No. 20-807

# In the Supreme Court of the United States

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

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

## BRIEF FOR RESPONDENT


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## QUESTION PRESENTED

Whether the Seventh Circuit correctly held that respondent was not currently "us[ing]" a locomotive for purposes of the Locomotive Inspection Act at a time when the locomotive was motionless, parked on a backtrack, awaiting inspection, and being tagged to "run dead" to its next destination as part of a train that was not yet assembled.

## 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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## INTRODUCTION

When the Locomotive Inspection Act ("LIA"), 49 U.S.C. § 20701 *et seq*., was enacted, as today, the verb "use" meant "[t]o make use of; to convert to one's *service*; to *avail* one's self of; to *employ*; to *put to a purpose*." *Webster's International Dictionary* 1588 (1907) (emphasis added). A locomotive is "a piece of on-track equipment … [w]ith one or more propelling motors designed for moving other equipment." 49 C.F.R. § 229.5. Railroads "use" locomotives to move rail cars. A locomotive that is parked off a railroad's main line track, waiting to be inspected and for a train to be assembled, is not in "use" in any ordinary sense. That is particularly true when, as here, the railroad was not even preparing to use the locomotive *as a locomotive* but instead planned to passively transport it, using another locomotive, to another location for scheduled maintenance.

The statute's plain meaning is confirmed by its history, purpose, and structure, and by a century of regulatory and judicial interpretation.

The LIA was initially enacted as the Boiler Inspection Act ("BIA"), which made it unlawful for railroad carriers "to use any locomotive engine propelled by steam power *in moving interstate or foreign traffic* unless the boiler of said locomotive" was "in proper condition and *safe to operate*" in "*active service*." Act of Feb. 17, 1911, ch. 103, § 2, 36 Stat. 913, 913-14 (emphasis added). In 1924 Congress dropped the interstate or foreign movement requirement, and subsequent amendments further simplified the language. But nothing in the text or history suggests that Congress ever extended the LIA's coverage such that every locomotive should be regarded as in "use"

24/7 unless it is in a dedicated place of repair, as petitioner and his *amici* contend. To our knowledge, no court in the long history of the LIA has ever interpreted the statute that way. To the contrary, the lower courts have understood it as applying only when a locomotive was in active service as a locomotive—*i.e.*, moving or imminently ready for movement under its own power—and, critically, *not* when the locomotive was being prepared for movement, being inspected, or being transported "dead."

Petitioner's contrary interpretation would break the statute. The LIA and its longstanding implementing regulations require railroads to inspect locomotives every day that they will be "use[d]," and to repair any safety defects "*before* a defective locomotive, tender, part, or appurtenance is used again." 49 U.S.C. § 20702(a)(3) (emphasis added). If locomotives are perpetually "use[d]" outside of dedicated places of repair, compliance with that requirement is literally impossible. Railroads would be constantly exposed to substantial civil penalties, limited only by agency forbearance. Indeed, if petitioner is right that 49 C.F.R. § 229.119(c), which requires 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," applies to external walkways, then every locomotive outside of a repair facility is in violation of the LIA every time it rains. Petitioner's interpretation also prevents railroads from transporting defective locomotives to maintenance locations without violating the statute. But Congress obviously understood that locomotives with boiler defects would have to be hauled to repair shops, and

the regulations have always expressly permitted such movements.

Petitioner and the government insist that their interpretation is compelled by this Court's early twentieth-century decisions interpreting a distinct but related statute, the Safety Appliance Act ("SAA"), 49 U.S.C. § 20301 *et seq*. This Court, however, has frequently recognized that the applied meaning of "use" is highly sensitive to factual and statutory context. Freight cars are "used" as passive receptacles for transporting freight, and that "use" continues even when they are temporarily motionless or uncoupled while being switched from one train or railroad to another—as in *Brady v. Terminal Railroad Ass'n*, 303 U.S. 10 (1938). A locomotive is "used" *to move other vehicles*, and its usage as such naturally ends when its immediate journey is complete. As a matter of plain language, when a U-Haul trailer carrying furniture is towed by a car from Seattle to New York, the trailer remains in "use" even while the driver stops at an Iowa motel for the night. The car does not.

