No. 20-807

In the Supreme Court of the United States

BRADLEY LEDURE,
Petitioner,
v.
UNION PACIFIC RAILROAD COMPANY,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT UNION PACIFIC RAILROAD COMPANY

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QUESTION PRESENTED

(1) Whether the Seventh Circuit erred in holding that a locomotive was not "in use" under the Locomotive Inspection Act when the train had not yet been assembled and the locomotive was parked on a backtrack, had not yet been inspected, was in the process of being tagged to "run dead" to its next destination, and could not depart the rail station until a great deal more preparation had been completed.

(2) Whether the Seventh Circuit erred in holding that petitioner could not survive summary judgment on the question of foreseeability where petitioner failed to offer any evidence that respondent knew of the alleged hazard that caused him to slip and fall, that an inspection could have uncovered the hazard, or that the hazard predated petitioner's fall.

RULE 29.6 STATEMENT

Respondent Union Pacific Railroad Company is a wholly owned subsidiary of Union Pacific Corporation, a publicly traded company. No publicly traded corporation is known to own 10% of the stock of Union Pacific Corporation.

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STATEMENT OF THE CASE

The Locomotive Inspection Act provides that a railroad may "use" a locomotive only if it is in safe operating condition. For more than seventy years the Seventh Circuit has recognized that *preparing* a locomotive for use is the antithesis of *using* it. That common sense distinction is uncontroversial and consistent with the precedents of this Court and every other circuit. And the Seventh Circuit's holding that Union Pacific was not yet "using" locomotive UP5683 at the time of petitioner's accident is a factbound application of properly stated law. It is also correct, since the locomotive was sitting on a backtrack waiting for a train to be assembled, and petitioner was engaged in tagging it for *non*-operation at the time he claims to have slipped on a nearly invisible spot of oil. The second question presented similarly asks this Court to second-guess the factbound application of settled legal principles. Certiorari should be denied.

A. Regulatory Background

Two interrelated statutes control this case: the Locomotive Inspection Act ("LIA"), 49 U.S.C. § 20701 *et seq*., and the Federal Employers Liability Act ("FELA"), 45 U.S.C. § 51 *et seq*.

1. In 1908, Congress enacted the FELA to provide a federal cause of action for railroad workers injured by the negligence of their employers. *Consol. Rail Corp. v. Gotchall*, 512 U.S. 532, 542-43 (1994). FELA is not "a workers' compensation statute," and it "'does not make the employer the insurer of the safety of his employees while they are on duty.'" *Id*. at 543 (citation omitted). However, a railroad's violation of specific federal safety requirements may constitute

negligence *per se* under FELA. *CSX Transp., Inc. v. McBride*, 564 U.S. 685, 703 n.12 (2011); *Urie v. Thompson*, 337 U.S. 163, 188-89 (1949). "[R]easonable foreseeability of harm is an essential ingredient of [FELA] negligence." *Gallick v. Baltimore & Ohio R.R. Co.*, 372 U.S. 108, 117 (1963).

2. In 1911, Congress enacted the Boiler Inspection Act, ch. 103, 36 Stat. 913, which made it unlawful for common carriers "to use any locomotive engine propelled by steam power in moving interstate or foreign traffic" unless the locomotive's boiler system was "in proper condition and safe to operate" in "active service." Ch. 103, § 2, 36 Stat. at 913-14. A few years later, Congress extended that mandate to "the entire locomotive and tender and all parts and appurtenances thereof." Act of Mar. 4, 1915, ch. 169, § 1, 38 Stat. 1192, 1192. As amended, the Boiler Inspection Act became known as the Locomotive Inspection Act.

In relevant part, the modern LIA provides that a "railroad carrier may use or allow to be used a locomotive or tender on its railroad line only when the locomotive or tender and its parts and appurtenances" are safe and have been inspected as required under "regulations prescribed by the Secretary of Transportation." 49 U.S.C. § 20701. The effect of the statute is to impose strict liability if a railroad puts a locomotive into active service without repairing a defective condition or conducting the required inspections. In requiring that locomotives be "safe to operate," "Congress by its own statement was attempting to insure that such equipment be employed *in . . . active service . . .* without unnecessary peril to life or limb . . . ." *Urie,* 337 U.S. at 190 (emphasis added) (citation omitted).

B. Factual Background

Petitioner worked as a locomotive engineer for respondent Union Pacific Railroad Company (Union Pacific) at its Salem, Illinois railyard. Pet. App. 7a. On August 12, 2016, he was assigned the task of assembling a train for a departure. *Id.* at 2a. The first step in this process was identifying or "tagging" those locomotives in the yard that would be used to power and pull the train, and those that would instead remain powered off so as to conserve fuel. Pet. App. 8a; Dkt. 49-1 at 76-77.[1] Tagging entails hanging signs in locomotive cabs so that subsequent crews can identify whether the locomotive's engines are running and will be used to power a train. Dkt. 49-1 at 76-77; Pet. App. 8a.

On the day of petitioner's injury, locomotive UP5683 was parked, coupled to two other locomotives, and sitting on a "backtrack" of the Salem yard. Pet. App. 7a-8a; Dkt. 49-1 at 80-83, 87-88. The backtrack is a "separate track that diverges from the main track," "runs around the back side of the yard," and "reattaches back at the south end of the depot." Pet. App. 7a-8a. It is used to perform yard work and is not part of the main line. Dkt. 55-2 at 24. For nearly thirty days before petitioner's accident, UP5683 had not been in the possession of Union Pacific. It had been used by Norfolk Southern, and had been returned to Union Pacific in Chicago the day before. Dkt. 49-5 at 17-18, 22.

