No. _____

In The
Supreme Court of the United States

BRADLEY LEDURE,

Petitioner,

v.

UNION PACIFIC RAILROAD COMPANY,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Seventh Circuit affirmed summary judgment for Union Pacific Railroad Company (UP) on claims brought by its employee, Bradley LeDure, under the Federal Employers' Liability Act (FELA), 45 U.S.C. §51 *et seq.* and Locomotive Inspection Act (LIA), 49 U.S.C. §20701 *et seq*. LeDure's claims arise from injuries he sustained after slipping on the oily passageway of a UP locomotive which was part of a freight train that originated in Chicago and temporarily stopped in a UP railyard before continuing into Missouri. Although a federal safety regulation enacted pursuant to the LIA requires that locomotive passageways be kept free of oil and other slipping hazards and the FELA imposes negligence *per se* liability when that regulation is violated, the courts below held that the locomotive was not "in use" within the meaning of the LIA to trigger application of the regulation and dismissed that claim. As to the general FELA negligence claim, the lower courts held that the oily passageway was not foreseeable to UP even though it failed, for several days before the incident, to perform the mandatory daily inspections of the locomotive.

In holding that the locomotive was not in use, the Seventh Circuit's decision conflicts with the holdings of this Court, as well as those of the First, Second, Third, Fourth, Fifth, Sixth, and Eighth Circuits. In holding that LeDure's injuries were not a reasonably foreseeable consequence of UP's failure to inspect its locomotive, the Seventh Circuit's decision conflicts with this Court's holdings that a jury should be permitted to draw reasonable inferences from circumstantial evidence in FELA cases—and, specifically here, to conclude that it is foreseeable that oil can accumulate as a slipping hazard on a locomotive passageway when the railroad fails to conduct mandatory daily inspections designed to detect and remediate those very hazards.

Two questions are presented:

1. Whether a locomotive is in use on a railroad's line and subject to the LIA and its safety regulations when its train makes a temporary stop in a railyard as part of its unitary journey in interstate commerce, or whether such use does not resume until the locomotive has left the yard as part of a fully assembled train, as held by the Seventh Circuit below, contrary to the decisions of this Court and other circuits.

2. Whether the FELA allows a jury determination on the issue of foreseeability of harm from oil on a locomotive passageway when the railroad failed to conduct federally mandated daily safety inspections intended to discover and cure such hazards in the days before the injury incident, contrary to the longstanding decisions of this Court.

LIST OF PARTIES TO THE PROCEEDING

Petitioner Bradley LeDure was the plaintiff in the district court and the appellant in the court of appeals.

Respondent Union Pacific Railroad Company was the defendant in the district court and the appellee in the court of appeals.

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PETITION

Bradley LeDure respectfully petitions the Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 962 F.3d 907 and reproduced at Pet.App.1-5.[1] The opinion affirmed the January 31, 2019 decision of the United States District Court for the Southern District of Illinois which granted UP's Motion for Summary Judgment (unpublished, but available at 2019 WL 399924). Pet.App.7-21. The district court denied LeDure's Motion to Alter or Amend by order dated May 20, 2019 (unpublished), reproduced at Pet. App.23-28.

JURISDICTION

The Court has jurisdiction to issue a writ of certiorari in this case under 28 U.S.C. §1254(1) and Rule 13.3. The Seventh Circuit's opinion was issued on June 17, 2020. Pet.App.1. LeDure timely filed a petition for rehearing *en banc* on July 1, 2020. *LeDure v. UP R.R. Co.*, No. 19-2164, Doc. 43. That petition was denied on July 16, 2020. Pet. App.29-30.

STATUTORY PROVISIONS INVOLVED

The provisions of 45 U.S.C. §§51, 53, and 54a; 49 U.S.C. §§20301, 20302, 20701; and 49 C.F.R. §§229.1, 229.21, and 229.119 are lengthy and, therefore, are set out in full in Pet.App.31-39, pursuant to Supreme Court Rule 14.1(f).

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[1] The circuit judge panel included recently appointed Justice Amy Coney Barrett.

STATEMENT OF THE CASE

I. Statutory Background

The FELA was enacted in 1908 and provides the exclusive remedy for railroad workers injured on the job. *New York Cent. R.R. v. Winfield*, 244 U.S. 147 (1917). "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." *Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532, 542 (1994) (quoting *Tiller v. Atl. Coast Line R.R. Co.*, 318 U.S. 54, 58 (1943)). FELA "was designed to put on the railroad industry some of the cost for the legs, eyes, arms, and lives which it consumed in its operation." *Wilkerson v. McCarthy*, 336 U.S. 53, 68 (1949) (Douglas, J., concurring).

While common law concepts of duty of care, negligence, and injury are relevant in FELA actions, they are subject to such qualifications as Congress has imported to those terms. *Bailey v. Central Vermont Ry.*, 319 U.S. 350, 353 (1943). Because FELA's substantive provisions are an avowed departure from the rules of common law, they must be interpreted consistently with the broad remedial purposes Congress intended to achieve. *Sinkler v. Missouri Pac. R. Co.*, 356 U.S. 326, 329 (1958).