The structure of both statutes confirms that "use" has a different meaning under the LIA than the SAA—and indeed that locomotives themselves will often, at the same moment, be in "use" *as vehicles* within the SAA's scope, but not in "use" *as locomotives* under the LIA. Since 1910 the SAA has contained a provision, now codified at 49 U.S.C. § 20303, permitting the transportation of non-complying vehicles for purposes of repair—exempt from civil penalties, but at the railroad's own risk for purposes of any resulting injury. As this Court recognized in *Texas & Pacific Railway Co. v. Rigsby*, 241 U.S. 33, 40 (1916), that provision confirms Congress's

understanding that a vehicle being transported for repair is in "use" within the SAA's meaning. Locomotives are rail vehicles as defined in the SAA (*see* 49 U.S.C. § 20301), and their transportation is governed by § 20303. But the LIA has never had any comparable provision, because Congress understood that locomotives being transported passively for purposes of repair are not in "use" *as locomotives* and therefore are not subject to the additional LIA requirements that are necessary to make locomotives "safe to operate" *as such* "without unnecessary danger of personal injury." 49 U.S.C. § 20701(1). Once that interaction is understood, it becomes clear that "use" cannot mean the same thing in both statutes. The LIA would forbid the movement of a locomotive with defective safety appliances even though the SAA—*the statute actually addressed to safety appliances*—explicitly authorizes such movements.

The interpretation of the LIA urged by petitioner and the government would introduce senseless operating inefficiencies, since idle locomotives would need daily inspections of systems that no one intends to use that day. The only way to avoid these burdens would be to move all locomotives to dedicated places of repair whenever they are temporarily not needed, which would be time-consuming, expensive, and highly burdensome. Indeed, petitioner insists that Union Pacific could not stop "using" this locomotive without first transporting it 80 miles away to a repair facility, while under his interpretation such transit would *also* violate the statute.

The plain meaning of the LIA—as well as its structure and longtime implementing regulations—clearly forbid petitioner's opportunistic construction. Adoption of petitioner's position would overturn a

century of practice and wreak havoc with basic railroad operations. The Seventh Circuit's judgment should be affirmed.

## STATEMENT OF THE CASE

### A. Statutory Background

This case was brought under the Federal Employers' Liability Act ("FELA"), 45 U.S.C. § 51 *et seq.*, enacted in 1908 to provide a federal cause of action for railroad workers injured by the negligence of their employers. *Consol. Rail Corp. v. Gottshall*, 512 U.S. 532, 542-43 (1994). FELA is not "a workers' compensation statute," and "'does not make the employer the insurer of the safety of his employees while they are on duty.'" *Id.* at 543 (citation omitted). But FELA's negligence regime is generous to employees. It eliminates the defense of assumption of risk, and it treats any violation of federal safety standards (such as those imposed under the LIA and SAA) as negligence per se. *CSX Transp., Inc. v. McBride*, 564 U.S. 685, 703 & n.12 (2011); *Urie v. Thompson*, 337 U.S. 163, 188-89 (1949). The interaction between the statutes thus effectively imposes strict liability for any injuries caused by a violation of the LIA and its implementing regulations.

The SAA began as a series of enactments between 1893 and 1910 that made it unlawful for a railroad "to haul, or permit to be hauled or used on its line" any car "used in moving interstate traffic" and not equipped with particular safety "appliances"—particularly automatic couplers, but also equipment like grab bars, ladders, and running boards. Act of Mar. 2, 1893, ch. 196, § 2, 27 Stat. 531, 531. This Court held in *Johnson v. Southern Pacific Co.*, 196 U.S. 1, 15-16 (1904), that the SAA used "car" in a

generic sense that included locomotives, and Congress made that point explicit in 1903 amendments. *See* Act of Mar. 2, 1903, ch. 976, § 1, 32 Stat. 943, 943. A railroad that hauled or used a car in violation of the SAA was liable for civil monetary penalties. Act of Mar. 2, 1893, ch. 196, § 6, 27 Stat. at 532. The 1903 amendments also extended the coverage of the SAA to all vehicles "used on any railroad engaged in interstate commerce," Act of Mar. 2, 1903, ch. 976, § 1, 32 Stat. at 943, which this Court interpreted as "embrac[ing] every train on a railroad which is a highway of interstate commerce, without regard to the class of traffic which the cars are moving," *Southern Ry. Co. v. United States*, 222 U.S. 20, 25 (1911). Additional amendments in 1910 added the language now codified at 49 U.S.C. § 20303, providing that a vehicle with a safety appliance defect "may be hauled from the place where such equipment was first discovered to be defective or insecure to the nearest available point where such car can be repaired" without civil penalties but "at the sole risk of the carrier" if injury results. Act of Apr. 14, 1910, ch. 160, § 4, 36 Stat. 298, 299.

Congress enacted the BIA in 1911 in response to concerns about boiler explosions. The BIA forbade railroad carriers "to use any locomotive engine propelled by steam power in moving interstate or foreign traffic unless the boiler of said locomotive" was "in proper condition and safe to operate … in the active service of such carrier in moving traffic without unnecessary peril to life or limb." Act of Feb. 17, 1911, ch. 103, § 2, 36 Stat. at 913-14. It also established a system of locomotive inspections, and required "that carriers repair the defects which such [inspections] disclose before the boiler or boilers … are again put in

service." *Id.* §§ 2-6, 36 Stat. at 913-15. The BIA applied only to locomotives in "use," omitting the "haul" language from the SAA. It also contained no provision comparable to Section 4 of the 1910 SAA, which authorized carriers to "haul" vehicles with defective safety appliances to the nearest point of repair.

Soon after, Congress extended the BIA to apply to "the entire locomotive and tender and all parts and appurtenances thereof," and it became known as the LIA. Act of Mar. 4, 1915, ch. 169, § 1, 38 Stat. 1192, 1192.

In 1924, Congress removed the jurisdictional requirement that a locomotive must be used "in moving interstate or foreign traffic," because this Court's decision in *Southern Railway Co.* had made clear that it was not required by the Commerce Clause, and the requirement had proved to be a significant obstacle to enforcement. H.R. Rep. No. 68-490, at 4 (1924). "Proof of interstate movement necessitated an extensive examination of railroad records," and "[t]he time and labor necessary for this" proof "limited to a great extent the number of cases which could be prepared for court action with the small number of inspectors available." *Id.* at 5. The ICC confirmed that the proposed amendments would eliminate that practical obstacle to enforcement by making interstate carriers "liable not only for using unsafe or uninspected locomotives in moving interstate traffic as now provided, but also for using

such locomotives in moving intrastate traffic or running light." H.R. Rep. No. 68-740 at 4-5 (1924).[1]

The 1924 LIA amendments made it unlawful for a carrier "to use or permit to be used on its line any locomotive" unless it is "in proper condition and safe to operate in the service to which the same are put, that the same may be employed in the active service of such carrier without unnecessary peril to life or limb," and unless it "ha[s] been inspected from time to time in accordance with the provisions of this Act." Act of June 7, 1924, ch. 355, § 2, 43 Stat. 659, 659. In addition to removing the interstate or foreign movement requirement, this language was intended to clarify that every "use" of a non-complying locomotive was a separate violation, rejecting the railroads' position that failure to inspect "was only one continuing offense." H.R. Rep. No. 68-740 at 5-6. The "permit to be used" language also brought "within the purview of the law many steam locomotives operated by industrial concerns and lumber companies" as well as by the railroads themselves. ICC, *Fourteenth Annual Report of the Chief Inspector Bureau of Locomotive Inspection* 9 (1925) ("ICC *Fourteenth Report*").[2]

The LIA and SAA took their present form in 1994, when Congress recodified the federal transportation laws "without substantive change." Pub. L. No. 103-272, § 1(a), 108 Stat. 745, 745 (1994). In relevant part,

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[1] Running a locomotive "light" or "lite" means operating it under its own power, but unconnected to freight cars. *See* 49 C.F.R. § 229.5.

[2] https://books.google.com/books?id=EowBAAAAMAAJ&printsec=frontcover&source=gbs_ge_summary_r&cad=0#v=onepage&q&f=false.

the LIA now 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 to operate without unnecessary danger of personal injury" and have been inspected as required under the statute and "regulations prescribed by the Secretary of Transportation." 49 U.S.C. § 20701(2).

The Secretary has delegated regulatory authority to the Federal Railroad Administration ("FRA"), *see* 49 U.S.C. § 103(g), which has imposed requirements for inspections, maintenance, and safe operations.

### B. Factual Background

At approximately 2:00 AM on August 12, 2016, petitioner, a locomotive engineer, arrived to work at a Union Pacific railyard in Salem, Illinois. JA27; JA108. Petitioner was assigned the task of assembling a train for a departure. Pet.App. 2a, 8a; JA27. The first step in this process was "tagging" those locomotives in the yard that would be used to power and pull the train, and those that would instead remain powered off to conserve fuel. Pet.App. 8a; JA25-27. A locomotive being towed as part of a train without the use of "any traction device supplying tractive power" is a "dead locomotive," 49 C.F.R. § 229.5, and may be described as "running dead" while it is being towed. JA30.

Locomotive UP5683 was parked, coupled to two other locomotives in front of it, and sitting on the "backtrack" of the Salem yard. Pet.App. 7a-8a; JA27-30; JA33-34. 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 the farthest

from the main line, and is directly adjacent to the Salem yard's "round house." *See* JA95 (diagram of tracks); *see also* Pet.Br. 33 (conceding that a "roundhouse or a repair yard" is "not on the line" and therefore outside the LIA's coverage).

Although petitioner repeatedly states that all three locomotives that day were "powered-on and idling," *e.g.*, Pet.Br. 7, petitioner previously admitted that the "second locomotive was shut down" when he arrived, JA30. As for UP5683, the record is at most equivocal. It is undisputed that UP5683 had been on loan to a different railroad company for the previous month, and had been returned to Union Pacific in Chicago just hours before. JA77-80. Petitioner's own position is that it had not received a daily inspection for several days. *E.g.*, Pet.Br. 8. The undisputed record also shows that when the locomotive arrived at its destination the following day it underwent significant scheduled maintenance. *See* JA83. The sole record evidence supporting an inference that UP5683 was ever powered on in its journey from Chicago to Salem is petitioner's deposition testimony that "I don't recall every motion, but I remember the second locomotive was shut down. And the Union Pacific locomotive, I think, was actually running and I had to shut it down." JA30.

At the time petitioner claims to have slipped, UP5683 was motionless, and 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; rather, it would be dragged "dead" behind a working locomotive. JA28-30. Before even that "dead" run could occur, petitioner maintains that the locomotive still needed to be inspected, with at least three different switching

operations required to "put [the] train back together." Pet.App. 15a (quoting petitioner's deposition); *see also id.* at 8a. In short, the "train was not set up and ready to go." JA30.

The parties dispute whether it was petitioner's job to inspect the locomotive, but petitioner conceded that he was supposed to "look[] for any unsafe conditions." JA33.[3] Petitioner testified that he was walking along UP5683's exterior walkway and toward the locomotive's cab to place a "dead" tag in the cab window when he slipped and fell. Pet.App. 8a; JA34-41. He did not see anything on the walkway before or immediately after his fall. Pet.App. 8a; JA39, JA41-44. Nor did anyone witness his 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 or its potential origin. Pet.App. 8a-9a (alteration in original) (quoting JA45). Petitioner then completed his task and helped to assemble the train.[4]

Petitioner's brief suggests (at 7) that the train "was scheduled to depart around 3:00 a.m. with a new

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[3] Petitioner has tried, inconsistently, to deny that daily inspections are the engineer's responsibility. *Cf., e.g.*, JA30 (87:4-5); Petitioner Tr. 48:20-49:11, Dkt. No. 49-1.

[4] This is not the first time petitioner has sued a railroad company for an allegedly career-ending slip and fall. He alleged a similar accident in 1991, and settled the resulting lawsuit for $850,000 after affirming that he had "sustained injuries that will forever and permanently disable him from returning to work for Burlington Northern Railroad Company in any capacity." JA106; JA21-26, 63.

crew." Petitioner cites nothing for this assertion, and his own testimony makes clear that several hours of preparatory work was necessary before departure.[5] In petitioner's words, after the three locomotives were tagged "we had to make a couple of moves on a couple of different tracks and then put our train back together." JA60-61. Petitioner "pulled [the] train up to clear the siding" so that another train could progress north, and "stopped and did all of our safety rules on setting brakes and all," before ultimately "coupl[ing] back up to the train." JA61. Petitioner continued working to prepare the train for departure until "somewhere in the vicinity of 7:00 [AM]." JA59. There is no evidence that the locomotive was scheduled to depart before then.

An inspection conducted after petitioner reported his slip noted a "small amount of oil" in the general location where he claims to have fallen. JA79; JA70. That oil stain was described as "small" and "isolated." Pet.App. 5a; *see also* JA131. No other oil spots were found on the locomotive. JA130. 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. The post-accident inspection revealed no defects or leaks. JA70.

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[5] The government cites counsel's response of "approximately" when the district court asked whether the locomotive was set to leave "an hour later." CA7App. 42. But the next line of that transcript clarifies that the train was *not* set to leave at any particular time: "There are no schedules for the freight trains … His train would leave Salem when everything was done regarding his inspections and making up the train." *Id.*

### C. Procedural Background

Petitioner brought suit under FELA and the LIA. Pet.App. 9a-10a. In asserting negligence per se, petitioner argued that either (1) UP5683 had not yet been inspected at the time of his accident, and an inspection would have discovered the oil spot; or (2) that 49 C.F.R. § 229.119(c) applies to exterior walkways. Pet.App. 10a-20a.

Union Pacific moved for summary judgment, arguing *inter alia* that the LIA did not apply because UP5683 was not "in use" at the time of petitioner's injury. JA3 (*see* Dkt. No. 49 at 3). Union Pacific further argued that petitioner did not otherwise present a triable negligence claim under FELA.

The district court entered summary judgment for Union Pacific on all claims. Pet.App. 7a-21a. 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." Pet.App. 13a (quoting *Lyle v. Atchison, Topeka & Santa Fe Ry. Co.*, 177 F.2d 221, 223 (7th Cir. 1949)); *see also Tisneros v. Chicago & N.W. Ry. Co.*, 197 F.2d 466, 467-68 (7th Cir. 1952) (same). Here, the district court explained, petitioner was "putting the locomotive 'in readiness for use' when he slipped." Pet.App. 14a-15a. The court stressed that "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." *Id.* at 15a. Moreover, petitioner "specifically said at his deposition that 'the train was not set up and ready to go.'" *Id.* (quoting JA30 (83:9-10)). Taken together, these facts indicated that

petitioner was "putting the locomotive 'in readiness for use' when he slipped." *Id.* at 14a-15a. The district court held that "these facts would lead to the same conclusion in other circuits." *Id.* at 15a-16a (collecting cases).

Turning to petitioner's negligence-based FELA claim, the district court recognized that there was no evidence that the oily substance was present on the walkway before petitioner stepped on it, no evidence that the substance came from the locomotive, and "'a myriad of possible ways it could have gotten onto' the walkway"'—including being brought there on petitioner's boots. *Id.* at 17a-20a (citation omitted).

The district court denied petitioner's motion for reconsideration, explaining that petitioner "misunderstands or misrepresents both this Court's prior order and the binding case law that it relied on," and did not provide an "honest depiction" of the evidence before the court. *Id.* at 24a, 28a.

On appeal, the Seventh Circuit agreed that the district court had properly applied Supreme Court and Seventh Circuit precedent. *Id.* at 1a-5a. Like the district court, the court of appeals emphasized that "UP5683 was stationary, on a sidetrack, and part of a train needing to be assembled before its use in interstate commerce." *Id.* at 4a. Because petitioner was injured while (at most) putting UP5683 in readiness for use, his activity was the "the antithesis" of "us[e]" under longstanding law. *Id.* (quoting *Lyle*, 177 F.2d at 223). The Seventh Circuit also affirmed the grant of summary judgment on petitioner's negligence claim. *Id.* at 4a-5a.

## SUMMARY OF THE ARGUMENT

A locomotive is "use[d]" as such only when it is moving under its own power in active service. The case law appropriately recognizes that its "use" does not end just because a locomotive is briefly motionless, and that active "use" can begin before actual movement if that movement is imminent and the locomotive has been inspected and deemed ready for active service. But a locomotive is not in active "use" when it is sitting for hours or days on a side track waiting for a train to be assembled for its next journey—particularly when, as here, the locomotive will not even move under its own power.

That plain meaning of "use" is confirmed by the history of the statute, which has always tied "use" to language like "in moving … freight" and "active service," and by the LIA's basic structure. Petitioner's contrary interpretation—under which every locomotive is "used" constantly whenever it is outside a dedicated place of repair—would mean that railroads are unavoidably in violation and subject to civil penalties any time a locomotive develops a defect *outside* a place of repair. Railroads would have no opportunity to repair defects found during routine inspections "*before* a defective locomotive, tender, part, or appurtenance is used again." 49 U.S.C. § 20702(a)(3) (emphasis added). And transporting a locomotive to a place of repair, even by hauling it "dead," would necessarily violate the statute.

This Court's early twentieth-century SAA precedents do not require such a tortured interpretation of the LIA. To the contrary, Congress clearly intended the SAA to have a broader sweep than the LIA. Congress included a safe harbor for the

movement of non-complying vehicles in the SAA but not in the LIA because it understood that locomotives (like other cars) were "use[d]" or "haul[ed]" as rail vehicles even when moving dead, but were not, at such times, in "use" *as locomotives*. That distinction honors the plain meaning of the statutory language, it is the only sensible way to reconcile the overlapping scope of these statutes, and it refutes the core premise of petitioner's and the government's argument.

The Seventh Circuit correctly held that Union Pacific was not using UP5683 as a locomotive at the time of petitioner's accident. Petitioner also cannot establish liability under the LIA because his injuries were not caused by any violation of the regulations.

## ARGUMENT

### I. A LOCOMOTIVE IS "USED" UNDER THE LIA ONLY WHEN PRESENTLY ENGAGED IN ACTIVE SERVICE

The LIA's plain language, its context and structure, and the unbroken history of its implementing regulations make clear that a railroad "use[s]" a locomotive under the LIA only when actively employing it as a locomotive—that is, when engaging the locomotive in "active service." *Urie*, 337 U.S. at 190. Petitioner and the government articulate a variety of different (and inconsistent) rules,[6] but appear to propose that all locomotives are in "use"

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[6] *Cf., e.g.*, Pet.Br. 9 (locomotive used whenever "available to be deployed as part of a train"); U.S.Br. 11 (railroad constantly uses all locomotives in its "employment" or "service"); Pet.Br. 25, 33 (locomotives always in use when outside "dedicated places of repair" like a "roundhouse or a repair yard"); U.S.Br. 26 (locomotive not in use only when in "repair, storage, or retirement").

constantly, whenever they are outside a location exclusively dedicated to repair (or, perhaps, storage). That interpretation has never been adopted by the courts or the FRA, and it would have consequences that Congress could not have intended. It should be rejected.

### A. The LIA's Text, Context, And Implementing Regulations Make Clear That "Using" A Locomotive Requires Active Employment As A Locomotive

1. The ordinary meaning of the LIA's plain text resolves this case. Undefined statutory terms are given their "ordinary, contemporary, common meaning." *Food Mktg. Inst. v. Argus Leader Media*, 139 S. Ct. 2356, 2362 (2019) (citation omitted). The ordinary meaning of the verb "use" depends on its direct object and broader context. As Justice Scalia put it, "[t]o use an instrumentality ordinarily means to use it for its intended purpose. When someone asks, 'Do you use a cane?,' he is not inquiring whether you have your grandfather's silver-handled walking stick on display in the hall; he wants to know whether you *walk* with a cane." *Smith v. United States*, 508 U.S. 223, 242 (1993) (Scalia, J., dissenting). Dictionaries from the early twentieth century and today consistently define "use" as employing an object for a purpose. *See, e.g.*, *Webster's New International Dictionary* 1588 (1907) ("To make use of; to convert to one's service; to avail one's self of; to employ; to put to a purpose…."); *A New English Dictionary on Historical Principles*, vol. 10, pt. 1 at 471 (1926) ("To employ or make use of (an article, etc.), esp. for a profitable end or purpose; to utilize, turn to account."); *see also id.* at 472 ("To work, employ, or manage (an

implement, instrument, etc.); to manipulate, operate, or handle, esp. to some useful or desired end."). Thus, a carpenter sawing a beam "uses" the saw; that same carpenter examining the saw to determine whether it is up to the task has not yet begun to use it; and that is certainly true when the saw is lying on a work bench waiting to be used at some later time.

This Court endorsed that active and contextual understanding of "use" in *Bailey v. United States*, 516 U.S. 137 (1995). There, a statute imposed penalties on any defendant who, "during and in relation to any crime of violence or drug trafficking crime …, uses or carries a firearm." 18 U.S.C. § 924(c)(1). This Court first noted that "'use' must connote more than mere possession of a firearm by a person who commits a drug offense." 516 U.S. at 143. It recognized that dictionary "definitions of 'use' imply action and implementation." *Id.* at 145. And although "use" sometimes colloquially "refers to an ongoing, inactive function," this Court rejected that construction on the ground that the "inert presence" or "storage" of a firearm, "without its more active employment, is not reasonably distinguishable from possession." *Id.* at 149. Instead, the Court held, the statute's language, "supported by its history and context, compel[led] the conclusion that Congress intended 'use' in the active sense of 'to avail oneself of,'" such that a conviction requires proof "that the defendant actively employed the firearm during and in relation to the predicate crime." *Id.* at 150.

The LIA calls for a similar construction. The direct object of the verb "use" is "locomotive," which at the time of the LIA's enactment—like today—meant "a self-propelled unit of equipment designed solely for moving other equipment." *In re Rules and*

*Instructions for Inspection and Testing of Locomotives Propelled by Power Other Than Steam Power*, 122 I.C.C. 414, 419 (1927) (quoting Interstate Commerce Commission Report of May 19, 1914); *see also* 49 C.F.R. § 229.5. Thus, *using* a locomotive ordinarily means using it for its intended purpose of moving other equipment through self-propulsion.

Statutory history confirms this plain meaning. The BIA's original language made the active meaning very explicit, by tying a locomotive's use to its function "in moving interstate or foreign traffic." Act of Feb. 17, 1911, ch. 103, § 2, 36 Stat. 913, 914 (1911); *cf. Bailey*, 516 U.S. at 147 (noting that a previous version of the statutory phrase "'uses a firearm to commit' indicate[d] that Congress originally intended to reach the situation where the firearm was actively employed during commission of the crime").

Congress amended the LIA in 1924 because the need to prove the interstate character of movements had proved an unreasonable obstacle to enforcement, and because it had become clear that an interstate movement was not required by the Commerce Clause. *Supra* at 7-8. But the new language still tied "use" to whether a locomotive was "safe to *operate* in the service to which the same are put," *i.e.*, in "the *active service* of such carrier." Act of June 7, 1924, ch. 355, § 2, 43 Stat. 659, 659 (emphasis added). Nothing in the 1924 amendments or their legislative history gives the slightest hint that Congress intended to fundamentally change what it means to "use" a locomotive, such that a locomotive sitting in a yard or on a siding, and not moving or preparing to move anything, would suddenly be covered. That would have been a radical transformation of the statute at a time when railroads were the industrial arteries of

America. The absence of any discussion of that possibility in legislative history comprehensively addressing much more mundane matters, and the fact that the railroad industry *supported* the legislation, underscores that Congress did not intend such an extraordinary change. *Hearings on H.R. 5836 Before the H. Comm. on Interstate and Foreign Commerce*, 68th Cong. 30-31, 44 (1924) (statements of John J. Esch and H.T. Bentley), https://hdl.handle.net/2027/umn.31951d03614825n; *cf. Alabama Ass'n of Realtors v. Department of Health & Human Servs.*, 141 S. Ct. 2485, 2489 (2021) (per curiam).

In adopting the LIA's current "use" language, Congress made clear that it was making only "technical improvements" "without substantive change," Pub. L. No. 103-272, 108 Stat. at 745, and the Senate and House reports note that Congress was merely "omit[ing] as surplus" the phrases "in the service to which the same are put," and "in the active service of such railroad," H.R. Rep. No. 103-180, at 99 (1993). Notably, however, even the current simplified version retains the language that a locomotive may not be "use[d]" unless it is "in proper condition and safe to *operate* without unnecessary danger of personal injury." 49 U.S.C. § 20701(1) (emphasis added). Tying "use" to *operational* safety confirms the plain meaning that one "use[s]" a locomotive by actively operating it.

2. The LIA's broader context confirms the ordinary meaning. To determine the plain meaning of a statute, courts "consider the entire text, in view of its structure and of the physical and logical relation of its many parts." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation Of Legal Texts* 167

(2012). That is particularly true of the word "use," which "draws meaning from its context." *Bailey*, 516 U.S. at 143; *see also Smith*, 508 U.S. at 244-45 (Scalia, J., dissenting) (noting that the word "use" is "inordinately sensitive to context"). Two structural aspects of the LIA reinforce the ordinary meaning of what it means to "use" a locomotive.

First, a railroad may use or allow to be used locomotives and tenders only when they "have been inspected as required under this chapter and regulations prescribed by the Secretary," 49 U.S.C. § 20701(2), and the railroad must "repair[] every defect that is disclosed by an inspection *before* a defective locomotive, tender, part, or appurtenance is used again," *id.* § 20702(a)(3) (emphasis added). The LIA thus plainly contemplates that locomotives are not perpetually in use, but rather go regularly out of use to permit inspection (and, if necessary, repair) *before* being "used again." *Id.* Courts interpreting the LIA have always understood that it would be inconsistent with the language and basic purposes of the statute to impose liability for injuries sustained while the locomotive was being inspected and prepared for use. *See, e.g.*, *Lyle*, 177 F.2d at 223 ("To 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."); *Angell v. Chesapeake & Ohio Ry. Co.*, 618 F.2d 260, 261 (4th Cir. 1980) (LIA applied because "all servicing, maintenance and inspection work had already been performed and the engine was being moved to its place in the consist").

Second, the LIA conspicuously omits a safe-harbor provision for transporting defective locomotives—which makes sense only because a locomotive being

passively hauled is not in "use" within the meaning and reach of the LIA. The same Congress that passed the LIA in 1911 had, just the year before, amended the SAA to provide a safe harbor for moving non-complying vehicles for purposes of repair. Act of Apr. 14, 1910, ch. 160, § 4, 36 Stat. 298, 299. But in drafting and amending the LIA, Congress never included any equivalent safe harbor. Surely Congress knew that it would sometimes be necessary to transport a locomotive with a defective boiler system to a place where it could be disassembled and reconstructed. Congress also knew that locomotives were covered by the SAA and sometimes would need to be transported for the repair of defective safety appliances. Since a locomotive with defective couplers or grabirons obviously is not "safe to operate" in "active service," such movements for repair would have violated the LIA if they constituted "use" under that statute—even though the SAA, the statute more specifically governing safety appliance defects, expressly authorizes such movements.

Congress obviously understood that a steam locomotive being passively transported was not being "used" within the meaning of the LIA. Of course a dead locomotive was being "haul[ed]" within the meaning of the SAA, and the SAA's requirement that all rail vehicles have specific safety appliances in good order also applied to locomotives and tenders. Although the SAA made it unlawful "to haul, or permit to be hauled or used on its line" any car "used in moving interstate commerce" lacking functioning safety appliances, *see, e.g.*, Act of Mar. 2, 1893, ch. 196, § 2, 27 Stat. 531, 531, Congress never included that "haul" language in the LIA and instead prohibited only the "use" of locomotives in a non-

complying condition. So a locomotive being "haul[ed]" dead must have, in good working order, all the safety features that the SAA (and implementing regulations) deems necessary for the safe movement of all passively transported rail vehicles—subject to the SAA's safe harbor. But a locomotive being transported dead has never been subject to the *additional* LIA requirements for the safe "operat[ion]" of a locomotive in "active service." That structure makes perfect sense. An employee engaged in passively transporting a dead locomotive could be injured if the automatic couplers are defective or a grab bar has become insecure. But a pressure defect in the locomotive's boiler system poses no danger to anyone if that system is cold and not supplying tractive power.[7]

3. FRA's regulations confirm that understanding. Those regulations define a "[d]ead" locomotive as one "that does not have any traction device supplying tractive power," 49 C.F.R. § 229.5, and permit dead locomotives to be moved in ways that would clearly violate the LIA if such movements constituted "use" under the statute. For example, a locomotive that is out of compliance with FRA safety regulations may be moved dead "within a yard, at speeds not in excess of 10 miles per hour … for the purpose of repair," *id.* § 229.9(c), notwithstanding the LIA's requirement that railroads "repair[] every defect that is disclosed

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[7] The government references (at 22-23) the possibility of boiler explosions while a steam locomotive is parked and motionless. But of course a boiler cannot explode unless it has been brought up to temperature. The government's point therefore supports only the understanding, long settled in the lower courts, that a locomotive may be in "use" when it is imminently ready for movement, even if not currently moving.

by an inspection *before* a defective locomotive … is used again," 49 U.S.C. § 20702(a)(3) (emphasis added). A carrier may also move a dead, non-complying locomotive much further afield, and for purposes other than repair, so long as the carrier undertakes certain precautions, including tagging the locomotive as a "non-complying locomotive." *See* 49 C.F.R. § 229.9(a)(3); *see also id.* § 230.12(a) (permitting a steam locomotive "with one or more non-complying conditions" to be "moved only as a lite steam locomotive or a steam locomotive in tow"); *compare id.* § 230.11 (requiring the repair of any non-complying conditions "*before* placing the locomotive back in service" (emphasis added)). Again, such agency-sanctioned movements would violate the statute if dead locomotives were in "use" within the meaning of the LIA.

The implementing regulations have always recognized that locomotives come in and out of service regularly. An early ICC regulation provided that each "locomotive and tender shall be inspected after each trip, or day's work," and required "proper written explanation … for defects reported which were not repaired *before the locomotive is returned to service*," 49 C.F.R. § 91.203 (1938) (emphasis added)—confirming that inspections happen *after* the locomotive's active use and that repairs must be completed *before* such use resumes. The current FRA inspection regulations are essentially identical. *See* 49 C.F.R. § 229.21(a) (mandating that "any conditions that constitute non-compliance" shall "be repaired before the locomotive is used"); *id.* § 230.13(a) (inspection of steam locomotives "*each day that they are offered for use* to determine that they are safe and suitable for service"). As the FRA has explained, "[a]s

currently written, § 229.21 requires railroads to repair all items noted on the daily inspection report *prior to using the locomotive*." Locomotive Cab Sanitation Standards, 67 Fed. Reg. 16,032, 16,038 (Apr. 4, 2002) (emphasis added).

The regulations have always recognized in other ways, large and small, that a locomotive is in "use" only when actively operating. Early regulations contained headlamp requirements applicable only to locomotives "used in road service between sunset and sunrise." 49 C.F.R. § 91.231 (1938). And the FRA continues to recognize that "[e]ach lead locomotive used in road service shall illuminate its headlight" only "while the locomotive is *in use*." *Id.* § 229.125(a) (emphasis added). Surely the ICC and later the FRA have not mandated for the past century that inert locomotives parked in yards and on sidings must burn their headlamps throughout the night. Likewise, the inspection regime for steam engines is tied to a concept of cumulative "service days" because of FRA's recognition that such locomotives frequently receive little "actual 'use.'" 64 Fed. Reg. 62,828, 62,830 (Nov. 17, 1999); *see also id.* (recognizing that a steam locomotive is in "actual 'use'" only when it "actually runs," and that the boiler "could have fire in the firebox and pressure above atmospheric pressure" without being in "actual 'use'").

These current and historical implementing regulations show that the federal officials most familiar with the structure and operation of the LIA have always recognized that a railroad "uses" a locomotive only when it actively employs it to perform tasks. That regulatory context is critical because this Court regularly construes statutory language "[a]gainst the backdrop of … established

administrative practice." *Michigan v. EPA*, 576 U.S. 743, 753 (2015). That presumption is further strengthened where—as here, in 1994—Congress revisits a statute yet declines to overturn a long-established administrative interpretation. *See Sebelius v. Auburn Regional Med. Ctr.*, 568 U.S. 145, 159 (2013).

### B. Petitioner's Interpretation Cannot Be Reconciled With The LIA's Plain Meaning, Structure, and Regulatory History

1. Neither petitioner nor the government can square their interpretation with the ordinary meaning of "using" a locomotive. Petitioner avoids that question entirely. The government acknowledges that "in common parlance" one uses an instrument for its intended purpose—which, for locomotives, is "to haul cars." U.S.Br. 12. The government nonetheless argues that the common meaning "is certainly not the *only* [meaning]" of the word. *Id.* (emphasis added). But in doing so it abandons the search for the *ordinary* meaning of "use" in a misguided effort to show that the word is "*capable* of bearing" some other meaning. *Wisconsin Cent. Ltd. v. United States*, 138 S. Ct. 2067, 2072 (2018).

The line offered by petitioner and the government also lacks any tether in the statutory language. Both recognize that a locomotive is not in use when in a place dedicated to repair (and perhaps, according to the government, a place of "repair, storage, or retirement," U.S.Br. 8). Why? A locomotive in a repair or storage location remains in the railroad's "employment," U.S.Br. 10, and would be potentially available for use with a bit of work—just like UP5683.

If Congress had intended for all locomotives to be covered by the LIA except when in a dedicated place of repair, