No. 20-807

In the Supreme Court of the United States

BRADLEY LEDURE, PETITIONER

v.

UNION PACIFIC RAILROAD COMPANY

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

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

1. Whether a locomotive is in "use" under the Locomotive Inspection Act, 49 U.S.C. 20701, when it is stopped on a sidetrack of a railyard, undergoing preparations for its next journey.

2. Whether the Seventh Circuit erred in holding that petitioner was not entitled to a jury trial on his negligence claim because he had not produced sufficient evidence that his accident was a reasonably foreseeable result of respondent's failure to inspect the locomotive on which he fell.

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This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be granted, limited to the first question presented.

STATEMENT

1. The Locomotive Inspection Act (LIA), 49 U.S.C. 20701, *et seq.*, establishes safety and inspection requirements for locomotives in "use" on a "railroad line." 49 U.S.C. 20701. The statute was first enacted in 1911 as part of a broad congressional effort to "reduce the loss of life and the injuries" caused by the dangerous conditions that prevailed on the railroads in the late 19th and early 20th centuries. *Johnson* v. *Southern Pac. Co.*, 196 U.S. 1, 19 (1904); see *Napier* v. *Atlantic Coast Line R.R.*, 272 U.S. 605, 607-608 (1926).

Congress initially addressed those railway safety problems through a series of statutes enacted between 1893 and 1910 that came to be known collectively as the "Safety Appliance Act" (SAA), now codified at 49 U.S.C. 20301 *et seq.* See *Napier*, 272 U.S. at 608. As the Act's name suggests, the statutes composing the SAA mandated that locomotives, trains, and cars had to be equipped with a variety of "safety appliances." *Ibid.* For example, Section 2 of the 1893 SAA made it "unlawful" for a "common carrier to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with" automatic couplers. Act of Mar. 2, 1893, ch. 196, 27 Stat. 531. And Section 2 of the 1910 SAA broadened that mandate, making it "unlawful" for a common carrier "to haul, or permit to be hauled or used on its line any car subject to the provisions of [the SAA] not equipped with" a range of safety appliances, including handholds, grab bars, ladders, and running boards. Act of Apr. 14, 1910, ch. 160, 36 Stat. 298.

The first iteration of the LIA—then known as the Boiler Inspection Act, see *Kurns* v. *Railroad Friction Products Corp.*, 565 U.S. 625, 629 (2012)—continued the work of the SAA and borrowed from its text. Like the 1893 SAA, the 1911 LIA made it "unlawful" for a common carrier "*to use any* locomotive engine propelled by steam power *in moving interstate or foreign traffic* unless the boiler of said locomotive and appurtenances thereof are in proper condition and safe to operate in the service to which the same is put." Act of Feb. 17, 1911, ch. 103, § 2, 36 Stat. 913-914 (emphasis added). In its amendments to the LIA in 1924, Congress dropped the requirement that locomotives be used in moving interstate traffic, Act of June 7, 1924, ch.

355, 43 Stat. 659, but Congress again borrowed from a provision of the SAA. As amended, the 1924 LIA provided that a common carrier may not "*use or permit to be used on its line* any locomotive" that is not "in proper condition and safe to operate," *ibid.* (emphasis added), closely tracking Section 2 of the 1910 SAA, which made it unlawful for a carrier to "use[] on its line any car" lacking certain safety equipment, 36 Stat. 298.

Over the ensuing decades, Congress made significant changes to both the LIA and SAA, removing some sections and recodifying others, but it left intact the key provisions prohibiting carriers from "us[ing] on" their "lines" railcars and locomotives that do not satisfy the statutes' safety requirements. 49 U.S.C. 20302(a) (SAA); 49 U.S.C. 20701 (LIA). In their current iterations, both statutes provide that a "railroad carrier may use or allow to be used" on "its railroad line" a covered vehicle "only" when certain safety requirements are met. 49 U.S.C. 20701; see 49 U.S.C. 20302(a)(1).