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[1] Citations to "Dkt." refer to the docket of the district court, No. 3:17-cv-00737 (S.D. Ill.). Citations to pages and lines are to those of the original documents, not the ECF header page.

At the time petitioner claims to have slipped, UP5683 was not doing any work at the Salem yard. The locomotive was not being used to assemble a train, nor would it be used to pull a train to its next destination. Dkt. 49-1 at 80-82. UP5683 would instead "run dead," non-operational and pulled by another locomotive in a train from Salem to its destination for inspection and maintenance. *Id.* at 82; Dkt. 49-5 at 39-40. Before even that "dead" run could occur, however, the locomotive would need to be inspected, and at least three different switching operations would need to take place to "put [the] train back together." Pet. App. 15a (quoting petitioner's deposition); *see also id.* at 8a.

Petitioner testified that he was walking along UP5683's exterior walkway and toward the locomotive's cab in order to place a shut-down tag when he slipped and fell. Pet. App. 8a; Dkt. 49-1 at 89-99. He did not see anything on the walkway before or immediately after his fall that would cause him to slip. Pet. App. 8a; Dkt. 49-1 at 96, 104-05, 108-09. Nor did anyone witness his slip and fall. Petitioner claims that he later returned to the walkway where, upon close examination, he first "notice[d] that there was a little something there," although he could not identify the substance and did not know where it could have come from. Pet. App. 8a-9a (alteration in original) (quoting petitioner's deposition). He then completed his task, helped to assemble the train, reported his fall to his manager, and went home for

the day. Pet. App. 9a; Dkt. 49-1 at 192-197; Dkt. 54-2 at 17.[2]

An inspection conducted after petitioner reported his injury noted a "small amount of oil" in the same general location on the locomotive where he claims to have slipped. Dkt. 49-5 at 19, 47; Dkt. 49-6. That oil stain was similarly described by others as "small" and "isolated." Pet. App. 5a; *see also* Dkt. 54-2 at 21. No other oil spots were found on the locomotive. Dkt. 54-2 at 18. It is undisputed that there were no components of UP5683 in the vicinity that could have leaked and left a slippery substance on the walkway, and petitioner conceded that he did not know where the substance could have come from. Pet. App. 9a; Dkt. 49-5 at 40-42. A post-accident inspection revealed no defects or leaks in the locomotive. Dkt. 49-6.

The petition declares that UP5683 "had not been inspected at all during the three days before the incident" and that the railroad "fail[ed]" to inspect the locomotive for days before his injury. *See*, *e.g.*, Pet. 5, 20, 21, 26. As the district court noted, petitioner consistently misstates the record on this issue. *See, e.g.*, Pet. App. 25a-26a. The regulation to which petitioner refers states that "each locomotive *in use* shall be inspected at least once during each calendar day." 49 C.F.R. § 229.21 (emphasis added). It is undisputed that UP5683 had been on loan to another railroad for a month and was only returned to Union Pacific hours before petitioner's injury. Dkt. 49-5 at

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[2] Petitioner tells this Court that UP5683's engine was running before his injury. Pet. 4. If it mattered in some way, his testimony was in fact equivocal on this point. Dkt. 49-1 at 82.

17-18, 38; Dkt. 87 at 4. Petitioner also fails to acknowledge that the question of whether the locomotive was "in use," triggering the application of the regulation upon which he relies, is the primary dispute in this case.

Following his injury, petitioner claimed that he was permanently disabled from all railroad work. Dkt. 22 at 3-6. This is the second time that petitioner has claimed he is permanently disabled from all railroad work. Petitioner previously worked for the BNSF Railway Company as a conductor and, following a similar alleged accident, left that position after settling a lawsuit against the railroad for $850,000 and affirming to BNSF that he was permanently disabled from railroad work. Dkt. 49-1 at 9; Dkt. 87 at 53.

B. Procedural Background

Petitioner brought suit against Union Pacific under the FELA and the LIA. Pet. App. 9a-10a.

Union Pacific moved for summary judgment, arguing that the LIA does not apply because UP5683 was not "in use" on its line at the time of petitioner's injury. Dkt. 49 at 3-5, 8-13. Union Pacific further argued that petitioner presented no evidence to support his allegation that his injury was reasonably foreseeable. *Id.* at 5-7, 15-19. Petitioner filed a cross-motion for summary judgment on whether UP5683 was "in use." Dkt. 50.

After full briefing and oral argument, the district court entered summary judgment for Union Pacific on both of petitioner's claims. Pet. App. 7a-21a. Addressing the LIA claim, the district court applied the Seventh Circuit's longstanding holding that "to put [a locomotive] in readiness for use, is the

