed by such carrier . . . for such injury or death resulting in whole or in part from the [railroad's] negligence." 45 U.S.C. § 51.

"FELA provides for concurrent jurisdiction of the state and federal courts," but "substantively FELA actions are governed by federal law." *Sorrell*, 549 U.S. at 165. Federal law thus controls "whether sufficient evidence of negligence is furnished by the record to justify the submission of the case to the jury." *Brady* v. *S. Ry.*, 320 U.S. 476, 479 (1943); *W. & Atl. R.R.* v. *Hughes*, 278 U.S. 496, 497–98 (1929).

This Court generally assumes that "when Congress creates a federal tort it adopts the background of general tort law." *Staub* v. *Proctor Hosp.*, 562 U.S. 411, 417 (2011). FELA is no different. The statute "is founded on common-law concepts of negligence and injury, subject to such qualifications as Congress has imported into those terms." *Urie* v. *Thompson*, 337 U.S. 163, 182 (1949). Thus, "[a]bsent express

---

dence . . . to have the [case] decided by the fact-finder, rather than decided against the [plaintiff] in a peremptory ruling such as a summary judgment or a directed verdict." *Burden of Production*, Black's Law Dictionary (10th ed. 2014).

language to the contrary, the elements of a FELA claim are determined by reference to the common law." *Sorrell*, 549 U.S. at 165–66; see also *McBride*, 564 U.S. at 706 (Roberts, C.J., dissenting); *Gottshall*, 512 U.S. at 543.

For example, FELA permits recovery for negligently caused "occupational disease[s]" as well as traumatic injuries, because "at 'common law the incurring of a disease'" is actionable "'if the other elements of liability for tort are present.'" *Urie*, 337 U.S. at 182. Likewise, it allows recovery for negligent infliction of emotional distress, because the common law allowed such claims and the topic "is not explicitly addressed in the statute." *Gottshall*, 512 U.S. at 551. And it applies "the same causation standard to railroad negligence and employee . . . negligence" because "the common law applied the same causation standard to defendant and plaintiff negligence, and FELA did not expressly depart from that approach." *Sorrell*, 549 U.S. at 168, 170–72.

By contrast, FELA expressly "abolished the fellow servant rule, rejected the doctrine of contributory negligence in favor of that of comparative negligence, . . . prohibited employers from exempting themselves from FELA through contract," and "abolished the assumption of risk defense." *Gottshall*, 512 U.S. at 542–43 (citing 45 U.S.C. §§ 51, 53–55). Also, given "the breadth of the phrase 'resulting in whole or in part from the [railroad's] negligence,'" this Court has held that, "in comparison to tort litigation at common law, 'a relaxed standard of causation applies under FELA.'" *McBride*, 564 U.S. at 691–92 (alteration in original) (quoting *Gottshall*, 512 U.S. at 542–43). If courts applied traditional common-law formulations of proximate causation, "then the force of FELA's 'resulting in whole or in part' language would

be blunted." *Id.* at 705; see *Rogers*, 352 U.S. at 506–07.

On causation, however, that is where FELA's innovations end. The statute retains the common-law requirement that the plaintiff prove (at least) but-for causation. See *McBride*, 564 U.S. at 699–700 & n.9, 704; *id.* at 706 (Roberts, C.J., dissenting); Pet. App. 17a (dissent below). And FELA nowhere suggests that the plaintiff can carry this burden with evidence that would not create a triable issue under the common law. The only language in FELA addressing causation is "resulting in whole or in part." As *McBride* holds, this is a *substantive* causation standard. It dictates that the plaintiff may recover even where causation was partial or attenuated. See *McBride*, 564 U.S. at 705. It says nothing about how much evidence is needed to show that a causal relationship existed.

FELA's silence on this topic becomes even clearer when it is compared to other statutes. Congress knows how to address standards of proof when it wants to. See, *e.g.*, 18 U.S.C. § 4243 (specifying preponderance and clear-and-convincing standards for different showings where a person is not guilty by reason of insanity); 22 U.S.C. § 9003(e) (same, for international child-abduction proceedings); 28 U.S.C. § 2254 (requiring "clear and convincing evidence" to rebut state-court factual determinations in habeas cases). FELA contains no such language. See Michael D. Green, *The Federal Employers' Liability Act: Sense and Nonsense About Causation*, 61 DePaul L. Rev. 503, 532 (2012) ("Legal sufficiency is a procedural common law standard that rarely is addressed in positive law. And if contrary to this, Congress did mean to address sufficiency of the evidence in the language of the FELA, employing the 'in whole or in

part' language was an unorthodox and mystifying way to do so.").