The LIA and SAA differ, however, in that the SAA generally specifies the particular equipment required for rail safety, *Napier*, 272 U.S. at 607-608, while the original LIA authorized the Interstate Commerce Commission to "prescribe the rules and regulations by which fitness for service shall be determined," *id.* at 612. In 1966, Congress transferred that rulemaking authority to the Secretary of Transportation. Department of Transportation Act, Pub. L. No. 89-670, § 6(e)(1)(E) and (F), 80 Stat. 939. The Secretary exercises his authority through the Federal Railroad Administration (FRA), see 49 U.S.C. 103(g), which has promulgated a number of regulations regarding locomotive safety, including—as most relevant here—a requirement that "the "[f]loors of cabs, passageways, and compartments 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).

Congress created administrative enforcement schemes within both the SAA and the LIA, and it also provided a private right of action under the Federal Employers' Liability Act of 1908 (FELA), 45 U.S.C. 51 *et seq.*, for railroad employees injured by a violation of the railroad safety laws. *Urie* v. *Thompson*, 337 U.S. 163, 188 (1949). Under FELA, a railroad is generally liable to its employees for injuries resulting from its negligence. 45 U.S.C. 51. If the employee is injured because his employer has violated the LIA, SAA, or another federal safety statute, the railroad's negligence is established as a matter of law, and the defenses of contributory negligence and assumption of the risk do not apply. 45 U.S.C. 53, 54; *Urie*, 337 U.S. at 188-189.

2. a. Petitioner Bradley LeDure worked as a locomotive engineer for respondent Union Pacific Railroad Company at the railroad's Salem, Illinois railyard. Pet. App. 7. At approximately 2:10 a.m. on August 12, 2016, petitioner reported for work at the railyard, *ibid.*, and was assigned to "reliev[e] a crew that had brought [a] train from the north to Salem." C.A. App. 41; see Pet. App. 7. The train had arrived "shortly before [petitioner] came on duty," and it was scheduled to leave for Dexter, Missouri at approximately 3 a.m. C.A. App. 41-42. Before the train could leave, petitioner had to determine how many of the train's three locomotives would need to be powered on "to provide enough juice for" the next leg of the journey, turn off the power in the locomotives whose "juice" was not needed, and switch out some of the cars that the locomotives would pull. Pet. App. 8.

After determining that only one locomotive needed to be powered on, petitioner climbed aboard the train and tagged the first locomotive for operation and the second locomotive for "non-operation." Pet. App. 2. He then "moved to the final locomotive" "to shut it down and tag it accordingly." *Ibid.* But before petitioner could do so, he slipped on the locomotive's exterior walkway and fell down, causing injuries to his shoulders, spine, back, neck, hands, fingers, and head. *Id.* at 8. After petitioner got up and turned off and tagged the locomotive, he returned to the scene of his accident, where he identified a "slick" substance on the ground. *Id.* at 2. Respondent later conducted its own inspection and cleaned a "small amount of oil" that was on the walkway. *Ibid.*

b. Petitioner filed this action under the LIA and FELA, alleging—as relevant—that the locomotive on which he fell was not "in proper condition and safe to operate" as required by the LIA, and that respondent's negligence had given rise to his accident. C.A. App. 35-36. The district court granted respondent's motion for summary judgment and dismissed petitioner's claims with prejudice. Pet. App. 7, 20-21.

The district court first determined that petitioner could not proceed under the LIA "at all" because the court concluded the locomotive on which petitioner fell was not "'in use'" at the time of the accident. Pet. App. 12-17 (citation omitted). The court observed that the courts of appeals are "all over the place" in how they analyze whether a locomotive is in use. *Id.* at 14. The district court found, however, that it was bound to follow the Seventh Circuit's precedent in *Lyle* v. *Atchison, T. & S. F. Ry. Co.*, 177 F.2d 221 (1949), cert. denied, 339 U.S. 913 (1950) (per curiam), in which the court held

that a locomotive being serviced in a roundhouse was out of use and explained that "[t]o service an engine while it is out of use, to put it in readiness for use, is the antithesis of using it," *id.* at 223.

The district court acknowledged that petitioner "was not repairing the locomotive in a roundhouse like in *Lyle*," but the court found that petitioner was "nevertheless putting the locomotive 'in readiness for use'" because "the 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." Pet. App. 14-15 (quoting *Lyle*, 177 F.2d at 223). And the court stated that "these facts would lead to the same conclusion" that the locomotive was not in use under the precedents of the other circuits. *Id.* at 15.

The district court next concluded that petitioner had not put forth sufficient evidence to survive summary judgment on his alternative negligence claim, which was premised on the theory that respondent had failed to timely inspect the locomotive and that a timely inspection would have led to the detection and removal of the oil spot on which petitioner fell. Pet. App. 17-20. The court determined that petitioner could not show that his injury was "reasonably foreseeable," *id.* at 17, because he "introduced no evidence that the small slick spot was on the walkway before he stepped on it," *id.* at 19, or that it would have been detected if the locomotive had been inspected, *id.* at 20.

c. The court of appeals affirmed. Pet. App. 1-5. The court recognized that the circuits have "various tests" for determining when a locomotive is in use under the LIA, *id.* at 3, but it concluded that "the district court

properly applied *Lyle* and its holding that 'to service an engine while it is out of use, to put it in readiness for use, is the antithesis of using it,'" *id.* at 4 (citation omitted). The court stated that a finding that the locomotive in this case was in use would "essentially" "limit [*Lyle*'s] holding to say a locomotive is not 'in use' only when it is being repaired." *Ibid.* The court viewed that reading of *Lyle* as "unduly narrow," and affirmed the district court's conclusion that the locomotive in this case was not "in use" because it "was stationary, on a sidetrack, and part of a train needing to be assembled before its use in interstate commerce." *Ibid.*

The court of appeals also affirmed the district court's grant of summary judgment on petitioner's standard negligence claim. Pet. App. 4-5. The court agreed that petitioner had "failed to provide evidence sufficient to prove his injuries were reasonably foreseeable" because there was "no evidence that an earlier inspection would have cured the hazard." *Id.* at 5. The court explained that the absence of such evidence was "problematic" because petitioner had testified that the slick spot "was small, isolated, and without explanation." *Ibid.* The court therefore concluded that, "[u]nder these facts, a jury could not find [respondent] knew or should have known about the oil or its hazard." *Ibid.*

d. The court of appeals denied rehearing en banc. Pet. App. 29-30.

DISCUSSION

The issue of statutory interpretation in this case is a relatively narrow one that does not arise with great frequency and has been treated by some courts as largely factbound. However, the court of appeals did err in finding that the locomotive on which petitioner fell was

not in "use" under the LIA, 49 U.S.C. 20701. That holding conflicts with this Court's precedents regarding when a rail vehicle is in "use" for purposes of the SAA and LIA, and there is some disagreement in the courts of appeals on that question. For these reasons, review by this Court is, on balance, warranted.

Petitioner also asks this Court to consider whether the court of appeals erred in sustaining summary judgment for respondent on his standard negligence claim. That question does not warrant this Court's consideration because, even if the Seventh Circuit erred, its case-specific determination that petitioner did not submit sufficient evidence to put his claim before a jury does not satisfy this Court's normal standards for certiorari review.

I. THE COURT OF APPEALS' ERRONEOUS UNDERSTANDING OF WHEN A LOCOMOTIVE IS IN USE WARRANTS THIS COURT'S REVIEW

A. The Court Of Appeals Erred In Concluding That The Locomotive Was Not In Use

While the LIA does not define "use," 49 U.S.C. 20701, this Court's precedents establish that a locomotive or railcar is in use while it is in service on a line, regardless of whether it is travelling to a destination or waiting for its next run. Thus, almost a century ago, this Court held that a railcar was "in use" under the SAA when it was standing "motionless" on a "receiving track," undergoing an inspection to determine whether it could travel to its next destination. *Brady* v. *Terminal R.R. Ass'n*, 303 U.S. 10, 13 (1938); see also, *e.g.*, *Johnson* v. *Southern Pac. Co.*, 196 U.S. 1 (1904). That SAA precedent applies with full force to the LIA because the two statutes share a common history, subject

matter, and purpose. And this Court's LIA cases confirm that a locomotive is in use under the Act both when it is pulling a train and when it is being prepared for its next journey. *Lilly* v. *Grand Trunk Western R.R.*, 317 U.S. 481 (1943).