antithesis of using it." *Id.* at 13a (quoting *Lyle v. Atchison, Topeka & Santa Fe Ry. Co.*, 177 F.2d 221, 223 (7th Cir. 1949), *cert. denied*, 339 U.S. 913 (1950)); *see also Tisneros v. Chicago & N.W. Ry. Co.*, 197 F.2d 466, 467-68 (7th Cir.), *cert. denied*, 344 U.S. 885 (1952) (same). The district court held that "after reviewing all of the circumstances in this case, Union Pacific's locomotive was not 'in use' at the time of LeDure's accident." Pet. App. 14a. Instead, petitioner was "putting the locomotive 'in readiness for use' when he slipped." *Id.* at 14a-15a. The court stressed four key facts: "[T]he train was (1) stationary; (2) on a backtrack in the depot yard; (3) had not yet been inspected or tagged; and (4) perhaps most importantly, the engineers had not yet assembled the cars on the train for its next use in interstate commerce." *Id.* at 15a. In fact, the district court emphasized, petitioner had "specifically said at his deposition that 'the train was not set up and ready to go.'" *Id.* (citing Dkt. 49-1 at 83:9-10). Taken as a whole, these facts indicated that petitioner was "putting the locomotive 'in readiness for use' when he slipped." *Id.* at 14a-15a. The district court further found that "these facts would lead to the same conclusion in other circuits." *Id.* at 15a-16a (citing *Trinidad v. Southern Pac. Transp. Co.,* 949 F.2d 187, 189 (5th Cir. 1991); *McGrath v. Consol. Rail Corp.*, 136 F.3d 838, 842 (1st Cir. 1998); *Estes v. Southern Pac. Transp. Co.,* 598 F.2d 1195, 1198 (10th Cir. 1979); *Deans v. CSX Transp., Inc.*, 152 F.3d 326, 330 (4th Cir. 1998)).

Turning to petitioner's negligence-based FELA claim, the district court held that petitioner offered no triable case that his injury was reasonably foreseeable. The court concluded that there was no

evidence in the record that Union Pacific had actual or constructive notice of any oily substance on the locomotive walkway prior to petitioner's accident because (1) there was no record evidence supporting a conclusion that the oily substance was present on the walkway before petitioner stepped on it; (2) there were no nearby locomotive components from which the substance could have leaked; (3) there was no evidence that the substance came from the locomotive; and (4) there were "'a myriad of possible ways it could have gotten onto' the walkway"—including that it was brought there on petitioner's boots. Pet. App. 17a-20a (citation omitted).

Petitioner moved for reconsideration under Federal Rule of Civil Procedure 59(e). *See* Pet. App. 23a-28a. The district court denied that motion, stating that petitioner "misunderstands or misrepresents both this Court's prior order and the binding case law that it relied on." *Id.* at 24a. The court explained that although none of petitioner's arguments merited significant discussion, "in order to ensure that the Court's order is not warped in any potential appellate briefs, it is necessary to highlight a few of LeDure's arguments." *Id.*

As relevant here, the district court emphasized that the reconsideration motion failed to provide "an honest depiction" of the evidence before the court. Pet. App. 28a. For example, the district court addressed petitioner's argument that the court had ignored his allegation that oil was previously discovered on UP5683, which might support a foreseeability finding. *Id.* at 27a-28a. The court observed that LeDure "fail[ed] to mention that this prior discovery [of oil on the locomotive] occurred *three years* before the incident in this case." *Id.* at 28a

(emphasis in original). On the law, the district court explained that petitioner's argument that the court had misstated the holding of a First Circuit decision was "either a misrepresentation or a misunderstanding," and that petitioner had ignored the district court's full and accurate explanation of that decision two pages earlier in its decision. Pet. App. 25a-26a. Finally, the court reiterated that petitioner's FELA claim was supported by "zero evidence" and was based purely on speculation, which "'cannot supply the place of proof.'" Pet. App. 27a-28a (quoting *Moore v. Chesapeake & Ohio Ry. Co.*, 340 U.S. 573, 577-78 (1951)). The district court thus declined to reconsider its judgment.

On appeal, the Seventh Circuit (Judges Bauer, Kanne, and Barrett) agreed that the district court had properly applied Supreme Court and Seventh Circuit precedent on when a locomotive is in "use." Pet. App. 1a-5a. The Seventh Circuit rejected petitioner's argument that a locomotive is only out of use when it is in a place of repair as "unduly narrow" and inconsistent with established case law. Pet. App. 4a. Like the district court, the court of appeals found it dispositive "that UP5683 was stationary, on a sidetrack, and part of a train needing to be assembled before its use in interstate commerce." *Id.* Because petitioner was injured while putting UP5683 in readiness for use, his activity was thus the "the antithesis" of "use" under longstanding law. *Id.* (quoting *Lyle*, 177 F.2d at 223). The court of appeals also affirmed the district court's foreseeability holding. *Id.* at 4a-5a.

Petitioner subsequently filed a petition for panel rehearing and petition for rehearing *en banc*. Pet. App. 29a. The petitions were denied. *Id.* at 30a. All

judges on the panel voted to deny the petition for panel rehearing, and no active judge requested a vote on the petition for rehearing *en banc*. *Id.* at 29a-30a.

REASONS FOR DENYING THE WRIT

1. The Seventh Circuit's factbound determination that UP5683 was not in "use" at the time of petitioner's accident does not conflict with decisions of this Court or other circuits.

Petitioner fundamentally misconstrues the Seventh Circuit's decision, which did not embrace any categorical rule that a locomotive is not "in use" until it is actively engaged in pulling a train. Both courts below rested their conclusion instead on the Seventh Circuit's longstanding holding that *preparing* a locomotive for use is not *using* it. Applying that rule to the facts, the district court and Seventh Circuit emphasized that the train had not yet been assembled and that UP5683 was stationary, on a backtrack, had not been inspected, was not ready to depart, and was in the process of being tagged to run dead. Given that whole constellation of facts, the courts below sensibly held that UP5683 was (at most) being put "'in readiness for use,'" which "'is the antithesis of using it.'" Pet. App. 4a (quoting *Lyle v. Atchison, Topeka & Santa Fe Ry. Co.*, 177 F.2d 221, 223 (7th Cir. 1949), *cert. denied*, 339 U.S. 913 (1950)).