In short, FELA "depart[s] from the rules of the common law" "[o]nly to the extent of the[ ] explicit statutory alterations" of those rules. *Gottshall*, 512 U.S. at 544. And the statute explicitly alters the substantive causation standard, but not the standard of proof. There is thus no basis to hold that FELA creates a "significantly more lenient" standard of proof. Pet. App. 8a; see *Sorrell*, 549 U.S. at 168; *Monessen Sw. Ry.* v. *Morgan*, 486 U.S. 330, 337–38 (1988) (holding that because FELA "expressly dispensed with other common-law doctrines" but did not address "the equally well-established doctrine barring the recovery of prejudgment interest . . . we are unpersuaded that Congress intended to abrogate that doctrine *sub silentio*").

B. The court below did not try to square its "significantly more lenient" standard with FELA's text. Instead, it cited a Virginia precedent, which in turn relied on this Court's opinion in *Rogers*. Pet. App. 8a (citing *Hughes*, 439 S.E.2d at 413). But *Rogers*—as *McBride* made clear—addressed FELA's *substantive* causation standard. It did not hold that FELA departs from the common-law standard of proof.

The *Rogers* plaintiff was using a flamethrower to clear brush along a track when a passing train fanned the flames; he fled, but he fell from a negligently maintained culvert and suffered serious injuries. 352 U.S. at 502. The lower court overturned a jury verdict in his favor. It held that the railroad's contribution to the injury "was too indirect, not sufficiently 'natural and probable,' to establish the requisite causation," apparently because it thought the plaintiff's inattention was a more direct cause. *McBride*, 564 U.S. at 695; see *Rogers* v. *Thompson*,

284 S.W.2d 467, 471–72 (Mo. 1955) (per curiam), *rev'd sub nom. Rogers*, 352 U.S. 500. This Court reversed, emphasizing that FELA "expressly imposes liability . . . for injury or death due 'in whole or *in part*' to its negligence.'" *Rogers*, 352 U.S. at 507. As a result, "the test of a jury case" under FELA "is simply whether the proofs justify with reason the conclusion that employer negligence *played any part, even the slightest*, in producing the injury." *Id.* at 506 (emphasis added). So, as *McBride* reaffirmed, *Rogers* simply held that FELA "did not incorporate any traditional common-law formulation of 'proximate causation.'" *McBride*, 564 U.S. at 694.

Rogers thus did not depart from the Court's prior FELA cases holding that "if there is only a scintilla of evidence . . . it is the duty of the judge to direct the verdict." *Hughes*, 278 U.S. at 497–98. To be sure, *Rogers* discussed "the test of a jury case." 352 U.S. at 506. But that language must be read in context. Long after FELA's passage, "lower courts continued to ignore FELA's 'significan[t]' departures from the 'ordinary common-law negligence' scheme, to reinsert common-law formulations of causation involving 'probabilities,' and consequently to 'deprive litigants of their right to a jury determination.'" *McBride*, 564 U.S. at 695 (alteration in original) (quoting *Rogers*, 352 U.S. at 507, 509–10). It was this reliance on common-law proximate-causation standards that *Rogers* sought to correct. See *id.*; *Rogers*, 352 U.S. at 509–10. And the test that *Rogers* recited—a jury verdict should stand unless "fair-minded jurors cannot honestly differ whether fault of the employer played any part in the employee's injury," 352 U.S. at 510—is the same one that governed ordinary negligence cases at common law and still does today. See *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 252

(1986) (a directed verdict depends on "whether a fair-minded jury could return a verdict for the plaintiff on the evidence presented"); accord *Richmond & Danville R.R.* v. *Powers*, 149 U.S. 43, 45 (1893); 2 *McCormick on Evidence* § 338 (7th ed. 2013 & Supp. 2016).