Under these precedents, the court of appeals should have held that the locomotive in this case was in use when it was stopped in a railyard being readied for its next journey. Instead, the court concluded that the locomotive was not "in use" because it was "stationary, on a sidetrack, and part of a train needing to be assembled before its use in interstate commerce." Pet. App. 4. Because respondent's efforts to reconcile that conclusion with this Court's precedents all miss the mark, certiorari review is warranted.

1. a. In *Brady*, a railroad worker was injured while inspecting a railcar to decide whether his employer should accept the car from another carrier and permit it to continue to its next destination. 303 U.S. at 11-12. Because the worker's injury was caused by a defective grab iron, he sued under Section 2 of the 1910 SAA, which made it "unlawful" for a common carrier "to haul, or permit to be hauled or used on its line" any car not equipped with "secure hand holds or grab irons." 36 Stat. 298. The Missouri Supreme Court held that the worker could not recover, reasoning that the railcar "had temporarily been withdrawn from use" for the inspection and therefore was not "'in use' 'on [the] line' within the true purpose and scope of the act." *Brady* v. *Terminal R.R. Ass'n*, 102 S.W.2d 903, 905 (Mo. 1937).

This Court reversed. The Court held that the railcar "had not been withdrawn from use" merely because it had been "brought into the yard" "and placed on a receiving track temporarily pending the continuance of

transportation." 303 U.S. at 13. The Court observed that if the inspection did not find the car "defective, it would proceed to [its] destination," demonstrating that it "was still in use, though motionless." *Ibid.* And the Court specifically contrasted the case to one in which "a defective car has reached a place of repair." *Ibid.*

Brady is one of several cases in which this Court has recognized that a railcar continues to be in "use" when it is stopped in a yard, engaged in preparations for a journey, or otherwise employed in tasks that do not involve travelling up and down the lines. For example, in *Johnson*, *supra*, this Court affirmed the application of the 1893 SAA to an accident involving a dining car that was waiting in a railyard "to be picked up by" the westbound train on which it would make its next journey. 196 U.S. 21. The court of appeals had concluded that "at the time of the accident the dining car was not 'used in moving interstate traffic'" as required by the relevant provision of the 1893 SAA. *Id.* at 14. But this Court explained that "[c]onfessedly this dining car was under the control of Congress while in the act of making its interstate journey, and in our judgment it was equally so when waiting for the train to be made up for the next trip." *Id.* at 22.

The Court has similarly affirmed the application of the SAA in cases involving railcars that were stopped on a line or involved in switching movements in a yard. See, *e.g.*, *Texas & Pac. Ry. Co.* v. *Rigsby*, 241 U.S. 33, 36-37, 42-43 (1916) (employee was within the protection of the SAA when he fell from a defective car that was halted on the mainline in the course of being taken from a spur track to the repair shops); *Delk* v. *St. Louis & S. F. R.R.*, 220 U.S. 580, 583-585 (1911) (defective train car "was being used in interstate traffic" under the SAA

where it was involved in switching movements while waiting for a new part). And the Court has more generally rejected the assertion that "only appliances designed to insure safety while the train is in movement are within" the SAA, explaining that there is no basis for "deny[ing] the humane benefits of the Act to those who perform dangerous work on train cars that are not moving." *Shields* v. *Atlantic Coast Line R.R.*, 350 U.S. 318, 324-325 (1956).

b. These cases apply with full force to the LIA. "[S]ettled principles of statutory construction" provide that particular words and phrases should be given "a consistent meaning" across statutes that "pertain to the same subject." *Erlenbaugh* v. *United States*, 409 U.S. 239, 243 (1972). Here, both the SAA and the LIA refer to vehicles "used on" a carrier's "railroad line[]," 49 U.S.C. 20302(a)(1)(C), 49 U.S.C. 20701; see pp. 2-3, *supra*, and the two statutes undoubtedly "pertain to the same subject." *Erlenbaugh*, 409 U.S. at 243. Indeed, this Court has recognized that the SAA and the LIA share "basically the same" purpose of "protect[ing] * * * railroad employees" "from injury due to industrial accidents," *Urie* v. *Thompson*, 337 U.S. 163, 190-191 (1949), and that the "same principles apply in an action under the [LIA] as in one under the [SAA]," *Tipton* v. *Atchison, Topeka & Santa Fe Ry. Co.*, 298 U.S. 141, 151 (1936).