The Seventh Circuit's distinction between preparation and "use" has been settled law for more than seventy years, and it correctly implements the LIA's text and core purpose of requiring that railroads ensure that locomotives are in safe condition before putting them into active use. That distinction, and the Seventh Circuit's factbound application in this case, do not conflict in any way with this Court's

decision in *Brady v. Terminal Railroad Association of St. Louis*, 303 U.S. 10 (1938). *Brady* was decided under the Safety Appliance Act (SAA), an earlier-enacted statute imposing strict liability when railroads "used" locomotives or "hauled or used" rail cars without certain specified safety equipment, such as automatic couplers, in good working order. *See* 45 U.S.C. § 1 *et seq.* (1934) (amended and recodified by Pub. L. No. 103-272, § 7(b), 108 Stat. 745, 1379 (1994)) (recodified in relevant part at 49 U.S.C. § 20302 *et seq.*). This Court held that a rail car had not been "withdrawn from use" simply because it was temporarily stopped in a yard for inspection and switching midway through its movement from origin to destination. *Brady*, 303 U.S. at 13. That holding makes perfect sense but does not support petitioner's argument that a locomotive is in "use" under the LIA any time it is not in a repair shop.

Nor is there any circuit split about the appropriate legal standards under the LIA. The courts of appeals all approach the LIA's "in use" inquiry the same way, conducting a holistic analysis of the facts at hand to determine whether a locomotive is currently being used or, instead, has been withdrawn from use or is merely being prepared for use. The cases that petitioner cites do not articulate or rely on the *per se* rules that petitioner attributes to them, and none reach conclusions that are inconsistent with the Seventh Circuit's distinction between preparation and use. Regardless, arguably divergent outcomes in the application of properly stated and factbound legal rules are not circuit splits meriting this Court's review. *See* Sup. Ct. R. 10(a).

Finally, the petition demonstrates that close cases in the application of the LIA's "in use" standard arise

very infrequently, and affect only whether a personal injury case will be governed by a negligence or negligence *per se* standard. Even if that issue merited this Court's attention, this case would be a poor vehicle to provide additional guidance. The district court expressly held that on these facts the outcome would be the same in every other circuit. And the fact that a new Justice of this Court participated in the decision below could pose an obstacle to consideration by the full Court.

2. Petitioner also fails to identify any conflict stemming from the Seventh Circuit's factbound ruling that he presented insufficient evidence of foreseeability for his FELA negligence claim. Petitioner presented no evidence at all that the "small," "isolated" spot of oil could have been identified by the railroad through an inspection, that Union Pacific had actual or constructive knowledge of any hazard, or even that the asserted slick spot predated petitioner's fall rather than having been carried there on petitioner's own boots. Petitioner essentially quarrels with the factbound application of the properly stated summary judgment standard.

The petition identifies no conflict of authority or other issue meriting this Court's review. It should be denied.

I. THE SEVENTH CIRCUIT'S HOLDING THAT UP5683 WAS "IN USE" IS CORRECT AND DOES NOT CONFLICT WITH THE PRECEDENTS OF THIS COURT OR ANY OTHER CIRCUIT

Petitioner does not explain why the Seventh Circuit's understanding of the LIA is wrong, or identify any conflict meriting review.

A. The Seventh Circuit's Understanding Of The LIA's "In Use" Requirement Is Correct And Does Not Merit Review

1. Both decisions below rested squarely on the Seventh Circuit's longstanding holding that the LIA draws a distinction between circumstances in which a locomotive is "still in use on the tracks of" a railroad, even if not currently moving, and circumstances in which "use of the engine in transportation had for the time being been abandoned" in a meaningful sense, and not yet restarted. *Lyle*, 177 F.2d at 222-23. In particular, the courts below applied the Seventh Circuit's common sense insight that "to put [a locomotive] in readiness for use, is the antithesis of using it.'" Pet. App. 4a (quoting *Lyle*, 177 F.2d at 223).

The Seventh Circuit's distinction correctly implements the language and purposes of the statute. The LIA provides that "[a] railroad carrier may *use or allow to be used* a locomotive or tender on its railroad line only when [they] . . . are in proper condition and safe to operate without unnecessary danger of personal injury." 49 U.S.C. § 20701 (emphasis added). A locomotive is a "piece of on-track equipment" "designed for moving other equipment." 49 C.F.R. § 229.5. One "uses" a locomotive to pull a train. As a matter of logic, usage, and common sense,

a locomotive is not "in use" when it is not in position to pull a train, it is not ready to pull a train, and no train has been assembled. For example, the statute did not apply when a steam locomotive was under the care of a "'fire-up' man," whose job was either to "keep the fire up" in a locomotive being prepared for use or "knock the fire out" in those engines that were being taken out of immediate service. *Tisneros v. Chicago & N.W. Ry. Co.*, 197 F.2d 466, 467 (7th Cir.), *cert. denied*, 344 U.S. 885 (1952).

That plain language understanding is confirmed by the statute's core purpose, which is to incentivize railroads to inspect their locomotives and ensure that they are in safe operating condition before putting them into service. In "requiring that the boiler and, not long after, the entire locomotive, be maintained 'in proper condition and safe to operate,' Congress by its own statement was attempting to insure that such equipment 'be employed in . . . *active service* . . . without unnecessary peril to life or limb.'" *Urie v. Thompson*, 337 U.S. 163, 190 (1949) (alterations in original) (citation omitted). The Seventh Circuit correctly recognized long ago that "[t]o apply the mandatory liability in favor of one who [merely] puts an engine *in readiness for use* is to enlarge and extend the intent of Congress in enacting the legislation." *Lyle*, 177 F.2d at 223 (emphasis added).

Both the district court and the Seventh Circuit focused on the same key facts in holding that at the time of petitioner's injury UP5863 was being put "in readiness for use" rather than being used. The locomotive was "stationary." It was "on a backtrack in the depot yard," on which locomotives are inspected and trains are assembled, rather than on the main track. Like the locomotive in *Lyle*, UP5683 "had not

yet been inspected or tagged." *See* Pet. App. 4a, 15a. "[P]erhaps most importantly, the engineers had not yet assembled the cars on the train for its next use in interstate commerce," and petitioner himself conceded that the "train was not set up and ready to go." *See id.* at 15a (citation omitted). The district court particularly emphasized that, based on petitioner's own testimony, there was "still a considerable amount of work to be done before this locomotive was ready for its next trip in interstate commerce." *Id.* And in this case, UP5683 was not even being *prepared* for later use as a locomotive. Petitioner's job was to tag UP5863 to "run dead" on its next journey. He admitted that he was tagging UP5683 for non-operation, that he "wasn't operating it," and that "[i]t wasn't in [his] consist" the day of his alleged accident. Dkt. 49-1 at 76-99, 109, 182.

Petitioner offers no persuasive argument that the Seventh Circuit's distinction between "use" and preparation for use misunderstands the statutory text and purpose. Since this case involves nothing more than a factbound application of that rule (and an eminently sensible one), review should be denied.

2. In an effort to create a controversy meriting review, petitioner asserts that the Seventh Circuit "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." Pet. 11 (emphasis added). The petition's Question Presented similarly characterizes the Seventh Circuit's decision as holding that a locomotive's use "does not resume until the locomotive has left the yard as part of a fully assembled train." *Id.* at ii.

These arguments confirm the district court's concern that the basis of its decision might be "warped in any potential appellate briefs." Pet. App. 24a. Neither of the courts below applied the categorical rule that petitioner tries to attribute to them, either expressly or "in essence." To the contrary, the Seventh Circuit and district court explained that the totality of the factual circumstances led them to the conclusion that there was "still a considerable amount of work to be done before this locomotive was ready for its next trip in interstate commerce," and that preparing a locomotive for use "'is the 'antithesis of using it.'" *Id.* at 15a (quoting *Lyle,* 177 F.2d at 223); *id.* at 4a; *see also id.* at 14a ("Here, after reviewing all of the circumstances in this case, Union Pacific's locomotive was not 'in use' . . . ."). If, as petitioner claims, the Seventh Circuit had announced or relied on a rule that a locomotive's "use" does not begin until it "has left the yard as part of a fully assembled train," there would have been no need to examine any of the facts that the courts below explained were critical to their decisions.[3]

In reality it was *petitioner* who offered an arbitrary bright-line rule below, which the Seventh Circuit correctly rejected. That court noted that petitioner "essentially seeks to limit [*Lyle*]'s holding to say a locomotive is not 'in use' only when it is being

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[3] Petitioner's *amici* suffer from this same misunderstanding, chiefly urging that this Court not "restrict the [LIA] violations to only locomotives actually moving." Amici Br. of Sheet Metal, Air, Rail Transp. Workers, Brotherhood of Locomotive Engineers and Trainmen, and the Academy of Rail Labor Attorneys 2 (Dec. 28, 2020); *id.* at 4-5. Because the Seventh Circuit's opinion did no such thing, *amici's* arguments are beside the point.

repaired." Pet. App. 4a. The Seventh Circuit sensibly rejected that "unduly narrow reading" of precedent, *id.*, which would be inconsistent with the plain meaning of in "use" and the basic purposes of the statute.

B. The Seventh Circuit's Decision Does Not Conflict With This Court's Decision In *Brady*

Petitioner wrongly claims that the Seventh Circuit's analysis or result conflicts with this Court's decision in *Brady*. *Brady* held that a freight car that had been "placed on a receiving track temporarily pending the continuance of transportation" remained in "use" within the meaning of the Safety Appliance Act. 303 U.S. at 13. That holding in no way controls the outcome of this case.

The rail car at issue in *Brady* was merely paused in the middle of a continuous movement, during a routine handoff from the Terminal Railroad Association of St. Louis to the Wabash Railway Company. It is entirely routine in railroad operations for a rail car to be switched from one train, and even one railroad, to another as it makes its way from origin to destination. That sort of switching does not remotely indicate that the rail car has been withdrawn from active use; it just means that the car needs to follow a path onward that the locomotive previously pulling the car will not be traveling. The rail car in *Brady* was pulled by the Terminal Association onto "a 'receiving' or 'inbound' track" to be inspected by the Wabash, so that the Wabash could carry the car the rest of the way to its destination. 303 U.S. at 11. In that context, this Court explained that the car had only been "placed on a receiving track

temporarily pending the continuance of transportation," and that it "had not been withdrawn from use" but "was still in use, though motionless." *Id.* at 13. This Court cited its prior decision in *Johnson v. Southern Pacific Co.*, which explained that a car similarly mid-transfer "was not a new car, or a car just from the repair shop, on its way to its field of labor," but simply a car halfway through its planned journey. 196 U.S. 1, 21-22 (1904).

