No. 20-807

IN THE
Supreme Court of the United States

BRADLEY LEDURE,

Petitioners,

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 OF *AMICI CURIAE* BY THE SHEET METAL, AIR, RAIL TRANSPORTATION WORKERS–TRANSPORTATION DIVISION, THE BROTHERHOOD OF LOCOMOTIVE ENGINEERS AND TRAINMEN, AND ACADEMY OF RAIL LABOR ATTORNEYS IN SUPPORT OF PETITIONER

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INTERESTS OF *AMICI CURIAE*[1]

The Sheet Metal, Air, Rail, and Transportation Workers-Transportation Division ("SMART-TD") is the duly recognized collective bargaining representative under the Railway Labor Act ("RLA"), 45 U.S.C. § 151, *et. seq.,* for the crafts or classes of conductors and other train service employees employed by freight, passenger and commuter rail carriers operating in the United States. SMART-TD represents more than 100,000 employees in the railroad industry.

The Brotherhood of Locomotive Engineers and Trainmen ("BLET") is the duly recognized collective bargaining representative under the RLA for the crafts or classes of locomotive engineers, conductors and other train service employees employed by freight, passenger and commuter rail carriers operating in the United States. BLET represents more than 57,000 employees in the railroad industry.

The crafts or classes of employees represented by SMART-TD and BLET comprise the crews who operate trains in the United States and are among those persons who are affected by this matter.

The Academy of Rail Labor Attorneys ("ARLA") is a professional association with members nationwide who represent railroad employees and their families

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[1] Pursuant to this Court's Rule 37.2, *amicus curiae* states that this brief was not authored in whole or in part by counsel for any party and that no person or entity other than *amicus curiae* and its counsel made a monetary contribution to the preparation or submission of this brief. Each of the parties received notice of our intention to file an amicus brief at least 10 days prior to the deadline to file this brief. The Petitioner and Respondent, through counsel, gave their consent to the filing of this Brief.

in personal injury and wrongful death cases under the Federal Employers' Liability Act ("FELA"). 45 U.S.C. §§ 51-60. The members of ARLA represent an overwhelming majority of employees seeking recovery under the FELA. ARLA's primary purpose is the recovery of damages for those railroad employees represented by its members, and ancillary to that purpose the promotion of rail safety for railroad employees and the general public.

The vast majority of railroad employees impacted by this case are represented by the *amici*. The interests common to the *amici* in this matter are the preservation of a statute that provides compensatory relief for a railroad worker's injury or death and as such an economic incentive for railroads to operate safely.

SUMMARY OF ARGUMENT

The clear intent, encouragement, and dedication of Congress is to the furtherance of the highest degree of safety in railroad transportation. 49 U.S.C. § 103(c). Coupled with these requirements, all of the railroad safety laws are to be construed in order to accomplish the remedial purpose of railroad safety. Neither of these policies can be accomplished by upholding the Seventh Circuit's restrictive view of the Locomotive Inspection Act ("LIA") (49 U.S.C. § 20701).

If this Court were to restrict the LIA has violations to only locomotives actually moving, then an overwhelming majority of violations imposed by the Federal Railroad Administration ("FRA") under the LIA and the Safety Appliance Act ("SAA" together with the LIA ("the Acts") (49 U.S.C. §§ 20101, 20301-20306) would become a nullity, even though most railroad casualties occur on locomotives or trains temporarily stopped. FRA always administered those laws with-

out the condition of movement and without opposition regarding the application of those laws.

Regarding "use" or "used", referenced in the LIA or SAA, with only one exception, none of FRA's 50-plus years of enforcement of those laws distinguishes between moving equipment and standing equipment.

One of the core objectives of Congress in enacting FELA and the Acts was to secure a uniform framework for protecting injured rail workers. This is made clear in the plain text of the statutes. In the statutory context, *stare decisis* is vital where this Court's decisions have helped create a uniform standard. And, change would dislodge settled rights and expectations. In *Brady v. Terminal Railroad Association,* 303 U.S. 10 (1938), this Court made clear that equipment is subject to the Acts safety requirements and is considered "in use" unless it is at a place of repair. This reflects the nature of the work that train crews perform and the reality of the hazards they encounter in railroad yards and during switching. In contrast, the Seventh's Circuit's decision, if upheld, would render the long-standing protections afforded by the Acts superfluous. Congress has amended the Acts several times since enactments, and nothing in those amendments indicates an intent to overturn *Brady*.

Through this Court's decision in *Brady* and others, a largely uniform application of "in use" has allowed courts and litigants to reliably apply the Acts in FELA cases. It allows railroad works, regulators, and railroads alike to know when minimum safety standards must be met. This uniformity is consistent with the remedial nature of FELA and the plain language of the Acts. The test urged by the railroad and proposed by the Seventh Circuit would turn this uniformity on its head. As detailed below, a departure from this

long-established standard would have vast and dire consequences to railroad safety. To reinterpret the Acts, as the railroad urges disrespects the principle of *stare decisis* and will endanger lives.

ARGUMENT

I. THE PLAIN TEXT OF THE LIA AND THE FRA's ENFORCEMENT OF IT DO NOT DISTINGUISH BETWEEN MOVING OR STATIONARY LOCOMOTIVES.

A. Legislative Changes To The LIA Show That It Is Violated Even If A Locomotive Is Not Moving.

The LIA is one of the oldest provisions of safety regulation in our Nation, dating back to the 19th century when it was known as the Boiler Inspection Act. Originally, it was enacted because of frequent boiler explosions on steam locomotives and applied only to locomotive boilers and appurtenances. *See,* H.R. Rep. No. 1974, 61st Cong., 3d Sess. (1911). In 1915, the Act was amended to cover the entire locomotive, tender, and appurtenances. Congress addressed the problem further in 1924, attempting to increase the safety of the public and workers.

Before 1924, the LIA was limited to locomotives "moving" in interstate or foreign commerce. Act of Feb. 17, 1911, ch.103, § 2, 36 Stat. 913-914. In 1924, Congress amended the LIA, removing the requirement that equipment be moving, therein making it unlawful for any carrier to "use or allow to be used any locomotive or tender on its railroad line. . ." unless they are in "proper condition and safe to operate without unnecessary danger of personal injury. . . . have

been inspected . . . ; and can withstand every test prescribed . . . .” 49 U.S. C. § 20701.[2]

The House and Senate reports include a letter from the Interstate Commerce Commission, which was authorized to administer the LIA until the FRA was established in 1966, which is instructive:

> It was necessary, in view of the language of section 2, making it unlawful to use a locomotive “in moving interstate traffic,” to secure evidence that the locomotives were in fact used in moving interstate traffic when in an unsafe condition or overdue for inspection. Proof of interstate movement necessitated an extensive examination of railroad records, including wheel reports, waybills, and yard records, at many different points. The time and labor necessary for this not only militated materially against the prompt handling of such cases, but limited, to a great extent the number of cases which could be prepared for court action with the small number of inspectors available. **The proposed amendment, in our opinion, will remedy this situation by making it unnecessary to prove movement of interstate traffic.**

H.R. Rep. No. 490, 68th Cong., 1st Sess. 5 (1924); S. Rep. No.740, 68th Cong., 1st Sess. 5 (1924) (emphasis added).

The statute makes it clear that movement is no longer a requirement under the LIA. When Congress makes a significant change in language and it amends an existing statute, it “presumptively connotes a change in meaning.” Antonin Scalia & Bryan

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[2] Both the LIA and the SAA were further amended in 1994 without any substantive change. Pub. L. 103–272, § 1(a), July 5, 1994, 108 Stat. 745.

A. Garner, *Reading Law: The Interpretation of Legal Texts* 256 (2012) ("If the legislature amends or reenacts a provision other than by way of a consolidating statute or restyling project, a significant change in language is presumed to entail a change in meaning"). Congress's evident purpose here was to remove the limiting language by expanding the LIA coverage beyond locomotives moving in interstate traffic, and it should be interpreted to effectuate the remedial purpose of the law.

Congress, since its enactment of the FELA, the Acts, and through its more recent enactment of the Federal Railroad Safety Act of 1970 (49 U.S.C. § 20103(a)) has consistently expressed its intention "to promote safety in all areas of railroad operations and to reduce railroad-related accidents, and reduce deaths and injuries to persons. . . ." Pub. L. 9l-458, codified at 49 U.S.C. § 20101. Additionally, a 2008 amendment mandates that the FRA "shall consider the assignment and maintenance of safety as the highest priority, recognizing the clear intent, encouragement, and dedication of Congress to the furtherance of the highest degree of safety in railroad transportation." Pub. L. 110-432, codified at 49 U.S.C. § 103(c) (2008). Each of these enactments demonstrate Congress's intent to promote railroad safety. Coupled with the above requirements, all railroad safety laws are to be construed in order to accomplish the remedial purpose of railroad safety. *Brady v. Terminal Railroad Association,* 303 U.S. 10 (1938). Moreover, FELA was enacted to "shif[t] part of the human overhead of doing business from employees to their employers." *Consolidated Rail Corporation v. Gottshall,* 512 U.S. 532, 542 (1994). Neither of these policies can be accomplished by upholding the Seventh Circuit's restrictive view.

B. Railroad Workers Are Injured More Frequently On Stationary Locomotives Than On Moving Locomotives.

More employees are injured on stationary locomotives than those that are moving. In fact, almost twice as many employees are injured when a locomotive is standing, as compared with a moving locomotive. Statistics compiled by FRA show that between 2018 and 2021, there were 558 injuries to employees in a locomotive/train standing in the cab or walkways, while there were only 316 injuries in moving locomotive/train.[3] Operating crews do more than transport freight across the country. Much work is incidental, but required prior to any movement. Many crews are assigned to build trains in hundreds of rail yards throughout the country. They board and alight locomotives and rail cars constantly in the yards, and are exposed daily to the hazards that the FRA has addressed in the safety regulations. Daily, their job duties require that there are numerous inspections required by train crews in rail yards before any locomotive is permitted to move. *See, e.g.,* 49 C.F.R. Part 229. And, in *Brady,* this Court made clear that a locomotive or car is still in use, though motionless. 303 U.S. at 13. The duty imposed is an absolute one, and Congress made no exception to those employed in inspecting cars. *Id.* at 15. Those laws should be construed to afford a right of recovery for every injury caused by the failure to comply with the requirements of the Acts. If the lower court's narrow interpretation of "in use" is followed, the adverse safety effect will be widespread and contrary to this Court's precedent. Moreover, the railroad safety laws enacted by Congress would be gutted.

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[3] https://safetydata.fra.dot.gov/OfficeofSafety/publicsite/Query/castall1.aspx.

C. Implications Of The Seventh Circuit's Decision Are Far Reaching.

The implications of the Seventh Circuit's decision are far reaching and will impact FELA litigation in a vast range of contexts, impacting more than the LIA. The SAA has similar language to the LIA. These two statutes, along with FELA, share the same underlying purpose of protecting employees and providing recovery for injured rail workers. *Urie v. Thompson,* 337 U.S. 163,191(1949). If this Court were to restrict the LIA violations to only locomotives actually moving, then an overwhelming majority of violations imposed by the FRA under the Acts also would become a nullity. This would also directly impact the FRA's freight car regulations at 49 C.F.R. Pt. 215, where the FRA does not imposed a requirement that a freight car be moving.

D. Enforcement Of The LIA By The FRA Does Not Distinguish Between Moving And Standing Locomotives.

This Court has reviewed how FRA enforces the Acts to understand the Acts' intended scope. *Norfolk & W. Ry. Co. v. Hiles*, 516 U.S. 400. 413 (1996) .In promulgating locomotive safety standards, the FRA enforces regulations whether the locomotive is moving or stationary. In construing prohibited acts in 49 C.F.R. § 229.7, it states: "For purposes of civil penalty liability, any use of a locomotive that is not in proper condition and safe to operate or that has not been inspected or tested as required is a violation." 45 Fed. Reg. 21092, 21093 (March 31, 1980). FRA's section of its locomotive standards is essentially a restatement of Section 2 of the LIA. *Id.* (Codified at 49 U.S.C. § 20701). Additionally, the FRA has stated that "Section 2 is broad in its sweep and makes clear that each carrier is responsible

to insure (sic) that locomotives used on its line are safe." 44 Fed. Reg. 29604, 29605 (May 21, 1979.)

In FRA's fiscal year enforcement reports. In 2020, it recommended 545 violations of LIA standards, 435 freight car safety standard violations, and 1,725 safety appliance statutes and regulations violations.[4] In 2020, there were 200,262 defects discovered by FRA inspectors on Class I railroads,[5] and 57,342 on the Union Pacific Railroad alone. *Id*. at 6, 10. Similarly, in 2019, it found 515 inspections in which it recommended a LIA violation, 429 freight car safety standards violations, and 1,642 violations of the SAA statutes and regulations.[6] In 2019, FRA identified 203,516 defects on Class I railroads, of which 50,607 defects were discovered on the Union Pacific Railroad. *Id*. at 6, 10. Substantially more violations likely existed, as the Government Accountability Office stated, "[b]y FRA's own estimation, its inspectors have the ability to inspect less than 1 percent of the federally-regulated railroad system." *RAIL SAFETY: Improved Human Capital Planning Could Address Emerging Safety Oversight Challenges*, Report to Congressional Requesters, December 2013; GAO-14-85 (p.2). Very little has changed since that report. Obviously, with such oversight lacking by FRA due to its limited resources, the protections afforded by FELA and the various safety laws, such as the Acts, are even more essential to accomplishing Congress' goals of improving rail safety and reducing injuries and deaths of rail workers.

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[4] At page 5. https://railroad.dot.gov/elibrary/fiscal-year-2020-enforcement report. The 2021 report has not been published.

[5] These are the Nation's 7 largest railroads.

[6] At page 5. https://railroad.dot.gov/elibrary/fiscal-year-2019-enforcement-report

Regarding "use" or "used," referenced in the railroad safety statutes, none of the FRA's 50-plus years of enforcement distinguishes between moving equipment and standing equipment, with only one exception. In only one instance does an LIA regulation establish a penalty for movement of a noncomplying locomotive, 49 C.F.R. § 229.9, which places some restrictions to ensure safe movement. And, even there, railroads remain strictly liable to workers injured while transporting a noncomplying locomotive. 45 U.S.C. § 54a. There are 199 other safety requirements for locomotives. 49 C.F.R. Part 229, App. B-Schedule of Civil Penalties. There are also 57 freight car safety requirements, and none entail movement. 49 C.F.R. Pt. 215, App. B-Schedule of Penalties. When added to the safety appliances standards in 49 C.F.R. Pt. 231, it cannot be validly argued that only locomotive movement is required to be considered in use by the LIA.

In this particular case, 49 C.F.R. § 229.45 requires all systems and components on a locomotive to be free of conditions endangering the safety of the crew, including oil. Additionally, 49 C.F.R. § 229.119 requires that floors of cabs, passageways, and compartments shall be kept free from oil and other slipping hazards. Neither of these regulations are limited to moving locomotives.

There are various other requirements that also clearly apply when a locomotive is stationery and part of a train that is not fully assembled: *See, e.g.,* 49 C.F.R. § 229.9(e) The movement of noncomplying locomotives, as dead locomotives, does not cause the engine to cease being a locomotive for purposes of this part even when the motors are inoperative; § 229.21- Each locomotive in use shall be inspected at least once during each calendar day and written report made. These inspections are not done while train is under

way and distinguishes between inspections in a repair facility versus one that is in use; § 229.41—This provides protection against personal injury; § 229.43 Exhaust and battery gases shall be located non-hazardous locations; § 229.45—All systems and components shall be free of conditions that endanger the safety of the crew, locomotives, or train; §§ 229.77-.91Cover the electrical systems, which are operating even when the locomotive is standing alone and idling; §§ 229.115-.119—Addressing locomotive cabs and equipment, including seats, windows, floors/passageways, ventilation, open end platform, and air conditioning; § 229.127—Requires sufficient illumination for the control panel; and §§ 229.137-.139—Requiring proper sanitation facilities on the locomotive.

Logically, these sections apply when train crews encounter the locomotive to perform their work, as opposed to in the maintenance/repair shop. Such an application is consistent with decades of express intent to protect crews when performing their duties, which often occur when the locomotive is stationary and not part of a fully assembled train awaiting imminent departure. Crews boarding and traversing a locomotive passageway and compartment are clearly intended to be within the scope of these regulations. Otherwise, their provisions would be rendered meaningless and absurd. All pre-departure work by train crews requires them to be onboard a standing locomotive, and many situations arise which place employees in danger. For example, "Cab seats shall be securely mounted and braced. Cab doors shall be equipped with a secure and operable latching device." 49 C.F.R. § 229.119(a). If a seat back fails once the engineer sits down in preparation for, but before, movement, it is negligence *per se*. 45 U.S.C. §§ 53 and 54a. Under this regulation, the FRA holds the railroad accountable

not only when the locomotive is in motion, but also when it is stationary. The regulation assures that safety is required at all times when an employee is on a locomotive.

II. ADOPTION OF THE RAILROADS' INTERPRETATION OF THE LIA WOULD REQUIRE THE COURT TO IGNORE S*TARE DECISIS*, CREATE A REGULATORY GAP, RESULT IN ABSURD OUTCOMES, AND OTHERWISE UNDERMINE THE LIA'S PURPOSE.

Congress has sought to reign in railroads putting profit ahead of employee safety by adopting the FELA. *See Gottshall,* 512 U.S. at 542. Through the FELA, Congress made railroads liable to employees injured because of and in proportion to the railroads' negligence. Congress has, however, found that more is needed in certain areas, when it comes to locomotive safety. Through the Acts, Congress has, therefore, set minimum safety standards for locomotives.

Congress has motivated railroads to comply with these standards by making them strictly liable to any employee who is injured because of a locomotive that is not in compliance. *See Urie*, 337 U.S. at 188-89. Railroads can neither avoid liability by demonstrating a lack of notice of the defect, nor reduce the amount they owe the injured, through the employee's comparative negligence when liability is based on noncompliance with LIA and its regulations.

Congress recognized, however, that holding railroads strictly liable for injuries caused while making the repairs necessary to bring a locomotive into compliance could disincentivize them from making such repairs—the antithesis of the Acts' purposes. Congress, there-

fore, exempted locomotives from the standards while the railroads are in the act of bringing a locomotive into compliance by performing maintenance or repairs at a facility dedicated for such. *See Brady*, 303 U.S. at 13. When a locomotive is in the shop, railroads can avoid liability by demonstrating a lack of notice, and they can reduce the amount they owe an injured employee through the employee's comparative negligence.

This paradigm strikes the right balance. Railroads are motivated to bring their locomotives into compliance by being held strictly liable for any injuries caused by a noncompliant locomotive. But they will not be punished for injuries caused by noncompliant locomotives while they are in the process of bringing the locomotive into compliance while at a place of repair.

As discussed *supra,* at 11, this Court has consistently held that locomotives are exempt from the LIA only when they are in a repair shop. In a minority of lower courts, however, the railroads' efforts have paid dividends, *e.g.*, the Seventh Circuit has so expanded the exemption so as to engulf the general rule such that all locomotives and cars are exempted unless they are fully assembled, through all inspections, and released for travel.

The Seventh Circuit's holding violates *stare decisis*. In *Brady*, 303 U.S. at 13, this Court made clear that only equipment at a place of repair is exempt from the Acts' minimum safety standards. As discussed *supra,* at 4, Congress has amended the Acts several times since then, and nothing in those amendments indicates an intent to overturn *Brady*. Under the doctrine of *stare decisis*, this Court's holding in *Brady* has "special force" that should have prevented the Seventh Circuit from issuing the decision at issue here. *Hilton v. S.C. Pub. Ry. Comm'n*, 502 U.S. 197, 202 (1991).

The Seventh Circuit's holding also creates a practical problem. As discussed *supra,* at 7, 21 29, under the railroads' interpretation of the term, locomotives would constantly be going in and out of "in use". Railroad employees, who are not lawyers, will therefore be forced to guess throughout the day whether the locomotive is safe for use. This hardly furthers Congress' purpose in setting minimum safety standards or—"the protection of employees and others by requiring the use of safe equipment." *Lilly v. Grand Trunk W. R.R. Co.*, 317 US 481, 486 (1943).

Finally, the Seventh Circuit's holding creates a regulatory problem. As discussed *supra,* at 10, 13, most locomotives are not fully assembled, through all inspections, and released for travel. In the Seventh Circuit, then, the LIA no longer applies to most locomotives—a paradox that certainly undermines its purpose.

This is especially true when one considers preemption. This Court has long held that Congress has, through the LIA, expressed its intent to broadly regulate locomotive safety. *Kurns v. R.R. Friction Prod. Corp.*, 565 U.S. 625, 631, 634 (2012) (citing *Napier v. Atl. Coast Line R. Co.*, 272 U.S. 605, 611-613 (1926). Consequently, the LIA preempts state laws, regulations, and causes of action involving the design, construction, and/or maintenance of locomotives. *Id.* This is true even for equipment that is exempted from the minimum safety standards. *Id.*

The railroads may argue that interpreting the LIA to exempt most locomotives while also preempting state regulation is not a problem because the FELA is sufficient to protect employees. Congress disagreed, as evidenced by it setting minimum safety

standards for locomotives in the first place. 49 U.S.C. § 20701, *et seq*. If Congress thought the FELA was sufficient to protect employees, it would not have wasted its time regulating locomotive safety through the LIA.

Adopting the railroad's proposed standard would render large portions of the Acts superfluous, something this Court is loath to do. *Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157, 166 (2004). This Court has also instructed against interpreting statutes in ways that create regulatory gaps. *Virginia Uranium, Inc. v. Warren*, 587 U.S. __, 139 S. Ct. 1894, 1903 (2019) (rejecting proposed interpretation that would create a regulatory gap and cripple the government's ability to regulate the unique risks of uranium mining). For both reasons, the Seventh Circuit was wrong to adopt the railroads' conception of "in use."

III. CANONS OF STATUTORY INTERPRETATION AND *STARE DECISIS* REQUIRE REVERSAL OF THE SEVENTH CIRCUIT.

The Acts have greatly improved railroad safety because of regulatory enforcement and worker remedies through the FELA. The Acts were implemented over one hundred years ago because of the massive number of railroad workers being killed and injured each year. Charles McDonald, *The Federal Railroad Safety Program: 100 Years of Safe Railroads*, Federal Railroad Administration 1993). During the period leading up to the Acts, safety was often sacrificed for profit and expansion. *Id*. Along with the Acts, Congress enacted the FELA to pass some of this "'human overhead' of doing business from employees to their employers." *Gottshall*, 512 U.S. at 542.

Here, the Acts are, if not in form, substantive[7] amendments to FELA. *Urie*, 337 U.S. at 189. "They are rather supplemental to it, having the purpose and effect of facilitating employee recovery, not of restricting such recovery or making it impossible." *Id*. at 190. As this Court has noted, the Acts "would take on highly incongruous character if, at the very time they were expediting employee recovery under the FELA, they were also contracting the scope of compensable injuries and to that extent defeating recovery altogether." *Id*.

As with any question of statutory construction, this Court begins "by analyzing the statutory language, 'assuming that the ordinary meaning of that language accurately expresses the legislative purpose.'" *Hardt v. Reliance Standard Life Ins. Co.*, 560 U.S. 242, 251 (2010), quoting *Gross v. FBL Financial Services, Inc.,* 557 U. S. 167, 175 (2009). Likewise, "[i]t is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Home Depot U. S. A., Inc. v. Jackson*, 139 S. Ct. 1743, 1748 (2019); see also A. Scalia & B. Garner, Reading Law, *supra,* at 167 ("The text must be construed as a whole.").

As noted below, the plain language of the Acts would be rendered moot were this Court to adopt the Seventh Circuit's interpretation of the Acts. The Seventh Circuit's interpretation reads into the Acts' language and limitations that Congress chose not to

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[7] Numerous reported cases discuss this element of the LIA and SAA, and cases that construe the term "in use" under one act are authoritative for purposes of construing the term under the other. *See, e.g., Holfester v. Long Island R.R. Co.*, 360 F.2d 369, 373 (2d Cir. 1966).

include. Further, the Seventh Circuit's ruling directly conflicts with this Court's previous holdings. Those holdings have long held that "in use" for purposes of the Acts encompasses equipment until it reaches a place of repair. Regulators have enforced it accordingly. Because of broad, consistent enforcement by the FRA of these federal rail safety statutes and regulations, along with their application by the courts under FELA, rail worker injuries have been greatly reduced. McDonald, *The Federal Railroad Safety Program: 100 Years of Safe Railroads*, Federal Railroad Administration (1993).

One of the core objectives of Congress in enacting the FELA and the Acts was to secure a uniform framework for protecting injured rail workers. *See Chi. Milwaukee & St. Paul Ry. Co. v. Coogan*, 271 U.S. 472, 474 (1926). This objective has been readily accomplished. In the statutory context, *stare decisis* is vital where this Court's decisions have helped create a uniform standard. Change would dislodge settled rights and expectations. *Hilton,* 502 U.S. at 202. To reinterpret the law as the railroad urges disrespects the principle of *stare decisis*. *CSX Transp., Inc. v. McBride*, 564 U.S. 685, 699 (2011).

Through this Court's decision in *Brady* and others, a largely uniform application of "in use" has allowed courts and litigants to reliably apply the Acts in FELA cases. The Seventh Circuit is an outlier. The overwhelming majority of state and federal courts apply the standard articulated in *Brady*. This uniformity is consistent with the remedial nature of FELA and the plain language of the Acts. As detailed below, a departure from this long-established standard would have vast consequences to railroad safety.

IV. EXCLUDING SWITCHING AND PRE-DEPARTURE ACTIVIES FROM THE DEFINITION OF "IN USE" WOULD RENDER THE ACTS NEARLY INAPPLICABLE.

A. Switching And Pre-Departure Work Is A Necessary, Predominate Work Duty Of Train Crews And Are The Most Common Form Of Work Duties Bringing Train Crews In Contact With Equipment Protected By The Acts.

Upholding the lower courts' definition of in use—and its negative impact on railroad safety and the FELA in the future—is exactly the type of "highly incongruous" result against which this Court has previously admonished. *See Urie*, 337 U.S. at 189. 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" as the primary reason for not finding the locomotive "in use." *LeDure v. Union Pac. R.R. Co.*, 2019 WL 399924, at *4 (S.D. Ill. Jan. 31, 2019).

This "considerable amount of work" and "prep" the lower court found dispositive is what is commonly referred to as switching, or the movement and assembly of trains in a railroad yard before a fully made-up train departs on the main line.[8] Switching casualties are responsible for more fatalities among railroad workers than any other kind of work activity. Gamst & Gavalla, *Hazard Survey of Remote Control Locomotive Oper-*

[8] *LeDure* estimated that this switching consisted of three movements. Although it is irrelevant because this Court has interpreted "in use" to mean any work at a location other than a place of repair, this is not a significant amount of switching work.

ations on the General System of Railroads in the United States, at ix (2005). As this Court has previously noted a primary reason for Congress passing the Acts was to reduce deaths and injuries during switching and "[i]ts success in promoting ***switchyard safety*** was stunning." *v. Hiles*, 516 U.S. at 406. (emphasis added).

This Court, and others, have rejected previous efforts by the rail industry to exclude switching and train crew work performed before a train leaves a yard from the scope of the Acts. Union Pacific and the Seventh Circuit's proposed change "would exclude the applications of the Act from its coverage of those activities occurring between servicing and preparing the engine up until the time the engineer takes the controls." *Angell v. Chesapeake & O. Ry. Co.*, 618 F.2d 260, 262 (4th Cir. 1980). Such an interpretation contravenes the legislative purpose of the Acts and undermines its goal of uniform safety. *Id.*

Switching work is required for all freight transportation. Practically speaking, excluding switching and pre-departure work from the Acts would largely eliminate the protections enacted by Congress and the FRA, and greatly undermine the safety of train crews, whose daily work occurs in railroad yards and at industries, not on mainlines. In fact, many train crew members work exclusively in railroad yards. Railroad yards are not analogous to any other transportation or industrial facility. Reinach & Gertler, *An Examination of Railroad Yard Worker Safety*, Federal Railroad Administration, at 11 (2001).[9] Trains arrive and are inspected, disassembled, and reassembled. Some aspects of newly assembled trains are inspected before

[9] https://railroads.dot.gov/sites/fra.dot.gov/files/fra_net/2938/ord0120.pdf

departing for another destination. Many railroad yards also have facilities to service locomotives and some yards have facilities to conduct major car repairs. Yards come in all sizes and shapes; and no two yards are identical, since each is built to fit a particular geographical area or logistical need.

There are numerous hazards associated with railroad yards due to the high traffic volume, the physical layout of the yard, and the labor-intensive nature of switching cars. *Id.* at 15. These job hazards include a high volume of large, heavy, moving equipment, such as rail cars, locomotives, and other equipment governed by the Acts. The yards are heavily trafficked 24 hours a day. The issue of potentially hazardous equipment in heavily trafficked yards is compounded with other conditions, such as inclement weather, poor lighting, nighttime work, loud noise, visual distractions, and other workers and equipment moving and working. When surveyed by the FRA, railroad workers identified poorly maintained equipment—those subject to the Acts—as being a critical safety concern regarding their work in railroad yards. *Id.* at 113.

Employees can be injured in or by a locomotive that is moving or standing. An employee is almost twice as likely to be injured when a locomotive is not moving. Statistics compiled by the FRA show that from 2018 to 2021, there were 558 injuries to employees in a locomotive/train standing in the cab or walkways, and 316 injuries while a locomotive/train was moving.[10] Significant work must be done by operating crews before any train movement. Crews are assigned to build trains in hundreds of rail yards throughout the coun-

[10] https://safetydata.fra.dot.gov/OfficeofSafety/publicsite/Query/castall 1.aspx.

try. They board and alight locomotives and rail cars constantly in the yards, and are exposed daily to hazards the FRA has addressed in safety regulations. If the narrow interpretation of "in use" by the Seventh Circuit is applied to the Acts, the adverse safety effect will be widespread.

Likewise, train crews performing pre-departure work are required to "use" locomotives and railcars, regardless of whether they are powered on or loaded. To do this they encounter the same hazards as when they encounter a powered locomotive or loaded car. To perform this work they must use walkways on the locomotives and various safety appliances such as hand brakes, pin lifters to couple/uncouple, air hoses to connect braking systems, and cables to connect electrical systems. These hazards are equally significant as those encountered when those same railcars are loaded, or locomotives are powered on.

B. Given The Acts' Plain Language, Excluding Switching And Pre-Departure Work Would Render Much of The Acts Superfluous.

Because of the nature of the work performed and the remedial nature of FELA and the Acts, the majority of jurisdictions—relying on this Court's decision in *Brady*—have consistently held that equipment is "in use" unless it is actively being repaired or is located in a place of repair.

From a policy perspective, this makes perfect sense because the "'in use' limitation gives the railroad an opportunity to remedy hazardous conditions before strict liability attaches to claims made by injured workers." *Wright v. Ark. & Mo. R.R.*, 574 F.3d 612 (8th Cir. 2009). This rationale is consistent with this

Court's decision in *Brady*, which also acknowledged that rail equipment is no longer in use on a railroad's line when it "has reached a place of repair." 303 U.S. at 13-15. In practice it also makes sense, as many standards incorporated under the Acts would be rendered irrelevant if "in use" was defined otherwise.

Adopting the railroad's proposed standard would render large portions of the Acts entirely superfluous, something this Court is loath to do. *Cooper Indus.*, 543 U.S. at 166. But superfluity is precisely what would occur were this Court to overturn its precedent. For instance, the following safety provisions of the Acts would be rendered dead by the railroad's proposed change:

- "Provisions calling for automatic couplers and grab irons are of broader application and embrace switching operations." *U.S. v. Erie R. Co.*, 237 U.S. 402, 408 (1915).

- Worker killed had viable claim under FELA and the LIA due to violation of regulation constructed under the LIA requiring lights. Locomotive was involved in switching in "yard service." *Tiller v. Atl. Coast Line R. Co.*, 323 U.S. 574, 577 (1945); see current 49 C.F.R. § 229.125(b).

- Concerning handbrakes: "It is precisely because safety in the yard during switching operations calls for efficient hand brakes that can stop cars and other vehicles that Congress passed the hand brake provision." "I will not adopt a construction that renders a statutory provision superfluous unless I am forced to." *Robb v. Burlington N. & Santa Fe Ry. Co.*, 100 F. Supp. 2d 867, 870 (N.D. Ill. 2000) (citing *Erie*, 237 U.S. at 408).

- A freight conductor can "recover for an injury resulting from failure of a grabiron" while switching. *Swinson v. Chicago, St. P., M. & O. Ry. Co.*, 294 U.S. 529, 531 (1935).

- 49 CFR § 231.30: Locomotives used in switching service, outlining requirements for steps, coupling mechanisms, handholds, etc.

- 49 CFR § 229.3(b): Expressly excluding from the LIA locomotives engaged in specific types of operations.

These are merely a few examples. Many others apply equally to equipment inside and outside of yards and switching locations, and, as a practical matter, are much more important for safety reasons to train crews during switching operations and inside railroad yards.

There is no reason why Congress would specify conditions under which the Acts apply, and at the same time exclude those conditions through the "in use" provision. To interpret the statute as such would violate the settled rule that this Court "must, if possible, construe a statute to give every word some operative effect." *Cooper*, 543 U.S. at 166. Simply, most of the Acts' provisions apply exclusively or primarily to work that is done while switching, pre-departure, or in railroad yards. During those activities, train crews encounter the equipment governed by the Acts. Congress cannot have intended to enact extensive safety legislation that has no meaning. Practicality and common sense dictate that equipment under the Acts remain in use when a train crew encounters equipment when they are not at a place of repair. Indeed, this is when train crews encounter equipment while performing their job duties as part of the operations department. Equipment is considered in use unless it is being re-

paired or is in a place of repair. To hold otherwise would exempt railroads from complying with the Acts' safety requirements the majority of the time in which transportation work is performed by train crews.

C. Union Pacific Asks This Court To Supplant Its Definition of "In Use" With One That Would Largely Render the Acts Inapplicable.

The doctrine of *stare decisis* is most compelling where, as here, this Court must engage in pure statutory construction. *Hilton*, 502 U.S. at 205. The doctrine has added force when people have acted in reliance on previous decisions. *Id*. at 202. Specifically, the issue presented to this Court is whether it should reexamine its longstanding statutory interpretation of the Acts and their applicability under FELA. As noted above, many of the safety provisions of the Acts would be rendered inapplicable if the lower court's definition applied.

As this Court has stated, Congress did not intend "to act so inconsistently or that, by dispensing with the employee's burden of proving negligence in certain classes of Employers' Liability Act suits, it had any purpose to withdraw from that Act's coverage any injury caused by the employment which was covered by its terms." *Urie*, 337 U.S. at 189. But that is precisely the result that would occur if the meaning of "in use" is uprooted in the dramatic fashion sought by Union Pacific and its industry partners.

The practical impact of defining in use in congruity with the clear language of regulations and statutes can be seen in cases that interpreted in use consistently with *Brady* and this Court's preceding decisions. Upholding the Seventh Circuit would now

overturn those cases, excluding workers from the protections of the Acts.

This Court's construction of the Acts rests on the text of the statutes and its prior interpretations of that language. *Hiles*, 516 U.S. at 411 n.15. This Court's previous decisions concerning the applicability of the Acts during switching operations conflict with the lower courts' decisions, which referred to switching as "a considerable amount of work to be done" before the equipment could be considered "in use." For example, in *Carter v. Atlanta & St. A.B. Ry. Co.*, 338 U.S. 430, 435 (1949), a train crew was performing switching activities at a paper plant, when the automatic couplers—which were required under the SAA—failed to couple a rail car to a locomotive. The conductor was injured trying to save the car and was struck by another piece of equipment. *Id.* Under the lower courts' decision, the train would not have been considered assembled but would have been in the "additional work" phase the lower court relied upon to determine the locomotive was not "in use".

Similarly, adopting Union Pacific's definition of "in use" would conflict with this Court's decision to apply the LIA as in *Lilly*, 317 U.S. at 491. In *Lilly*, a train crew member was injured while performing predeparture work on a locomotive, which was to be subsequently operated in a railroad yard. *Id.* at 483-84. Under the definition of "in use" created by the lower courts, the LIA would no longer apply. This would negate the LIA's "protection of employees and others by requiring the use of safe equipment" that this Court found important in *Lilly*. *Id.* at 486.

Likewise, this Court has issued numerous decisions involving injuries that occurred when an employee

was forced to go between cars during coupling operations while railcars were being switched in yards:

- *Johnson v. So. Pac. Co., 196 U.S. 1, 15 (1904)*: Applying the SAA to an employee's injuries sustained during coupling of dining car and engine and rejecting unnecessarily narrow construction of statute inconsistent with congressional intent.

- *San Antonio & Aransas Pass R. Co. v. Wagner,* 241 U.S. 476, 478 (1916): Brakeman whose foot was caught between couplers was entitled to relief under FELA because the SAA's "protection extends to men when coupling as well as when uncoupling cars."

- *Atlantic City R. Co. v. Parker,* 242 U.S. 56, 58 (1916): Jury entitled to find that railroad "had not fully complied with law" and was liable under the SAA and FELA where trainmen's arm was caught while coupling cars.

- *Affolder v. New York, C. & St. L.R. Co.,* 339 U.S. 96, 97 (1950): Railroad employee whose leg was amputated while "classifying, or sorting railcars" that began moving after failing to couple could recover under the SAA and FELA.

- *O'Donnell v. Elgin, J. & E. Ry. Co.,* 338 U.S. 384, 385–86 (1949): Railworker who was adjusting coupler on cars while switching and was killed when two runaway cars—the result of a broken coupler—struck him could recover under the SAA and FELA.

- *Erie R. Co.*, 237 U.S. at 408: "Provisions calling for automatic couplers and grab irons are of broader application and embrace switching operations."

Under the Seventh Circuit's new test, every single one of these cases would result in a finding of "not in use," and the inapplicability of the Acts.

D. Rejecting the Acts' Plain Meaning And This Court's Precedent Would Dislodge Settled Rights and Expectations, Inviting An Inconsistent And Unsafe Application.

"Adherence to precedent promotes stability, predictability, and respect for judicial authority." *Hilton*, 502 U.S. at 202. Countless lower courts, railroad workers, and railroads themselves have long relied upon this Court's application of "in use" to the Acts. This has been the case for over a century and is evident in this Court's body of case law on the Acts. Given the power of *stare decisis* in the statutory context, to discard or narrow this Court's previous definition of "in use" and its application to the Acts "now would ill serve the goals of 'stability' and 'predictability' that the doctrine of statutory *stare decisis* aims to ensure." *McBride*, 564 U.S. at 699.

"Considerations of *stare decisis* have special force in the area of statutory interpretation, for here, unlike in the context of constitutional interpretation, the legislative power is implicated, and Congress remains free to alter" this Court's decisions. *Hilton*, 502 U.S. at 202. This is particularly true "when the legislature, in the public sphere, and citizens, in the private realm, have acted in reliance on a previous decision, for in this instance overruling the decision would dislodge settled rights and expectations or require an extensive legislative response." *Id*. Congress has had over a century to correct this Court's decision in *Brady* and its cases preceding it if they disagreed. It has not done so. In turn, railroad workers, regulators, and the rail-

roads themselves have had the benefit of the reliability and uniformity that was—and remains—essential to the safety driven nature of the Acts.

Accepting Union Pacific and the lower courts' narrowing of the Acts' applicability will eradicate many of this Court's previous rulings, leave railroad workers exposed to increase hazards, and leave them without the remedies provided by the Acts under FELA which have been consistent for over one hundred years. Such can only lead to confusion and inconsistency in lower courts.

The district court here, for instance, expressed confusion because "there is no clear-cut test to determine when a locomotive is 'in use.'"[11] The district court went on to explain that multifactorial assessment was necessary to determine if the LIA and its safety requirements applied, finding his minimal switching work dispositive.[12] This highlights the problem for trial courts, railroads, regulators, and particularly railroad workers if this Court were to eschew its existing precedent in favor of the Seventh Circuit's decision upending that precedent.

The current test—the Acts provide safety protections except when at a place of repair—is both easily

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[11] The trial court then relied upon, *Lyle v. Atchison T. & S.F. Ry. Co.*, 177 F.2d 221, 222 (7th Cir. 1949), which concerned ***servicing*** a locomotive at a maintenance facility.(emphasis added). By no stretch could it be said that LeDure was servicing the locomotive, as train crews do not service such. That is done by maintenance employees "at a place of repair" like a shop or roundhouse.

[12] In fact, the trial court focused on the type of work LeDure was performing and about to perform, a consideration expressly rejected by this Court in *Brady*. 303 U.S. at 16 ("liability springs from its being made unlawful to use cars not equipped as required, not from the position the employee may be in, or the work which he may be doing at the moment when he is injured.").

understood and easy to apply uniformly and reliably. Train crews are entitled under the Acts to expect safe and compliant equipment when they encounter it to perform their work, and have relied upon the Acts to accomplish this unless the equipment has been pulled out of service and is at a place of repair. Conversely, the Seventh Circuit's test would require train crews to engage in a multifactorial assessment (either the three factors identified by the trial court and/or a test to determine "if considerable work" is yet to be done) to determine if the equipment they are using is repaired, compliant, and safe.

It cannot be overstated that railroad workers, regulators, and the railroads themselves would constantly be required to assess whether equipment is "in use" and thus are protected afforded protection by the Acts. Under this definition, railroads will have no incentive whatsoever to provide equipment—that meets Congress and the FRA's definition of safe—in railroad yards and locations where switching is done, where the majority of the work by train crews is performed.

This Court's rule already provides a bright-line test that can be applied by laymen, regulators, and judges reliably and ensures consistent results.[13] The interpretation urged by the Seventh Circuit would require an analysis of several factors, rather than what this Court's precedent and the plain language of the statute

[13] For instance, all three Circuits that have compiled pattern jury instructions (the First, Fifth, and Eighth Circuits) have uniformly stated that Acts applies to all injuries except for those "directly resulting from the inspection, repair and servicing of railroad equipment located ***at a maintenance facility***." 1st Cir. Pattern Jury Instr. For R.R. Empl. Pers. Inj. Cases – § 2.1 (2011). 5th Circuit Pattern Jury Instr. – Civil § 5.2 (2014); 8th Cir. Civil Jury Instr. §§ 15.41, 15.42 (2020) (emphasis added).

have already established in a straightforward inquiry. Doing so would invite inconsistent and conflicting applications of the Acts across the Nation's court systems. Most importantly, there will be dire safety repercussions; repercussions that would in essence revert back to a dark era of railroading that existed before—and was the reason for which—Congress passed the Acts.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully Submitted,

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