Enacted in 1911, the Boiler Inspection Act (BIA), now known as the Locomotive Inspection Act, 49 U.S.C. §20701 (LIA), "supplement[ed] the [FELA] by imposing on interstate railroads 'an absolute and continuing duty' to provide safe equipment." *Urie v. Thompson*, 337 U.S. 163, 188 (1949) (quoting *Lilly v. Grand Trunk Western R. Co.*, 317 U.S. 481, 485 (1943)). Under the LIA, a railroad may "*use or allow to be used* a locomotive …

on its railroad line only when [it]…and its parts and appurtenances (1) are in proper condition and safe to operate without unnecessary danger of personal injury… [and] (2) [have] been inspected as required" by the LIA and its associated regulations. 49 U.S.C. §20701 (emphasis added); *see also* 49 C.F.R. §229.1 (identifying "minimum Federal safety standards for all locomotives except those propelled by steam power"). The regulations require that "each locomotive in use shall be inspected at least once during each calendar day," 49 C.F.R. §229.21, and that locomotive "passageways … shall be kept free from oil, water, waste, or any obstruction that creates a slipping, tripping, or fire hazard." 49 C.F.R. §229.119(c).

A violation of the LIA or its regulations is negligence *per se* for which the railroad is strictly liable. 45 U.S.C. §§53, 54a; *see also Urie*, 337 U.S. at 188-89. "The duty imposed is an absolute one, and the carrier is not excused by any showing of care, however assiduous." *Brady v. Terminal R.R. Assoc.*, 303 U.S. 10, 15 (1938). The injured worker need not prove the railroad had notice of the hazardous condition or failed to exercise ordinary care, and contributory negligence is barred as a defense in such negligence *per se* cases. 45 U.S.C. §§53-54a; *O'Donnell v. Elgin, Joliet & E. Ry.*, 338 U.S. 384, 393-94 (1949).

Although the LIA and its regulations do not specifically define what type of use triggers negligence *per se* liability, this Court has consistently recognized that the FELA, in accordance with the statute's broad humanitarian purpose and remedial goals, should be liberally construed to accord relief to injured railroad workers. *Urie*, 337 U.S. at 180. Likewise, the LIA and its regulations are also "to be liberally construed in light of [their] primary purpose, the protection of employees and others by requiring the use of safe equipment." *Lilly*, 317 U.S. at 486. Following these principles, this Court has

broadly construed on-rail equipment (locomotives and railcars) to be in use even when motionless and off the mainline and the majority of other courts have followed that lead, with the exception of the Seventh Circuit here and the Fifth Circuit in *Trinidad v. Southern Pac. Transp. Co.*, 949 F.2d 187 (5th Cir. 1991). *See Brady*, 303 U.S. at 11-14.

II. Factual Background

LeDure was a long time locomotive engineer employed by UP when, on August 12, 2016, he was assigned to transport a freight train from UP's Salem, Illinois railyard to Dexter, Missouri. The train had originated in Chicago the evening before and arrived in the Salem Yard around 2:00 a.m. with a different crew, that was being relieved by LeDure and a conductor, and to remove and add some railcars before continuing the train's journey across the state line. Doc. 55-1 at 26:4-11; Doc. 87 at 4:7-10, 4:25-5:2, 6-8.[2] LeDure reported for duty around 2:10 a.m. and the train was scheduled to depart around 3:00 a.m. Doc. 50-1 at 78:14-17; Doc. 87 at 4:25-5:2, 6-10. This train had three diesel locomotives at the front, the third being UP5683. Doc. 50-1 at 81:1-13. Before departing, LeDure was required by UP's fuel conservation policy to walk on UP5683 while it was idling, place a tag inside the cab, and shut it down before walking back to the first locomotive to power the train. Doc. 50-1 at 76:8-78:12, 82:6-21. After successfully traversing the exterior passageways of the first two locomotives, LeDure stepped onto UP5683 via the cross-over platform while it was still powered on from the trip from Chicago. Doc. 50-1 at 76:8-78:12, 82:6-21, 94:18-95:18. Before LeDure could reach the

[2] "Doc." refers to the ECF document number in the district court, No. 17-cv-00737 (S.D. Ill). Citations to pages and lines are to the pages and lines of the original documents, not to the ECF header page.

cab of UP5683, his foot slipped on the passageway and he fell, striking his head, back and shoulder. Doc. 50-1 at 81:8-13, 106:2-10, 120:20-121:6, 122:1-7, 125:4-14, 140:12-141:6, 158:3-13; Doc. 50-6; Doc. 50-7. He identified an oily substance where he had slipped. Doc. 50-1 at 85:14-20, 106:2-10. He promptly reported the incident to his supervisor. Doc. 50-1 at 84:16-85:1; Doc. 50-7. UP's post-incident inspection confirmed the presence of oil on the platform. Doc. 50-2 at 6:20-21, 18:3-25; Doc. 50-6; Doc. 50-8. Although federal regulations required UP to conduct a daily inspection of UP5683 the day before this incident, and every calendar day before that, to identify and remove slipping hazards *before* assigning it to LeDure, UP's records showed that UP5683 had not been inspected at all during the three days before the incident. Doc. 55-1 at 38:13-16, 44:22-45:5; Doc. 88-4.

At the time of the incident, UP5683 and its train were, according to a UP manager's testimony, on "an active track that you can bring trains [in] from either direction;" it was not in a location dedicated to repair, maintenance or service. Doc. 55-2 at 8:22-24, 21:4-20, 24:7-14; Doc. 50-6. UP has a separate mechanical department which services and repairs its locomotives when needed, but the closest facility was located about 1.5 hours away south of Salem in Dupo, Illinois. Doc. 50-2 at 23:20-24:14. Engineers like LeDure are not responsible for locomotive maintenance, repair, and servicing.

After the incident, LeDure was diagnosed with spine, shoulder, and closed head injuries, for which he underwent multiple surgeries; his doctors declared him permanently disabled from railroad work. *See* Doc. 50-1 at 144:1-6; Doc. 72-2 at 15:13-17, 38:20-39:15.