Finally, *Rogers* noted that Congress considered—but did not adopt—language that would depart from the common-law standard for jury questions. A version of the 1908 statute provided: "All questions of fact relating to negligence shall be for the jury to determine." 352 U.S. at 508 n.18. Congress did not enact this provision, concluding that it "would be surplusage in light of the Seventh Amendment embodying *the common-law tradition that fact questions were for the jury*." *Id.* (emphasis added) (citing *Hearings on S. 5307 Before the S. Comm. on Educ. & Labor*, 60th Cong. 8–9, 45–46 (1908)).

Rogers thus gives no license for a "significantly more lenient" standard of proof "than in a common-law tort action." Pet. App. 8a. And if *Rogers* left any doubt on that score, *McBride* should have dispelled it. In analyzing *Rogers*' "comprehensive statement of the FELA causation standard," *McBride* never suggested that the statute's "in whole or in part" language does anything besides state "[w]hat qualifie[s] as a 'proximate' or legally sufficient cause in FELA cases." 564 U.S. at 695–96. *Gottshall* similarly described *Rogers* as adopting "a relaxed standard of causation," not a relaxed standard of proof. 512 U.S. at 543.

The Virginia Supreme Court's contrary view appears to conflate the statute's proximate-causation standard (which *Rogers* relaxed) with its standard of proof (which it did not). See *Hughes*, 439 S.E.2d at 413 (quoting the "test of a jury case" passage from *Rogers* above and then stating that "the standard of

proof in a [FELA] action is more lenient than in a common law action"). But the Virginia court did not merely use "standard of proof" as shorthand to describe the relaxed causation standard: The court below specifically recited that "the standard of proof in an FELA action is significantly more lenient" than at common law *and* that "proximate cause is *also* treated more leniently in FELA cases." Pet. App. 8a (emphasis added). And as the dissent explained, the majority upheld the verdict against Norfolk Southern based on evidence that would never pass muster under the common law. *Id.* at 18a–26a. Nothing in FELA's text or this Court's precedents supports that result.

C. The Virginia Supreme Court's rule serves merely to insulate unsupported jury verdicts from review. That is because, like other jurisdictions that have adopted the same rule, Virginia still instructs FELA juries that they must find causation by a preponderance of the evidence. *E.g.*, *Norfolk & W. Ry.* v. *Sonney*, 374 S.E.2d 71, 75 (Va. 1988). The jurors here received the same instruction. See Pet. App. 110a. Thus, the quantum of proof needed to *prevail* at trial is no lower than under the common law; the only difference is that, under the decision below, courts must send unsupported cases to the jury anyway.

That makes no sense. This Court has explained that "ruling on a motion for summary judgment or for a directed verdict necessarily implicates the substantive evidentiary standard of proof that would apply at the trial on the merits." *Liberty Lobby*, 477 U.S. at 252. The judge "unavoidably asks whether reasonable jurors could find by a preponderance of the evidence that the plaintiff is entitled to a verdict." *Id.* But under the decision below, a FELA claim must go to the jury even if the judge cannot make that deter-

mination. The upshot is that the decision below insulates from review jury verdicts that are *necessarily incorrect*. In fact, that is the decision's sole effect. Because the common-law standard already requires a jury trial whenever "a fair-minded jury" applying the preponderance standard "could return a verdict for the plaintiff," see *id.*, the Virginia Supreme Court's "significantly more lenient" standard serves merely to prevent courts from foreclosing or overturning damages awards that "a fair-minded jury" would not have granted.

Nothing in FELA or this Court's precedents requires this bizarre result. To be sure, Congress meant FELA "to secure the right to a jury determination" on negligence claims, *Rogers*, 352 U.S. at 509, by relaxing "the 'harsh and technical' rules of state common law," *McBride*, 564 U.S. at 695. But Congress did not establish a no-fault regime. *Sorrell,* 549 U.S. at 165. And it did not direct that railroads can be held liable even where a fair-minded jury could not award damages. That, however, is the inevitable result of the rule adopted below.

II. THE LOWER COURTS ARE CONFUSED AND DIVIDED ABOUT FELA'S STANDARD OF PROOF.

The Virginia Supreme Court is not alone in misconstruing FELA. Even after *McBride*, there are at least three different camps on the standard of proof under FELA (and the Jones Act, which incorporates FELA's substantive provisions, see 46 U.S.C. § 30104). Many courts apply a lower standard of proof for causation. Some courts apply that lower standard not only to causation, but also to negligence. And a few courts apply the statute correctly by relaxing the substantive causation standard but *not* the standard of proof.

Many cases say, usually relying on *Rogers* (or cases citing it), that the "standard . . . in determining whether there is sufficient evidence to send a FELA case to the jury is significantly broader than the standard applied in common law negligence actions." *Schulenberg* v. *BNSF Ry.*, 911 F.3d 1276, 1286 (10th Cir. 2018). Most courts, like the court below, describe this difference as a "considerably relaxed standard of proof." *Moody* v. *Me. Cent. R.R.*, 823 F.2d 693, 695 (1st Cir. 1987); see also, *e.g.*, *Coffey* v. *Ne. Ill. Reg'l Commuter R.R.*, 479 F.3d 472, 476 (7th Cir. 2007) (asserting that FELA "relax[es] . . . common law standards of proof"); *Wilburn* v. *Maritrans GP Inc.*, 139 F.3d 350, 357 (3d Cir. 1998) ("The standard of proof for causation is relaxed in cases filed pursuant to the Jones Act."); *Mo.-Kan.-Tex. Ry.* v. *Hearson*, 422 F.2d 1037, 1040 (10th Cir. 1970) ("a statutory action under FELA significantly differs from a common law negligence action in terms of standard of proof"). Under these decisions, "FELA plaintiffs can survive dispositive motions by offering evidence which would be insufficient to overcome a similar motion in an ordinary civil case." *Kan. City S. Ry.* v. *Nichols Constr. Co.*, 574 F. Supp. 2d 590, 594 (E.D. La. 2008), *vacated in part on other grounds on reconsideration*, No. 05-1182, 2008 WL 4587113 (E.D. La. Oct. 14, 2008). In some courts, that is "featherweight" evidence. *Mar. Overseas Corp.* v. *Ellis*, 971 S.W.2d 402, 406 (Tex. 1998). In others, it is "any evidence" at all. *Alby* v. *BNSF Ry.*, 918 N.W.2d 562, 568 (Minn. Ct. App. 2018), *appeal docketed*, No. A17-1242 (Minn. argued Mar. 4, 2019).

This confusion persists eight years after *McBride*. *E.g.*, *Schulenberg*, 911 F.3d at 1286; *Strickland* v. *Norfolk S. Ry.*, 692 F.3d 1151, 1156, 1162 (11th Cir. 2012) (citing *McBride* to say that "summary judg-

ment is disfavored in FELA actions" and repeating that FELA requires only "featherweight" evidence); *Huffman* v. *Union Pac. R.R.*, 675 F.3d 412, 419, 426 (5th Cir. 2012) (citing *McBride* to say that "[w]e rely on juror common sense to reduce the risk of exorbitant liability in FELA actions," and "the quantum of causation that is required is low").

Like the Virginia courts, many of these courts hold that the jury should still be instructed that it must find the elements of a FELA claim by a preponderance of the evidence. Indeed, research has revealed no court that calls for a different jury instruction under FELA. See, *e.g.*, *Wilson* v. *Chi., Milwaukee, St. Paul, & Pac. R.R.*, 841 F.2d 1347, 1353 (7th Cir. 1988); *CSX Transp., Inc.* v. *Miller*, 46 So. 3d 434, 466 (Ala. 2010); *Union Pac. R.R.* v. *Williams*, 85 S.W.3d 162, 170 (Tex. 2002); *Jones* v. *New Orleans Pub. Belt R.R. Comm'n*, 464 So. 2d 919, 921 (La. Ct. App. 1985), *abrogated on other grounds by Virgil* v. *Am. Guar. & Liab. Ins. Co.,* 507 So. 2d 825 (La. 1987) (per curiam); *Kelley* v. *Union Pacific R.R.*, 481 P.2d 56, 57 (Or. 1971); 5 Leonard B. Sand et al., *Modern Federal Jury Instructions—Civil* ¶ 89.02 (2019). Thus, as in Virginia, the relaxed "standard of proof" in these courts serves merely to preserve jury verdicts that lack sufficient evidentiary support. See *supra* pp. 18–19.

What is more, these courts disagree on whether FELA's supposedly lower standard applies across the board, or only to causation. "There is a federal circuit split as to whether the relaxed FELA standard applies only to causation, or applies to the fault prong of FELA negligence as well." *Montgomery* v. *CSX Transp., Inc.*, 656 S.E.2d 20, 26–27 (S.C. 2008) (collecting cases); compare, *e.g.*, *Coffey*, 479 F.3d at 476 ("causation and failure to exercise due care are separate inquiries, and the relaxation of common law

standards of proof applies to the first rather than to the second"), and *Gautreaux* v. *Scurlock Marine, Inc.*, 107 F.3d 331, 335 (5th Cir. 1997) (en banc) (similar), with *Williams* v. *Long Island R.R.*, 196 F.3d 402, 406 (2d Cir. 1999) ("this Circuit . . . construes 'the statute, in light of its broad remedial nature, as creating a relaxed standard for negligence as well as causation'"), and *Mullahon* v. *Union Pac. R.R.*, 64 F.3d 1358, 1364 (9th Cir. 1995) (similar). State courts disagree about this too. Compare, *e.g.*, *Montgomery*, 656 S.E.2d at 28 (holding that the lower court "erred in lowering the burden of proof on the duty/breach elements of a FELA negligence claim"), with *Pilarski* v. *Consol. Rail Corp.*, 702 N.Y.S.2d 485, 486 (App. Div. 2000) ("There is a 'more lenient standard for determining negligence and causation' in a FELA action." (citation omitted)).

A few courts, however, correctly distinguish between FELA's relaxed causation standard and the standard of proof. The Fourth Circuit recognizes that under FELA, "the element of causation is relaxed," *Hernandez* v. *Trawler Miss Vertie Mae, Inc.*, 187 F.3d 432, 437 (4th Cir. 1999), but it applies traditional common-law standards when assessing the evidence at summary judgment or on a directed-verdict motion. In a FELA case, as in any other case, a "JNOV should not be granted unless the evidence is so clear that reasonable [jurors] could reach no other conclusion," but "more than a 'mere scintilla' of evidence is necessary to defeat the motion." *Persinger* v. *Norfolk & W. Ry.*, 920 F.2d 1185, 1188–89 (4th Cir. 1990). The court has likewise affirmed a grant of summary judgment in a FELA case by applying ordinary summary-judgment principles. *Deans* v. *CSX Transp., Inc.*, 152 F.3d 326, 330 (4th Cir. 1998). The plaintiff "introduced no evidence to show that an earlier in-

spection would have revealed or cured the problem" that ultimately caused his injury, and thus "any suggestion that CSX was negligent rests on mere speculation and conjecture." *Id.*

Similarly, the Sixth Circuit recognizes that while "FELA has a relaxed standard of proximate cause," "the elements of a FELA claim are determined by reference to the common law" unless the statute provides otherwise. *Garza* v. *Norfolk S. Ry.*, 536 F. App'x 517, 519 (6th Cir. 2013). The court thus applied the usual common-law standard to review and affirm the district court's grant of summary judgment, explaining that the plaintiff must "present more than a scintilla of evidence to demonstrate each element," and the "possibility" that the railroad's negligence caused the employee's injury "falls short of the standard for but-for causation." *Id.* at 519, 521. Like the Fourth Circuit, the Sixth Circuit did not suggest that the plaintiff's summary-judgment burden was lower than in any other negligence case. *Id.*; see also *Przybylinski* v. *CSX Transp., Inc.*, 292 F. App'x 485, 488–89 (6th Cir. 2008) (similar); Pet. App. 24a–25a (dissent below discussing *Garza*).

In sum, many lower courts have systematically misread *Rogers*—which admittedly is not a model of clarity, see *Sorrell*, 549 U.S. at 175 (Souter, J., concurring)—by confusing the Court's "statement of the FELA causation standard," see *McBride*, 564 U.S. at 695–96, for a reduction in the standard of proof. Some courts apply that lower standard on causation alone, and others apply it to negligence too. And a few courts, although not many, apply the statute correctly. The result "has been [over] a half century of muddle about factual cause, scope of liability, the burden of production, and the relationship of these concepts in FELA jurisprudence." Green, *supra*, at

528 (internal footnote omitted). And *McBride* unfortunately did not succeed in clearing up the confusion.

III. THE QUESTION PRESENTED IS IMPORTANT AND RECURRING.

The question presented here is important, and it arises constantly. In the federal courts alone, over 400 FELA suits were filed in 2018, which marked the third consecutive year in which FELA complaints increased.[2] And 1,500 Jones Act cases were filed during the same year. Nor do these numbers account for the many FELA cases filed in state courts, which constitute a large proportion of the total. Each year, the railroads spend hundreds of millions of dollars defending or paying FELA claims. See Brief of the Association of American Railroads as *Amicus Curiae* in Support of Petitioner at 2, *Union Pac. R.R.* v. *Barker*, 138 S. Ct. 50 (2017) (No. 17-115) (mem.), 2017 WL 3614410, at *2.

Whether FELA and the Jones Act impose a relaxed standard of proof is often dispositive in these cases, as it was here. As the Court observed in *Rogers*, "for practical purposes the inquiry in these cases . . . 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." 352 U.S. at 508. Combining this expansive causation standard with a relaxed evidentiary standard reduces the statute's causation requirement almost to the vanishing point. So long as the plaintiff can point to *any* evidence of a connection between

---

[2] *See* Admin. Office of U.S. Courts, Tbl. C-2A, *U.S. District Courts—Civil Cases Commenced, by Nature of Suit, During the 12-Month Periods Ending September 30, 2014 through 2018*, at 2 (Sept. 30, 2018), https://www.uscourts.gov/sites/default/files/data_tables/jb_c2a_0930.2018.pdf.

negligence and injury—no matter how attenuated the connection and how flimsy the evidence—he is entitled to a jury trial. And in those courts that apply a relaxed standard of proof for negligence as well, even the thinnest evidence of fault and causation will stave off summary judgment. At that point, the railroad must either settle to avoid the risks of a jury trial, or go to the expense of defending the trial.

No purpose is served by exempting FELA and Jones Act plaintiffs from the modern summary judgment regime, which exists precisely to avoid the burdens and expenses of a trial in cases where the evidence does not warrant it. Certainly, the possibility that a plaintiff will prevail because the jury disregards its instructions is not a good reason to impose these burdens on defendants and on the federal courts. Because "FELA cases go to trial and require a jury disproportionately more often than other civil cases," one study estimated that FELA and the Jones Act accounted for roughly 5% of all federal civil trials, and a higher proportion of jury trials. Thomas E. Baker, *Why Congress Should Repeal the Federal Employers' Liability Act of 1908*, 29 Harv. J. on Legis. 79, 86 (1992). Letting plaintiffs roll the dice, particularly when they are loaded, is not a good use of these scarce resources.

The upshot is that, as the lower courts currently administer them, FELA and the Jones Act come close to being the "workers' compensation scheme[s]" this Court has repeatedly said they are not. See *Sorrell,* 549 U.S. at 165; *Gottshall*, 512 U.S. at 543–44. The Court's review is urgently needed to return FELA liability to its proper scope.

IV. THIS CASE IS AN IDEAL VEHICLE FOR THIS COURT'S REVIEW.

This case presents a perfect opportunity to clarify FELA's standard of proof. Negligence is not contested. Pet. App. 10a. Nor does this case raise a question of proximate causation. Sumner's causation theory—that he fell because the footpath was too narrow—is not the sort of "far out" causal scenario that *McBride* condemned. 564 U.S. at 704. Thus, "the sole question" decided below and presented here "is whether the evidence was sufficient to create a jury issue on [but for] causation." Pet. App. 14a. And the majority answered in the affirmative only because it believed that "the standard of proof in an FELA action is significantly more lenient than in a common-law tort action." *Id.* at 8a. As the dissenters explained without contradiction, Sumner's evidence would not survive a directed verdict under the common-law standards that govern ordinary negligence cases. *Id.* at 25a. In turn, unless the majority's reduced standard of proof is correct, the judgment below must be reversed. And for all the reasons above, it should be.

CONCLUSION

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

Respectfully submitted,

CARTER G. PHILLIPS *
TOBIAS S. LOSS-EATON
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000
cphillips@sidley.com

Counsel for Petitioner

April 26, 2019

* Counsel of Record