By contrast, the basis of the Seventh Circuit's holding in this case was its conclusion that UP5683 had not yet been placed into service. It was being *readied for use*, but was not yet actively *in use*. That distinction, which the Seventh Circuit and other courts have drawn for decades, is perfectly consistent with the reasoning and outcome of *Brady*. UP5683 was not in the middle of a switching operation. It was on a backtrack, out of operation, without an assembled train, waiting to be tagged for *non*-operation. The courts below emphasized that there was "still a considerable amount of work to be done before this locomotive was ready for its next trip in interstate commerce," Pet. App. 15a, unlike the car in *Brady* that had only been "placed on a receiving track temporarily pending the continuance of transportation." 303 U.S. at 13. At most, therefore, petitioner quarrels with the factbound application of standards and distinctions that are perfectly consistent with *Brady*. *See, e.g.*, *Trinidad v. Southern Pac. Transp. Co.*, 949 F.2d 187, 189 (5th Cir. 1991) ("The issue in *Brady*, thus, was whether the train's 'use had ended' during this temporary stop. *Brady* is inapposite to the case at bar, as this case involves the question whether the train had passed from the

assembly phase to the 'in use' phase." (citations omitted)).

Those conclusions would be correct even if the SAA and the LIA were identical. And because the LIA (regulating the use of locomotives) was in some respects patterned after the SAA (regulating the use and hauling of rail vehicles lacking particular safety equipment), and "the congressional purpose underlying [them] is basically the same," *Urie*, 337 U.S. at 190, SAA precedents are often invoked as persuasive in LIA cases. But two important differences between the LIA and the SAA provisions at issue in *Brady* bear mention.

First, rail cars and locomotives perform very different functions, and what it means to "use" them may be different in particular contexts. A rail car is a passive receptacle for cargo, and therefore routinely remains in "use" even when it is temporarily motionless and even disconnected from other cars while being switched from one train or railroad to another. A locomotive, by contrast, is "used" to pull cars. When a locomotive is no longer attached to a train and has been sidelined in a rail yard to await its next assignment (or, as here, to await its own passive transportation), it has been withdrawn from active "use" in a way that a rail car mid-movement has not.

Second, the SAA contains directly applicable statutory text that is absent from the LIA. In *Brady*, the key question was whether the freight car had been taken out of service. But the SAA's text addresses that question expressly. Where a freight car has been discovered to be defective, the SAA permits a railroad to haul the car to a place of repair, but provides that "such movement or hauling of such car shall be at the sole risk of the carrier, and nothing in this section

shall be construed to relieve such carrier from liability in any remedial action for the death or injury of any railroad employee caused . . . in connection with the movement or hauling of such car." Act of Apr. 14, 1910, ch. 160, § 4, 36 Stat. 298, 299; *see also Great N. Ry. Co. v. Otos,* 239 U.S. 349, 351-52 (1915) (relying on that provision to find that a car had not been "withdrawn from interstate commerce"); *Brady*, 303 U.S. at 13 (relying on *Otos* to find that the car "in this instance had not been withdrawn from use"); *see also* 49 U.S.C. § 20303 (current codification of this provision).

C. The Seventh Circuit's Decision Does Not Conflict With The Decisions Of Any Other Court Of Appeals

There also is no conflict in the courts of appeals about the applicable legal principles. To the contrary, the nationwide case law reveals courts endeavoring to draw, on particular and highly varied facts, the same fundamental distinction that the Seventh Circuit considered dispositive in this case.

Petitioner seeks, unpersuasively, to divide a multitude of fact-dependent LIA and SAA decisions into two broad legal rules. Under one putative rule—assertedly embraced by the Seventh Circuit below, by "the Fifth Circuit's holding in *Trinidad* and [by] the Tenth Circuit's holding in *Estes* (to the extent it has been broadly applied to except rail vehicles from use)"—a locomotive is not in use if "the train's inspection had not been completed" or the locomotive was not being "'used in moving interstate or foreign traffic.'" Pet. 14-15, 18 (citations omitted). Under the other putative rule—assertedly embraced by "rulings of the First, Second, Third, Fourth, Fifth (other than

Trinidad), Sixth, and Eighth Circuits," *id.* at 18—a locomotive is "in use *unless* it is located in a place of maintenance or repair and/or the injured party was responsible for such maintenance," *id.* at 15.

None of this accurately describes the actual case law. Take the Fourth Circuit, on which petitioner heavily relies. In *Deans v. CSX Transportation, Inc.*, the Fourth Circuit explained that the SAA's "in use" requirement should be assessed by "looking at a number of different factors," and that "the primary factors we consider are where the train was located at the time of the accident and the activity of the injured party." 152 F.3d 326, 329 (4th Cir. 1998). On the facts, the Fourth Circuit held that where a train "had already had its engine coupled to it and was standing on a track in the rail yard in preparation for imminent departure—not in storage or waiting to be moved into a repair location," and was "close[] to actual motion," it was in use. *Id.* at 330. Obviously that holding in no way conflicts with the Seventh Circuit's holding in this case that a locomotive was not in use when the train had not been assembled, considerable work remained before departure, and UP5683 was being tagged to run dead.

Notably, the year after *Deans* the Fourth Circuit distinguished that case and issued a ruling in another SAA case completely inconsistent with the rule that petitioner ascribes to that court. *See Phillips v. CSX Transp., Inc.*, 190 F.3d 285, 289-90 (4th Cir. 1999), *cert. denied*, 529 U.S. 1004 (2000). Whereas the train in *Deans* was already "coupled to its engine, its handbrakes were being released, and its departure was 'imminent,'" the Fourth Circuit explained that in *Phillips* "the train was about to be uncoupled from its engine, its handbrakes were being engaged, and it

had yet to undergo its predeparture inspection" for its next trip. *Id.* (citation omitted). "Taken together," these different facts showed that the plaintiff "was injured at the *end* of the switching process, rather than at the beginning"—and the car thus *was not* "in use." *Id.* at 290 (emphasis added). Far from holding 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," Pet. 15, as petitioner asserts, both Fourth Circuit decisions examined the totality of the circumstances to determine whether a vehicle was in use—and placed crucial emphasis on whether a train had already been "prepar[ed] for imminent departure." *Deans*, 152 F.3d at 330.

The same is true of the decisions of the First, Second, Third, Sixth, and Eighth Circuits cited favorably by petitioner. In each case, the court examined the totality of the factual circumstances, rather than applying anything like the bright-line rule that petitioner advances.

In *McGrath v. Consolidated Rail Corp.*, the First Circuit noted that the "facts of this case do not lend themselves to an easy answer" and emphasized that the locomotive was not being "stored on the yard track" but instead was "running" and "ready to move into service." 136 F.3d 838, 842 (1st Cir. 1998).

In *Holfester v. Long Island Railroad Co.*, the Second Circuit held that the electric mail car in question was still "in use" because it "was only temporarily taken off the mainline for a between-run inspection," it was left "with its lights on, its switchboard operating, and its motor generator and pumps working," and its cargo had not been unloaded. 360 F.2d 369, 372 (2d Cir. 1966).

In *Raudenbush v. Baltimore & Ohio Railroad Co.*, the locomotive was still "in use" because it had just been uncoupled from the train and "moved back some fifteen feet," there was only "an interval of but a few seconds or minutes between the active use of the locomotive and the time of the accident," the locomotive was to be used again as soon as additional cars arrived, and the engineer was still in the cab. 160 F.2d 363, 367-68 (3d Cir. 1947).

The Sixth Circuit's decision in *Fort Street Union Depot Co. v. Hillen* involved rail cars governed by the SAA, and an injury sustained during active switching operations. 119 F.2d 307, 310 (6th Cir.), *cert. denied*, 314 U.S. 642 (1941). The Sixth Circuit simply held, citing *Brady*, that the rail car in question "had not been withdrawn from service and was in 'use' within the meaning of the statute even though motionless." *Id.* at 312. In another case the Sixth Circuit explained that the SAA does not "extend to one who is merely putting the couplings in condition for a use which, though it may come soon, is distinctly of the future and not of the present." *McCalmont v. Pennsylvania R.R. Co.*, 283 F. 736, 739 (6th Cir. 1922), *cert. denied*, 260 U.S. 751 (1923). That is, of course, the same distinction between preparation and use that the Seventh Circuit applied in this case.[4]

Petitioner is even further off base when he argues that the Eighth Circuit's decision in *Wright v. Arkansas & Missouri Railroad Co.*, 574 F.3d 612 (8th

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[4] The Sixth Circuit's decision in *Edwards v. CSX Transportation Inc.*, stated in passing that a "locomotive is 'in use' almost any time it is not stopped for repair," but that case did not concern the scope of the "in use" requirement, which was not at issue. 821 F.3d 758, 762 (6th Cir. 2016).

Cir. 2009), supports his proposed categorical rule. *Wright* expressly stated that the "determination of whether a train is 'in use' is to be made based upon the totality of the circumstances at the time of the injury," and held that a train that was not at a maintenance facility and was scheduled for departure half an hour after the injury occurred nonetheless was not "in use" because it was parked on a side track, was undergoing inspection, and had been flagged as not to be moved until inspection was complete. *Id.* at 621-22. Again, that ruling more closely parallels the Seventh Circuit's reasoning in this case than petitioner's proposed rule.

Petitioner's characterization of the other side of this supposed "split" is even more inaccurate and schizophrenic. Petitioner obviously does not like the Seventh Circuit's conclusion on the facts of this particular case, but he actually argues that the "common and dispositive thread" in the Seventh Circuit's *prior* decisions, and in the Tenth Circuit decisions like *Estes*, "was a locomotive that had been moved to . . . an area of tracks and facilities where locomotives are inspected, serviced, maintained, and repaired." Pet. 15. He contends, in other words, that he should have won under the law of the circuits purportedly on the other side of the "split"—and that those decisions in fact stand for precisely the bright line rule ("every locomotive outside a repair facility is in use") that he advocates for now.

As for the Fifth Circuit, petitioner asserts that *Trinidad* endorsed a bright-line rule that a freight car was "in use" under the SAA only once pre-departure inspections had been completed and the car was prepared to depart. Pet. 14. But the decision itself said nothing of the sort. Instead, the Fifth Circuit

held that it "must determine [the] case on its facts alone" and that, because the train had not been released following inspection "we do not believe that this train, at this stage, was 'in use.'" 949 F.2d at 189. Although the Seventh Circuit and some other courts have sometimes read *Trinidad* as holding that "a locomotive is 'in use' if it is assembled and the crew has completed pre-departure procedures," Pet. App. 4a, many other courts have "refuse[d] to interpret" the decision "expansively" and "have limited its holding to the unique facts" of the case. Pet. 14 n.4 (collecting cases); *see also Solice v. CSX Transp., Inc.*, No. 11-1288, 2012 WL 1196668, at *1-2 (E.D. La. Apr. 10, 2012). Commentators agree that "the Fifth Circuit did not state that it was adopting a hard and fast departure rule." James Lockhart, *Construction and Application of "In Use" Requirement of Locomotive Inspection Act (LIA), 49 U.S.C.A. §§ 20701* et seq., 78 A.L.R. Fed. 2d 333 § 4 (Cum. Supp. 2013).

Indeed, petitioner cannot resist arguing that he would have won under the reasoning of *Trinidad* itself, Pet. 14, and he groups decisions from the Fifth Circuit "other than *Trinidad*" on the favorable side of his supposed split, *id.* at 18. Petitioner notes, for example, the Fifth Circuit's decision in *Southern Railway Co. v. Bryan*, which held that a locomotive remained in "use" after a derailment left it gutted by fire and inoperable. 375 F.2d 155, 157 (5th Cir.), *cert. denied*, 389 U.S. 827 (1967). The *Bryan* result may not be correct, but its existence obviously disproves petitioner's contention that the Fifth Circuit takes a highly restrictive approach to the "use" requirement.

The petition does not truly allege a circuit split. It assembles a large group of cases conducting a holistic analysis of whether a rail vehicle was "in use" under

highly variable circumstances, engages in selective editing to characterize them as standing for bright-line rules that none of the cases actually articulates, and then shatters its own artificial construct by arguing that in fact petitioner should have prevailed under a better reading of all of them. At most, petitioner complains that "[b]y drifting towards the [Fifth Circuit's] strict test of *Trinidad*, the Seventh Circuit's narrow interpretation of in use countermands the underlying intent" of the LIA and "mires the scope of in use in more murkiness and obscurity." Pet. 19. But the only "holding" that he asserts "irreconcilably conflicts" with other judicial decisions is the "holding that UP5683 was not in use" —*i.e.*, the Seventh Circuit's application of the law to the particular facts of this case. *Id.* And the "confusion" that petitioner (and, to some extent, the courts below) sees in the nationwide case law just reflects Congress's decision to make the LIA's coverage turn on a distinction that calls for some judgment in the face of infinitely variable circumstances.

Even granting petitioner's premise that the SAA and LIA precedents can be regarded as entirely interchangeable, it is far from clear that any of these cases reach genuinely inconsistent results on comparable facts. Regardless, the factbound application of properly stated legal rules does not merit certiorari even when another court might have reached a different result. *Cf., e.g.*, *Strickland v. Washington*, 466 U.S. 668 (1984).

D. This Case Presents A Poor Vehicle And Does Not Merit This Court's Review

Petitioner and his *amici* do not make a persuasive case that the first question presented is sufficiently important to merit this Court's review. Cases concerning the LIA's "in use" requirement are relatively rare, and cases presenting close questions are even rarer. The Seventh Circuit articulated the rule that petitioner challenges more than seventy years ago, and has applied it only a handful of times since. Many of the cases that petitioner cites in support of his asserted circuit conflict date from the 1950s, 1960s, and 1970s. Pet. 13-19. That is likely why, as petitioner notes, this Court has not needed to address the "in use" standard in more than eighty years. *Id.* at 13. There is nothing pressing about this issue.

Even if this obscure area of the law would benefit from this Court's attention at some point, this case would not be a good vehicle. The district court expressly held that the particular facts of this case "would lead to the same conclusion in other circuits." Pet. App. 15a-16a (citing decisions from First, Fourth, Fifth, and Tenth Circuits). In order to advance a proposed test under which he would actually prevail, petitioner is forced to invent an arbitrary bright-line rule (every locomotive is in "use" whenever it is outside a dedicated repair facility) that no court of appeals employs and that has never been tested in the crucible of actual litigation. And, finally, the fact that a new Justice of this Court sat on the panel below could potentially interfere with this Court's ability to reach a decision.

II. THE SEVENTH CIRCUIT'S FACTBOUND FORESEEABILITY HOLDING DOES NOT WARRANT THIS COURT'S REVIEW

Petitioner also seeks review of the Seventh Circuit's holding that he failed to present any evidence that Union Pacific knew or should have known about the small oil smudge that he claims to have slipped on, and that therefore his negligence-based claims fail on foreseeability grounds. That factbound application of ordinary negligence principles and the summary judgment standard does not merit further review.

Petitioner does not contest the Seventh Circuit's holding that a plaintiff bringing suit under the FELA must ultimately prove foreseeability—that is, that there were "circumstances which a reasonable person would foresee as creating a potential for harm." Pet. App. 4a (quoting *Holbrook v. Norfolk S. Ry. Co.*, 414 F.3d 739, 742 (7th Cir. 2005)). The Seventh Circuit concluded in this case that petitioner had offered no evidence of foreseeability because he did not "claim Union Pacific had notice of the slick spot or any hazardous condition that could have leaked the oil," nor has he offered any evidence that "an earlier inspection would have cured the hazard." Pet. App. 5a. That is a particular problem given petitioner's testimony that the spot was "small, isolated, and without explanation." *Id.* "Under these facts," the court of appeals concluded, a jury "could not find Union Pacific knew or should have known about the oil or its hazard to Ledure." *Id.* The district court agreed, noting that petitioner "introduced no evidence that the small slick spot was on the walkway before he stepped on it—which is especially concerning

considering he testified that he wears the very same work boots around his farm." *Id.* at 19a. Nor did petitioner offer any explanation for where this oily substance could have come from. In fact he testified that he did not see any substance "coming out of the engine compartments." *Id.* (citation omitted).

In seeking to reframe this factual dispute as a legal one, petitioner quotes a host of cases endorsing the right to a jury trial where a defendant has provided "probative facts" in its favor. Pet. 23 (quoting *Lavender v. Kurn*, 327 U.S. 645, 653 (1946)). Petitioner's problem is that he presented no such facts. And petitioner's reliance (at 23-25) on a regulation requiring inspections fails for the reasons just discussed: He offered no evidence whatsoever that an inspection would have uncovered the hazard, or even that the hazard predated his fall. Moreover, that regulation applies only to locomotives "in use"—and thus does not apply at all in this case for reasons already explained. *See* 49 C.F.R. § 229.21; Pet. App. 27a.

Petitioner offers no sound reason why this Court should review a factbound application of ordinary negligence and summary judgment principles.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

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