III. Proceedings Below

A. The district court's order granting summary judgment.

LeDure commenced this action in the United States District Court for the Southern District of Illinois, which had jurisdiction pursuant to 28 U.S.C. §1331. The district court granted UP's motion for summary judgment on two grounds. It found *locomotive* UP5683 was not in use at the time of the incident because the *train* was not fully assembled or ready to move into service, was not moving, and was not on the mainline. Pet.App. 14-15. It therefore held that LeDure's claim based on the LIA and its safety regulation prohibiting oil on locomotive passageways failed as a matter of law. Pet.App.15-17. In reaching this conclusion, the court noted, "[t]he problem … is that there is no clear-cut test to determine when a locomotive is 'in use,'" that the "sheer number and contrasting outcomes" of other federal and state cases were not "very instructive," and the tests formulated by other federal courts of appeals were "all over the place." Pet.App.13-14.

With respect to LeDure's FELA general negligence claim, the district court held that LeDure could not demonstrate circumstances which a reasonable person would foresee as creating a potential for harm because it believed there was no evidence that UP had actual or constructive notice of the oil on the locomotive walkway. Pet.App.17-20. Specifically, it held that the constructive notice argument would rest "on mere speculation and conjecture that an inspection [by UP before the incident] would have turned something up." Pet.App.20. Accordingly, it concluded that the FELA negligence claim failed as a matter of law.

The court denied LeDure's Rule 59(e) Motion to Alter or Amend on similar grounds. Pet.App.23-28.

B. The circuit court's affirmance.

The court of appeals affirmed. As to the LIA claim, the court acknowledged the lack of a uniform standard and the "various tests" developed by other federal circuits to determine whether a locomotive is in use. The court declined to adopt any of them. It acknowledged, but failed to follow, this Court's decision in *Brady v. Terminal Assoc. of St. Louis*, 303 U.S. 10 (1938), which broadly interpreted in use to include injuries sustained even when the equipment was not on the mainline, was not moving, and was not part of a fully assembled train. Pet.App.3-4; 962 F.3d at 910. The court wholly failed to acknowledge a host of other decisions issued by this Court which likewise broadly interpreted in use to find railroads *per se* liable, even where the rail vehicle at issue was motionless, off the mainline, and/or not part of a fully assembled train. Instead, it endorsed the district court's view that UP5683 was not in use simply because LeDure's locomotive was stationary, on a sidetrack, and the train was not fully assembled, thereby rendering the LIA and its regulations inapplicable. *Id.*

As to the general negligence FELA claim, the circuit court held there was no evidence from which a jury could find that UP knew or should have known about the oil or its hazard to LeDure because he could not prove that an earlier inspection would have cured the hazard. Pet.App.4-5; 962 F.3d at 911. In doing so, the court did not follow, much less acknowledge, this Court's FELA case law ensuring a jury determination of foreseeability where reasonable inferences could be drawn from circumstantial evidence to support a finding that a railroad's failure to inspect could increase the risk

of oil accumulation and increase the risk of injury to engineers.

REASONS FOR GRANTING THE PETITION

I. The decision below that a locomotive is no longer in use and subject to federal safety regulations when it is temporarily stopped in a railyard conflicts with this Court's precedents and deepens a circuit split on an issue of national and critical importance.

This Court's precedents have liberally interpreted the LIA according to its plain meaning and consistent with legislative intent, holding that a locomotive remains in use until taken out of service to undergo repairs or maintenance at a location dedicated for such purpose. Despite these precedents, the lower courts have struggled to develop a uniform standard for determining when locomotive use begins and ends for the purpose of enforcing safety statutes and regulations promulgated to protect railroad employees. As the courts below put it, the "various tests" developed by lower courts have resulted in decisions that are "all over the map." The Seventh Circuit's decision exacerbates the circuit conflict, contradicts this Court's precedent, and demonstrates the acute need for this Court's guidance on this important issue.

A. The decision below conflicts with this Court's precedent.

Long ago, this Court determined that in use should be interpreted broadly to foster railroad employee recovery in a case brought under another closely related federal railroad statute. In *Brady*, the Court addressed the Safety Appliance Act (SAA), which provided that it was

unlawful for a railroad to "haul, or permit to be hauled or *used on its line*" railcars or locomotives unless they were equipped with certain devices. 303 U.S. at 12 (emphasis added).[3] There, the plaintiff was injured while inspecting railcars after their arrival in a railyard. *Id.* at 11-12. The Court specifically addressed the question of whether the subject car continued to be in use during that stop:

> [T]he use, movement or hauling of the defective car, within the meaning of the statute, had not ended when [plaintiff] sustained his injuries….The car had been brought into the yard…and placed on a receiving track temporarily pending the continuance of transportation. If not found to be defective, it would proceed to [its] destination; if found defective, it would be subject to removal for repairs. It is not a case where a defective car has reached a place of repair…The car in this instance had not been withdrawn from use… The car was still in use, though motionless….The breadth of the statutory requirements is shown by the fact that it embraces all locomotives, cars, and similar vehicles used on any railway….Congress has made no exception to those employed in inspecting cars. The statute has been liberally construed so as to give a right of recovery for every injury the proximate cause of which was a failure to comply with a requirement of the Act....

Id. at 13-15 (citations and quotations omitted). In furtherance of the expansive application of in use, the Court declared that liability attaches "[e]ven where the

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[3] *Cf.* LIA, it shall be unlawful to "use or allow to be used a locomotive…on its railroad line." 49 U.S.C. §20701; *see also Smith v. City of Jackson*, 544 U.S. 228, 233 (2005) (plurality) ("[W]hen Congress uses the same language in two statutes having similar purposes…it is appropriate to presume that Congress intended that text to have the same meaning in both statutes."). The SAA has been recodified. *See* 49 U.S.C. §§20301, 20302.

required equipment is known to have become defective and is being hauled to the nearest available point for repairs." *Id.* at 15-16.

Similarly, in *Delk v. St. Louis & S.F. R. Co.*, the plaintiff was injured when a safety appliance on defendant's railcar malfunctioned. 220 U.S. 580, 583-84 (1911). The railcar had been returned to the railroad the day before, still containing its cargo, because its coupler was defective. *Id.* at 582. Upon its return, it was placed in a string of cars on the "dead track" or "team track" in the yard and plaintiff was injured while switching other cars in and out of that track. *Id.* at 582-84. At the time of the incident, the railroad had "bad ordered" the car, but the defective coupler had not yet been fixed. *Id.* at 584. In holding that the car remained in use, this Court noted that "[i]ts stoppage in the yard was an incident to the transportation." *Id.* at 584-85. Thus, it "was being used in interstate traffic when the plaintiff was injured." *Id.* at 586. Other decisions of this Court are in accord. *See Texas & Pacific Ry. Co. v. Rigsby*, 241 U.S. 33 36-37, 43 (1916) (stationary railcar had been out of service and sitting on spur track for more than a month but was still in use when worker was injured descending the car in connection with moving it to the repair shop); *Chicago Great Western R. Co. v. Schendel*, 267 U.S. 287, 291-92 (1925) (defective railcar being removed from train and placed on a side track remained in use because the incident occurred in the process of allowing the train to eventually proceed to its ultimate destination).

The clear principle underlying each of these decisions is an expansive application of in use on the railroad's line to include everything *other than* injuries incurred by employees while repairing or servicing a known defect. Although these cases specifically addressed claims brought under the SAA, federal courts interchangeably apply case law arising under the SAA and LIA to interpret

the phrase in use because it is used in both federal railroad safety statutes. *See*, *e.g.*, *Steer v. Burlington Northern*, *Inc.*, 720 F.2d 975, 977 n.3 (8th Cir. 1983); *Holfester v. Long Island R.R. Co.*, 360 F.2d 369, 373 (2d Cir. 1966). The SAA, enacted in 1893, along with its associated regulations, provides that a railcar cannot be used unless its components comply with their provisions, the violation of which gives rise to negligence *per se* liability. *See Brady*, 303 U.S. at 15; *see also* 49 U.S.C. §§20301(a), 20302(a). Since its inception, the SAA has applied to railcars and locomotives used or allowed to be used by a railroad on its lines. The later enactment of the BIA/LIA in 1911 incorporated the same in use language and, today, applies to any locomotive that "[a] railroad carrier may use or allowed to be used…on its railroad line." 49 U.S.C. §20701.

The SAA and BIA/LIA "are substantively if not in form amendments to [FELA and t]he congressional purpose underlying [them] is basically the same as …[FELA]." *Urie*, 337 U.S. at 189. Clearly, Congress's adoption of the same in use terminology is consistent with the legislative purpose uniformly recognized by this Court: that the FELA, SAA, LIA, and their regulations are *in pari materia* and must be liberally construed "in light of [their] primary purpose, the protection of employees and others by requiring the use of safe equipment." *Lilly*, 317 U.S. at 485-86.

The Seventh Circuit failed to acknowledge this Court's binding precedent that applies the scope of in use on railroad lines broadly and, instead, issued a highly aberrational opinion which, in essence, held that a locomotive is not in use unless it is in motion or part of a fully assembled train ready to depart. This overly simplistic and restrictive interpretation irreconcilably conflicts with the underlying rationale of the LIA and this Court's precedent that a locomotive remains in

use on a railroad's line until it is actually removed from commercial transportation—namely, by taking it to the shop for repair or maintenance. Moreover, the holding largely eviscerates the protections afforded railroad workers like LeDure under the LIA and renders the protections intended by many LIA regulations meaningless. Indeed, there is little value in imposing strict liability on a railroad for failing to keep locomotive walkways free of oil and other slipping hazards if such liability attaches only when the locomotive is moving as part of a fully assembled train along the mainline or fully prepared to depart—at which time an engineer like LeDure would have no occasion to traverse the locomotive's exterior passageways, like those at issue here.

Similar to the railcar this Court found to remain in use in *Brady*, UP5683 was in a railyard—not a place of repair—and was only temporarily stopped pending its continuance in interstate transportation. The mere fact that LeDure was preparing to shut down UP5683 pursuant to the railroad's fuel conservation policies at the time he was injured does not alter its character. UP5683 was unquestionably in use when UP used it to power the train from Chicago to Salem, and it would continue to be in use when it traveled onward with the train across state lines from Salem to Dexter, Missouri. The temporary placement of the UP5683's train in the railyard as part of its readiness to continue in interstate transport did not, in any way, remove it from use. UP5683 was not in a place of repair or maintenance at the time of the injury incident and, in light of this Court's prior holdings and clear legislative intent, it most certainly remained in use. This Court should grant review and reverse the decision below.

B. In light of the lack of recent precedent from this Court, the lower courts are confused and divided as to when a locomotive ceases to be in use.

The district court noted that federal appellate decisions interpreting in use are "all over the place." Pet. App.14. Other circuit courts have also cited confusion and the need for clear direction in light of the competing tests that have developed since this Court last addressed the issue, 80 years ago. *See Wright v. Ark. & Mo. R.R.*, 574 F.3d 612, 624 (8th Cir. 2009) (decisions "sometimes appear to be decided on an *ad hoc* basis" in light of these different tests).