It is particularly appropriate to interpret the similar language in the two statutes in the same way because Congress clearly borrowed the LIA's "use" language directly from the SAA. See pp. 2-3, *supra.* This Court has explained that when text "is obviously transplanted from * * * other legislation, it brings the old soil with it." *Sekhar* v. *United States*, 570 U.S. 729, 733 (2013)

(internal citation omitted). When Congress first borrowed the "use" language from the SAA in 1911, see p. 2, *supra*, this Court had already given that text a broad interpretation in *Johnson*. And when Congress again borrowed the "use" language from the SAA for the 1924 LIA amendments, see p. 3, *supra*, this Court had reiterated its broad understanding of "use" in cases like *Delk* and *Rigsby*. The "old soil" of those SAA decisions was therefore "transplanted" to the LIA. *Sekhar*, 570 U.S. at 733.

c. That understanding is reinforced by this Court's LIA cases. While the Court has never directly confronted the meaning of the term "use" in the LIA, it has repeatedly emphasized the broad reach of the statute. For example, in a 1936 case, the Court explained that under "accepted doctrine," "the Act imposes upon the carrier an absolute and continuing duty to maintain the locomotive, and all parts and appurtenances thereof, in proper condition, and safe to operate in active service without unnecessary peril to life or limb." *Southern Ry. Co.* v. *Lunsford*, 297 U.S. 398, 401 (1936). And the Court has since reiterated that, in enacting the LIA, Congress "manifest[ed] the intention to occupy the entire field of regulating locomotive equipment." *Kurns* v. *Railroad Friction Products Corp.*, 565 U.S. 625, 634 (2012) (quoting *Napier*, 272 U.S. at 611) (brackets in original).[1]

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[1] *Kurns* held that the LIA's preemptive force necessarily extends to claims that "arise out of the repair and maintenance of locomotives," and not just claims arising out of their "use," explaining that *Napier* held that the LIA preempts the "'entire field'" of locomotive equipment safety. 565 U.S. 633-634 (citation omitted). But *Kurns* did not address whether the LIA may itself be enforced with respect to claims arising from repair and maintenance rather than use.

Further, in at least one case, this Court has explicitly affirmed the application of the LIA where the locomotive in question was not being employed to pull cars on a track, but was instead being prepared for its next journey. *Lilly*, 317 U.S. at 483. In *Lilly*, a railroad employee fell on some ice on the "the top of the locomotive tender,"—the attachment that carries the locomotive's supply of fuel and water—while the employee "was pulling a water spout, which was at the side of the track, over the tender's manhole" so that he could fill the tender for the upcoming journey. *Ibid.* This Court held that "the jury had a right to find a violation of the [LIA] by reason of the presence of ice on the top of the tender," *id.* at 489, and it cited approvingly to LIA regulations aimed at ensuring that the surfaces on which employees must stand are "kept free of foreign matter which would render footing insecure," *id.* at 486-487. Although *Lilly* did not expressly consider the significance of the term "use" in the LIA, it cited *Brady* in discussing the broad scope of the LIA's coverage, *id.* at 485, and it emphasized that the LIA, "like the [SAA], is to be liberally construed in the light of its prime purpose, the protection of employees and others by requiring the use of safe equipment," *id.* at 486 (internal citation omitted).

2. The Seventh Circuit's decision in this case is inconsistent with *Brady*, *Lilly*, and this Court's other SAA and LIA precedents. While those precedents establish that a car or locomotive *is* in "use" when it is stopped in a railyard undergoing preparations for its next journey, the court of appeals held that the locomotive on which petitioner fell was *not* in "use" because it

"was stationary, on a sidetrack, and part of a train needing to be assembled before its use in interstate commerce." Pet. App. 4. That was error.

a. The court of appeals did not attempt to reconcile its conclusion that the locomotive on which petitioner fell was out of use with *Brady*'s holding that a similarly situated railcar was "in use." 303 U.S. at 13. Instead, the court relied almost entirely on its statement in a prior case that "to service an engine while it is out of use, to put it in readiness for use, is the antithesis of using it." Pet. App. 4 (quoting *Lyle* v. *Atchison T. & S. F. Ry. Co.*, 177 F.2d 221, 222 (7th Cir. 1949), cert. denied, 339 U.S. 913 (1950)). While that statement may be correct as far as it goes, it does not foreclose petitioner's claim unless a locomotive is in "use" only when it is pulling cars—and this Court's precedents establish the opposite. See pp. 9-11, 13, *supra*.

The Seventh Circuit also suggested that finding that the locomotive in this case was in use would lead to an "unduly narrow" understanding of when a locomotive is out of use. Pet. App. 4. But this Court's precedents support a narrow understanding of when a car or locomotive is out of use. See, *e.g.*, *Brady*, 303 U.S. at 13 (suggesting that a car is out of use where it "has reached a place of repair"); *Urie*, 337 U.S. at 191 (recognizing that the LIA and SAA were broadly intended to "protect[] * * * railroad employees" "from injury due to industrial accidents"). And it is unnecessary to adopt an artificially constrained understanding of "use" in order to narrow the statute's reach because the LIA's text contains its own limit, providing that the locomotive must be in "use" "*on*" a carrier's "*railroad line*." 49

U.S.C. 20701 (emphasis added). The LIA therefore excludes locomotives that are off the line and in, for example, a storage or repair facility.

b. Respondent's attempts to defend the Seventh Circuit's conclusion are unavailing. Respondent contends (Br. in Opp. 14) that 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." That contention, however, is at odds with this Court's SAA precedents, several of which involved cars that were obviously not in position or ready for travel. See pp. 9-11, *supra*. And respondent's contention also conflicts with *Lilly*, in which the locomotive was stopped at a waterspout preparing for its journey rather than in position and ready to leave. 317 U.S. at 483.

Respondent also errs in echoing the lower courts' conclusion that the locomotive on which petitioner fell was not in use because "the engineers had not yet assembled the cars on the train for its next use in interstate commerce." Br. in Opp. 15 (quoting Pet. App. 4, 15). This Court's precedents make clear that a railcar is in use even if it is "waiting for the train to be made up for the next trip." *Johnson*, 196 U.S. at 22. To be sure, the Court has separately held that "a *train* in the sense intended" by certain SAA provisions governing power brakes "consists of an engine and cars which have been assembled and coupled together for a run or trip along the road," and does not include cars involved in "the various movements in railroad yards whereby cars are assembled and coupled into outgoing trains." *United States* v. *Erie R.R.*, 237 U.S. 402, 407 (1915) (emphasis added); see *United States* v. *Seaboard Air Line R.R.*, 361 U.S. 80 (1959). But the meaning of the term "train" in the power-brake provisions has no bearing on when a

car or locomotive in is "use." Indeed, *Erie R.R.* itself recognized that while switching movements do not involve "trains" under the SAA's power-brake provisions, they involve "a hauling or *using* of cars" within the meaning of the Act as a whole. 237 U.S. at 408 (emphasis added).[2]

Respondent is also unsuccessful in its attempts to distinguish this Court's SAA precedents regarding when a vehicle is in "use." Respondent suggests (Br. in Opp. 18) that the railcars in *Brady* and *Johnson* were still "actively *in use*" while the locomotive in this case "was being *readied for use*." But the railcar in *Brady* was plainly not yet "read[y] for" its next journey, *ibid.*, as it was in the process of being inspected to determine whether it was defective, *Brady*, 303 U.S. at 13. And in

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[2] In order to implement this Court's determination that the power-brake provisions apply only to "an engine and cars which have been assembled and coupled together for a run or trip along the roads," *Erie R.R.*, 237 U.S. at 407, an FRA regulation provides that "[f]or purposes of [the brake system regulations], a train, railroad car, or locomotive will be considered in use prior to departure but after it has received, or should have received, the inspection required for movement and is deemed ready for service." 49 C.F.R. 232.9. Because this regulation's application is expressly limited to the power-brake regulations, it does not address how "use" should generally be understood. *Ibid.* By contrast, the FRA's regulations regarding locomotive safety demonstrate its understanding that a locomotive is in use and covered by the LIA whenever it is in service on a line, regardless of whether it is fully assembled or otherwise ready to pull cars. See, *e.g.*, 49 C.F.R. 229.21 ("each locomotive *in use* shall be inspected at least once during each calendar day") (emphasis added); 49 C.F.R. 229.9(c) (addressing when a locomotive may be moved "lite"—*i.e.*, without cars attached—or "dead"—*i.e.*, with its engine off—"within a yard"); 49 C.F.R. 229.101(b) (requiring a "distinctive warning notice" when an engine has been shut down due to a defect).

Johnson, while the Court assumed that the dining car was loaded and therefore ready for its next trip, the Court emphasized that even if the car was "empty"—and thus not yet prepared for active service—it would still be within the reach of the SAA. 196 U.S. at 21-22.

Respondent also suggests (Br. in Opp. 19) that the SAA precedents do not apply because "rail cars and locomotives perform very different functions," such that a railcar can still be in use while motionless and disconnected, but a locomotive cannot. Although respondent is obviously correct that locomotives and railcars serve different functions—locomotives generally pull trains, while the car in *Brady* transported freight and the car in *Johnson* provided refreshments to passengers—none of those functions is being served when a locomotive or car is motionless or uncoupled from its train. This Court's SAA precedents therefore make clear that whether a locomotive or car is currently serving its primary function does not define whether it is in "use." Cf. *Smith* v. *United States*, 508 U.S. 223, 230-231 (1993) (recognizing that a person "uses" a firearm even when the gun is not serving its "intended purpose"); *Astor* v. *Merritt*, 111 U.S. 202, 213 (1884) (holding that apparel may be "in actual use" even if it is not being worn).

Finally, respondent briefly suggests (Br. in Opp. 19) that the SAA precedents are not relevant because that statute "expressly" "addresses the question" of when a railcar has been "taken out of service" through a provision that is absent from the LIA. But the provision respondent cites merely specifies that the SAA's administrative penalties do not apply in certain circumstances where a defective car is being moved "to the nearest available place at which the repairs can be made." 49 U.S.C. 20303(a). That provision does not define when a

railcar has been withdrawn from use such that it is outside the Act's coverage; to the contrary, the provision explicitly states that, while it exempts a carrier from administrative fines, it "does not relieve a carrier from liability in a proceeding to recover damages for death or injury of a railroad employee arising from [the relevant] movement." 49 U.S.C. 20303(c); see *Rigsby*, 241 U.S. at 42-43.

B. The Court Of Appeals' Decision Warrants This Court's Review

The question of statutory interpretation presented by this case is relatively narrow, does not occur with great frequency, and may—as in this case—appear factbound where it arises. While those considerations might generally counsel against review, the decision of the Seventh Circuit in this case is erroneous and inconsistent with this Court's precedents. Moreover, as described below, there is some disagreement among the courts of appeals. See Pet. App. 3-4; *id.* at 13-14. Accordingly, on balance, review of the first question presented is warranted.

The courts of appeals have taken various approaches and reached divergent results in determining when a locomotive or railcar is in use under the SAA and the LIA. In many cases, the courts have appropriately recognized that a locomotive or car is in use when it is in service on a line, even if it is stopped in a yard, engaged in switching operations, or being readied for its next journey. See, *e.g.*, *McGrath* v. *Consolidated Rail Corp.*, 136 F.3d 838, 842 (1st Cir. 1998); *Deans* v. *CSX Transportation, Inc.*, 152 F.3d 326, 332 (4th Cir. 1998); *Angell* v. *Chesapeake & Ohio Ry. Co.*, 618 F.2d 260, 261-262 (4th Cir. 1980); *Holfester* v. *Long Island R.R.*, 360 F.2d 369, 372 (2d Cir. 1966); *Raudenbush* v. *Baltimore & Ohio*

R.R., 160 F.2d 363, 367-368 (3d Cir. 1947); *Fort Street Union Depot Co.* v. *Hillen*, 119 F.2d 307, 310 (6th Cir.), cert. denied, 314 U.S. 642 (1941); see also, *e.g. Steer* v. *Burlington N., Inc.*, 720 F.2d 975, 976-977 (8th Cir. 1983) (appropriately concluding that a locomotive was not in use because it was being repaired in a maintenance facility).[3]

Other decisions, however, are difficult to square with *Brady* and the other SAA and LIA precedents of this Court. For example, in *Estes* v. *Southern Pacific Transportation Co.*, 598 F.2d 1195 (1979), the Tenth Circuit held that the LIA did not cover a locomotive that was in an area of the railyard typically reserved for fueling and light servicing because the court concluded the phrase "used on its line" in the LIA "was intended to mean used in moving interstate or foreign traffic." *Id.* at 1198. That conclusion is at odds with *Brady*'s holding that a railcar may be "in use, but motionless." 303 U.S. at 313. And in *Phillips* v. *CSX Transportation, Inc.*, 190 F.3d 285 (1999) (per curiam), cert. denied, 529 U.S. 1004 (2004), the Fourth Circuit similarly erred by holding that a railcar "becomes 'in use'" under the SAA (and therefore the LIA, see *id.* at 288 n.2) only when "switching operations end," *id.* at 289. In reaching that conclusion, the Fourth Circuit mistakenly relied on precedents regarding what constitutes a "train" under the SAA's power-brake provisions, ignoring that the very same precedents establish that a railcar is in "use"

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[3] In at least one case, however, a court of appeals may have gone too far in concluding that a burned out and inoperable locomotive being lifted by a crane onto a track was still within the coverage of the LIA. *Southern Ry. Co.* v. *Bryan*, 375 F.2d 155, 157 (5th Cir.), cert. denied, 389 U.S. 827 (1967).

while engaged in switching operations. *Ibid.*; see *Erie R.R.*, 237 U.S. at 407-408; see also pp. 15-16, *supra*.

Moreover, even where a court of appeals has reached the correct result, it has sometimes relied on flawed reasoning. For example, in *Deans*, the Fourth Circuit correctly concluded that a locomotive was in use "even though it [wa]s motionless and not yet on the main track," 152 F.2d at 330, but its analysis relied heavily on *Trinidad* v. *Southern Pacific Transportation Co.*, 949 F.2d 187 (1991), a Fifth Circuit decision that involved the application of the SAA's power-brake provisions and the irrelevant factors involved in that distinct analysis, see 152 F.2d at 331-332; see also pp. 15-16, *supra*. And in *Holfester*, the Second Circuit correctly concluded that a self-propelled mail car was in use while undergoing a "between-run inspection," 360 F.2d at 372, but its holding was based in part on evidence establishing that "the mail had not yet been unloaded from the car at the time of the accident," *ibid.*, a consideration that *Johnson* suggests is irrelevant, 196 U.S. at 21-22; see pp. 16-17, *supra*.

In light of these divergent decisions, this Court should grant review to resolve the disagreement in the circuits and restore a uniform understanding of "use" in the relevant statutes.

II. THE FORESEEABILITY QUESTION DOES NOT WARRANT THIS COURT'S REVIEW

This Court should deny review of petitioner's second question presented, which concerns whether the Seventh Circuit should have granted respondent's motion for summary judgment on petitioner's standard negligence claim. Even if petitioner is correct that the Seventh Circuit erred, there is no reason for this Court to

consider the court of appeals' case-specific determination that "[u]nder the[] facts" of this case, "a jury could not find [respondent] knew or should have known about the oil" on which petitioner slipped. Pet. App. 5.

CONCLUSION

The petition for a writ of certiorari should be granted limited to the first question presented.

Respectfully submitted.

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