The Seventh Circuit's decision cites various tests for determining when a locomotive is in use, noting that, "while the Fourth Circuit created a totality of the circumstances analysis, the Fifth Circuit has said a locomotive is 'in use' if it is assembled and the crew has completed pre-departure procedures." Pet.App.3-4; *LeDure*, 962 F.2d at 910 (citing *Deans v. CSX Transp., Inc.*, 152 F.3d 326, 329 (4th Cir. 1998) and *Trinidad v. Southern Pac. Transp. Co.*, 949 F.2d 187, 189 (5th Cir. 1991), respectively). Although the Seventh Circuit did not specifically adopt either test—relying instead on its own sparse precedent which predates *Deans* and *Trinidad*—its approach more closely aligns with the Fifth Circuit's restrictive standard by excluding UP5683 from use because it "was stationary, on a sidetrack, and part of a train needing to be assembled before its use in interstate commerce." *Id.*

In *Trinidad*, an SAA claim was brought for injuries occurring in connection with a pre-departure airbrake test. 949 F.2d at 188. The Fifth Circuit considered this a question of first impression, noting that, "[l]ike many courts before us that have examined this statute, we

are without precedents of any clear and controlling effectiveness," thus leaving that court to render a decision based solely on the facts before it. *Id.* at 189 (quoting *United States v. Panhandle S.F. Ry.*, 203 F.2d 241 (5th Cir. 1953) (internal quotes omitted)). Because the train's inspection had not been completed, the court found the subject railcar was not in use.[4] *Id.* The court attempted to distinguish *Brady*, where the railcar was in the midst of its journey, albeit temporarily sidetracked, because the train in *Trinidad* had not yet started its journey. *Id.* at 189. Notably, under even the Fifth Circuit's aberrational opinion in *Trinidad*, UP5683 would be in use because, like the railcar at issue in *Brady*, UP5683 was temporarily stopped "in the midst of its journey when the injury occurred." *Id.* at 189.

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[4] Many courts have rejected the holding in *Trinidad* all together whereas others simply refuse to interpret its holding expansively. Instead, courts have limited its holding to the unique facts involving an air brake test that can only be conducted after a *train* has been fully assembled. *See*, *e.g.*, *Haworth v. Burlington N. & S.F. Ry. Co.*, 281 F.Supp.2d 1207, 1211-12 (E.D.Wash. 2003) (rejecting test and noting other circuits have rejected the *Trinidad* standard). Although some courts have cited *Trinidad* to exclude any switching maneuvers from the scope of in use, such a finding directly conflicts with this Court's precedent, acknowledging that these statutes apply when rail vehicles are engaged in switching maneuvers. *See*, *e.g.*, *O'Donnell*, 338 U.S. at 385, 394 (plaintiff entitled to "preemptory instruction that to equip a car with a coupler which broke in [a] switching operation was a violation of the [SAA]…which rendered defendant liable [*per se*] for injuries proximately resulting therefrom."); *Affolder v. New York, C. & St.L. R. Co.*, 339 U.S. 96, 97, 99 (1950) (affirming verdict for railroader injured while engaging in switching maneuvers); *Carter v. Atlanta & St. A.B. Ry. Co.*, 338 U.S. 430, 431-32, 435 (1949) (reversing grant of directed verdict to railroad on SAA claim where injury occurred during switching operations). Finally, while in use is a term common to the SAA and LIA, the use of certain equipment in the SAA requires a train to be completely assembled, like the air brake provision at issue in *Trinidad*, which is another reason this case is an outlier.

The Tenth Circuit in *Estes v. Southern Pac. Transp. Co.*, also cited by the district court below, equated in use with "used in moving interstate or foreign traffic." 598 F.2d 1195, 1198 (10th Cir. 1979) (citing the Seventh Circuit's earlier decisions in *Lyle v. Atchison, T & S.F. Ry. Co*, 177 F.2d 221 (7th Cir. 1949) and *Tisneros v. Chicago & N.W. Ry. Co.*, 197 F.2d 466 (7th Cir. 1952)). However, the common and dispositive thread in *Estes*, *Lyle* and *Tisneros* was a locomotive that had been moved to the "roundhouse"— an area of tracks and facilities where locomotives are inspected, serviced, maintained, and repaired—and an injury that was sustained by an employee who was responsible for taking charge of the locomotives *after* their interstate run had been finished to service them to be returned to interstate use later. *Id.* at 1196, 1198-99.

Other circuit courts, however, have acted consistently with this Court's longstanding precedent and the LIA's clear legislative intent and have broadly construed in use to include motionless rail vehicles that were not part of fully assembled trains, with some work to be done before departure. The common thread running throughout these decisions is that a rail vehicle is in use *unless* it is located in a place of maintenance or repair and/or the injured party was responsible for such maintenance. In *McGrath v. Consolidated Rail Corp.*, for example, the First Circuit held that a locomotive remained in use when it was idling but motionless in a railyard and the plaintiff slipped and fell while entering the cab to review the daily inspection card, work deemed incidental to his train operation duties. 136 F.3d 838, 842 (1st Cir. 1998). The train was not fully assembled and more work needed to be done before it was to be operated along the tracks. *See id.* at 840, 842.

The Second Circuit in *Holfester* held that a railcar remained in use even though it had been removed from

its train, taken off the mainline, and temporarily moved to a yard assembly track when the employee was injured while inspecting it. 360 F.2d at 370-71. The car had not been moved to a repair or storage track and was scheduled to be part of a train scheduled to leave the yard approximately three hours later. *Id.* Thus, negligence *per se* liability attached. *Id.* at 372. That decision was in accord with the Second Circuit's earlier decision in *Erie R. Co. v. Russell* finding a railcar in use although it sat motionless on a switching track and a been slated for repairs. 183 F. 722, 724-25 (2d Cir. 1910).

The Third Circuit in *Raudenbush v. Baltimore & O. R. Co.* held that a locomotive remained in use although it was uncoupled from railcars and sat motionless in a switching yard, not on the mainline, and would "be used again at an undetermined time when … other cars arrived." 160 F.2d 363, 367 (3d Cir. 1947).

The Fourth Circuit in *Angell v. Chesapeake & O. Ry. Co.* specifically rejected the Tenth Circuit's decision in *Estes* as establishing broad authority to limit application of the LIA to only those cases where the locomotive was actually *moving* in interstate commerce. 618 F.2d 260, 261-62 (4th Cir. 1980). In *Angell*, the locomotive was found to be in use although it was not moving at the time of the accident, was not yet part of a fully assembled train, and the employee was injured "in preparation for moving it to a nearby track to pull a train a few hours later." *Id.* at 262. The court looked to Congressional intent and other case law to observe the BIA/LIA "clearly exclude[d] those injuries directly resulting from the inspection, repair, or servicing of railroad equipment located at a maintenance facility," and rejected the railroad's attempt to exclude activities occurring between the completion of servicing and the time the engineer takes control. *Id.* (citing H.R. Rep. No. 61st Cong., 3d Sess. 3 (1911)). Thus, because the locomotive was not in need of being repaired or

serviced, it was held to be in use.[5] *Id.* Similarly, in *Deans*, the Fourth Circuit held that a railcar was in use when an injury to the conductor occurred while he was releasing a handbrake to prepare for departure; although the railcar was sitting motionless in the railyard, the court found it significant that it was not at a repair location. 152 F.3d at 330. The court considered the totality of the circumstances at the time of the injury, with the primary factors being where the train was located and the activity of the injured party. *Id.* at 329.

The Fifth Circuit in *Southern Ry. Co. v. Bryan* held that a locomotive remained in use when it was being re-railed after a derailment, despite the fact that it had been gutted by fire and was wholly inoperable as a locomotive. 375 F.2d 155, 157 (5th Cir. 1967). That court noted that "where hauling of a disabled or defective railroad vehicle is in progress or in immediate contemplation … handling of it for that purpose is part of its unitary journey from the point of discovery of disability to the repair shop." *Id.* (citations and quotations omitted).

The Sixth Circuit in *Fort Street Union Depot Co. v. Hillen* found a railcar remained in use when it arrived in the railyard earlier that morning as part of a train and it and other cars were then detached and placed upon a track in defendant's railyard, where they remained at the time the fatal injury occurred. 119 F.2d 307, 310 (6th Cir. 1941). The court summarily rejected the railroad's contention that the railcar was not in use, because it "had not been withdrawn from service within the meaning of the statute even though motionless." *Id.* at 312. More

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[5] The Fifth Circuit's decision in *Trinidad* distinguished *Angell* on its facts, finding it significant that the locomotive in *Angell* had previously been *subject to inspection* and thus was authorized for use, before it was added to other engines and connected to the rest of the train. 949 F.2d at 189. The pre-trip train inspections had not been completed at the time of injury in *Trinidad*.

recently, the Sixth Circuit went so far as to proclaim that "a locomotive is 'in use' almost any time it is not stopped for repair." *Edwards v. CSX Transp., Inc.*, 821 F.3d 758, 762 (6th Cir. 2016).

The Eighth Circuit adopted *Angell*'s broad in use interpretation when it held that a locomotive was not in use because it was in a place of repair and the plaintiff was in the process of repairing it when injury occurred. *Steer*, 720 F.2d at 977 (citing *Brady*, 303 U.S. at 13 and acknowledging construction for in use is the same under SAA and BIA/LIA). Similarly, in *Wright*, the Eighth Circuit found that a locomotive was not in use when the employee was injured before the mechanical inspection, servicing, and daily inspection had been completed; the locomotive was still on a repair track with blue flags posted at each end and the engine had not been released by the maintenance crew to the operating crew to use. 574 F.3d at 619-20 (citing *Deans*, 152 F.3d at 329). The *Wright* court acknowledged that the "'in use' limitation gives the railroad an opportunity to remedy hazardous conditions before strict liability attaches to claims made by injured workers" under the LIA. 574 F.3d at 620.

Accordingly, the Seventh Circuit's opinion, along with the Fifth Circuit's holding in *Trinidad* and the Tenth Circuit's holding in *Estes* (to the extent it has been broadly applied to except rail vehicles from use), conflicts with the rulings of the First, Second, Third, Fourth, Fifth (other than *Trinidad*), Sixth and Eighth Circuits. Quite clearly, the multifarious in use tests formulated by the various Courts of Appeals cannot all be correct, as a rail vehicle which is indisputably in use under some tests has been deemed *not* in use under others. A railroad worker's ability to invoke strict liability under FELA to recover compensation for his injuries should not turn on the forum. Had LeDure filed suit in one of the other circuits, his case would not have been dismissed, rather, he would

have been granted summary judgment. Given FELA's overarching purpose of establishing a uniform federal standard, this Court should grant review to resolve this conflict among the circuits.

C. This case presents an ideal vehicle for this Court to resolve the circuit split regarding the scope of in use, an issue of critical nationwide importance.

By holding that UP5683 was not in use, the Seventh Circuit rendered a decision that irreconcilably conflicts with the aforementioned opinions of this Court and those of the majority of other circuit courts. By drifting towards the strict test of *Trinidad*, the Seventh Circuit's narrow interpretation of in use countermands the underlying intent of FELA, LIA, and SAA: to promote safety and ensure a liberal recovery for injured workers. The varying in use tests which have proliferated since this Court's decision in *Brady* over 80 years ago demonstrably fail to provide lower courts with adequate direction on when rail vehicles, once clearly in use, cease to be. The Seventh Circuit's opinion here only mires the scope of in use in more murkiness and obscurity. Notably, multiple lower courts—including those here—have bemoaned the apparently conflicting tests, the resulting confusion, and the lack of clear guidance. Such disparity begs for this Court's intervention.

This case presents an ideal vehicle for this Court to resolve the growing circuit split on this critical issue and to provide much-needed guidance to railroads, railroad workers, and lower courts alike on the scope and applicability of the LIA. The district court's decision was set forth in an order of summary judgment; whether a locomotive is in use presents a question of law for the courts to decide. *McGrath*, 136 F.3d at 842; *Steer*, 720 F.2d at 976-77 n. 3, 4. Thus, this portion of the petition

presents a pure question of law. Moreover, it is essential that uniformity and predictability be brought to this area, particularly given the LIA's irrefutable humanitarian purpose and broad remedial goals, and that the ongoing erosion of protections promulgated by Congress for the benefit of railroad workers like LeDure be halted by a clear and unequivocal statement as to the meaning of in use. This is a particularly important issue because a train crew's use of exterior passageways occurs while the locomotive is stationary, in a railyard, and before the train is fully assembled. If allowed to stand, the Seventh Circuit's decision will likely eviscerate negligence *per se* liability for railroad violations of many safety regulations enacted under the LIA and SAA. Accordingly, this Court should grant certiorari and take this opportunity to reinforce its holding in *Brady*, that locomotives and railcars remain in use, although motionless, until they are removed from use by storing them at a location dedicated for maintenance and repair by service personnel and to ensure that all other train service employees receive the full benefit of the protections intended by the LIA's safety regulations.

II. Review is warranted to resolve a conflict concerning the issue of foreseeability in FELA cases.

The lower court's grant of summary judgment to UP on LeDure's FELA general negligence claim on the issue of foreseeability conflicts with decisions of this Court and other circuit courts holding that foreseeability is a jury question where, as here, there was sufficient evidence from which a jury could reasonably infer that UP's failure to inspect its locomotive in the days before assigning it to LeDure could expose him to a risk of harm since inspections are intended to identify and remove oil from walking surfaces.

Even when a railroad is not subject to negligence *per se* liability for violation of safety statutes and regulations where a locomotive is not in use, it remains liable under the FELA for employee injuries that "result in whole or in part from [railroad] negligence." 45 U.S.C. §51. This right is liberally interpreted in light of FELA's humanitarian purposes. *Metro-North Commuter R. Co. v. Buckley*, 521 U.S. 424, 429 (1997). LeDure's negligence claim asserted that UP5683 was in an unsafe condition due to oil that accumulated on its passageway as a result of UP's failure to conduct daily inspections mandated by 49 U.S.C. §20701(2) and 49 C.F.R. §229.21. The undisputed evidence showed that UP had not inspected the locomotive during the three days before the injury incident, including before the locomotive began its journey from Chicago to Salem the day before.

Although FELA does not define negligence, this Court has looked to federal common law to identify the elements as "want of due or ordinary care, proximate causation of the injury, and injury." *Urie*, 337 U.S. at 177. Foreseeability of harm, as part of negligence, exists if the railroad "knew, or by the exercise of due care should have known, that [its] standards of conduct were inadequate to protect petitioner and similarly situated employees…. [A railroad's] knowledge, actual or constructive, of the alleged inadequacies of the… equipment [i]s a jury question." *Id.* at 178 (citations and quotations omitted).

In *Gallick v. Baltimore & O. R. Co.*, the Court further explained that a railroad "defendant's duties are measured by what is reasonably foreseeable under like circumstances—by what in the light of the facts then known, should or could reasonably have been anticipated." 372 U.S. 108, 118 (1963). Foreseeability does not require that a similar incident occurred previously. *Id.* at 121. In *Gallick*, a railroad employee was working near a pool of stagnant water on railroad property which was infested

with vermin and insects when he received an insect bite that became infected, necessitating amputation of his legs. The lower court rejected the jury's liability finding because there was no

> direct evidence that the existence of the unidentified bug at the time and place had any connection with the stagnant and infested pool, or had become infected by the pool with the substance that caused petitioner's infection, evidence which would negative the alternative possibility that the insect had emanated from the nearby putrid mouth of the Cuyahoga River, or from weeds, or unsanitary places situated on property not owned or controlled by the railroad.

Id at 112. In reinstating the verdict, this Court reiterated that the railroad had a duty to act reasonably given not only existing conditions, but anticipated ones as well. *Id*. at 118. Therefore, the Court acknowledged that the railroad should have foreseen that permitting a stagnant pool of water to exist on its property "increased [the] likelihood of an insect biting [an employee] while he was working in the vicinity of the pool." *Id*.

This Court has acknowledged the decision-making role of the jury is much greater in an FELA case than in an ordinary negligence case and the right to jury determinations is a "basic and fundamental" part of the substantive FELA remedy. *Bailey*, 319 U.S. at 354. 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." *CSX Transp., Inc. v. McBride*, 564 U.S. 685, 692 (2011) (quoting *Rogers v. Mo. Pac. R.R. Co.*, 352 U.S. 500, 506 (1957)). "The burden of the employee is met, and the obligation of the employer to pay damages arises, when there is proof, even though entirely circumstantial, from

which the jury may with reason make that inference." *Rogers*, 352 U.S. at 508. "Congress vested the power of decision in these actions exclusively in the jury in all but the infrequent cases where fair-minded jurors cannot honestly differ whether fault of the employer played any part in the employee's injury." *Id.* at 510. "To deprive these workers of the benefit of a jury trial in close or doubtful cases is to take away a goodly portion of the relief which Congress has afforded them." *Bailey*, 319 U.S. at 354. A court may invade the province of the jury "[o]nly when there is a complete absence of probative facts" from which it could find in favor of the injured worker. *Lavender v. Kurn*, 327 U.S. 645, 653 (1946). That a court might "feel that another conclusion is more reasonable" is immaterial. *Id.* at 653.

Other circuit court decisions have consistently recognized that foreseeability presents a jury question in all but extremely limited circumstances, which are not present here. *See Gadsden v. Port Auth. Trans-Hudson Corp.*, 140 F.3d 207, 209 (2d Cir. 1998) (reversing summary judgment for railroad on issue of notice, explaining "[defendant] has a duty to inspect its workplace and a duty to provide a safe workplace"); *Szekeres v. CSX Transp., Inc.*, 617 F.3d 424, 430-31 (6th Cir. 2010) ("law is clear that notice under the FELA may be shown from facts permitting a jury to infer that the defect could have been discovered by the exercise of reasonable care or inspection"); *Mullahon v. Union Pac. R.R. Co.*, 64 F.3d 1358, 1363-65 (9th Cir. 1995) (reversing summary judgment where it was "not outside the possibility of reason" that a jury could find plaintiff's attack by a coworker to be foreseeable, noting "[t]he test of foreseeability does not require that the negligent person should have been able to foresee the injury in the precise form in which it occurred. Rather, it is sufficient if the negligent person might reasonably have foreseen that

an injury might occur." (citation and quotations omitted) (emphasis in original)).

In another opinion issued by the Seventh Circuit, addressing *Gallick*, the court commented that reasonable foreseeability of harm "remains somewhat elusive and abstract." *Williams v. National Railroad Passenger Corp.*, 161 F.3d 1059, 1062 (7th Cir. 1998). It also noted that, in the wake of *Gallick*, the Seventh Circuit's decisions consistently declined to infer negligence when a plaintiff failed to produce *any* evidence suggesting that employer negligence played even the slightest role in bringing about the injury. *Id.* But the Seventh Circuit's characterization of what constitutes "any evidence" here deviates from this Court's precedent. The court held that LeDure failed to provide evidence sufficient to prove UP

> had notice of the slick spot or any hazardous condition that could have leaked the oil. Instead, he argues that Union Pacific should have inspected UP5683 and cleaned the spot beforehand. But … *there is no evidence that an earlier inspection would have cured the hazard*… [where] the spot was small, isolated, and without explanation. Under these facts, a jury could not find Union Pacific knew or should have known about the oil or its hazard to LeDure.

Pet.App.5; 962 F.3d at 911 (emphasis added).

However, the proper inquiry is *not* whether an inspection *would* have identified the oil. Rather, it is whether a jury could infer that harm may come to engineers, whose duties require them to walk on locomotive passageways at night, as a result of UP's failure to inspect the locomotive during the previous three days during which it would have been fueled and lubricated before beginning its interstate transport. The very purpose of those mechanical inspections is to identify and remediate hazards before the locomotives

are assigned to transportation crews. FELA law does not require workers to prove *exactly* when or how hazardous conditions came into existence or eliminate all possibilities or that an earlier inspection would have revealed the oil. This Court in *Gallick* explicitly rejected that notion in holding that the worker did not need to present direct evidence to prove the unidentified bug came from the railroad's property as opposed to a nearby waterway not owned or controlled by the railroad. *Gallick*, 372 U.S. at 112. Here, there was ample evidence from which UP, like the railroad in *Gallick*, could have foreseen that its conduct (or failure to inspect) "increased the likelihood of [employee harm] while he was working in th[at location]" and the lower courts erred in depriving LeDure of a jury trial on this claim.

Notably, this is not the first time this Court reviewed and reversed a decision from the Seventh Circuit relating to the sufficiency of evidence as to foreseeability of harm in light of a railroad's failure to conduct adequate inspections. In *Webb v. Illinois Central R. Co.*, this Court found that a jury question was indeed presented by evidence bearing on the adequacy of the railroad's inspection practices showing such were not properly conducted to discover and remove hazards, holding that

> It was for the jury to weigh the evidence and to decide whether or not the inspections satisfied [its] duty to provide the [employee] with a safe place to work…. That there were other possible sources of the [hazard] would not, of course, justify a directed verdict in light of our conclusion that the evidence supports with reason a jury finding that the [railroad] negligently caused the [hazard] to be…[in the workplace] and failed to use proper care to discover and remove it.

352 U.S. 512, 514-15 (1957).

Here, there was sufficient evidence from which a jury could reasonably infer that UP's failure to inspect UP5683 (either upon its arrival in Salem, the day before in Chicago, or in the days before that) subjected LeDure to an increased risk of injury by allowing oil to accumulate undetected on its walkway during previous fueling and lubrication. That LeDure did not see the oil as he was walking on the passageway at night because it was a small spot is merely some evidence which the jury could weigh and reconcile, but it does not justify the *court* deciding, as a matter of law, that no jury could reasonably infer that the failure by UP to properly inspect for at least three days could allow an unsafe condition to exist. By granting summary judgment on this issue, the lower court violated this Court's precedent and deprived LeDure of his fundamental right under FELA to a jury determination of foreseeability. Moreover, the lower courts' rulings actually undermine FELA's purpose of reducing injuries by providing safe working conditions and affording compensation when that is not done. Instead, the rulings reward railroads which fail to inspect equipment by allowing them to avoid liability by claiming lack of notice. This Court has repeatedly reversed lower court decisions that deprived injured workers of their right to a jury determination on similar issues, *Rogers*, 352 U.S. at 510, n.26 (collecting cases), and it should do so here. Thus, given the highly aberrational nature of this opinion and the important nature of the interests protected by the FELA for over a century, this Court should grant certiorari to review the second question presented in this petition.

CONCLUSION

The Court should issue a writ of certiorari to the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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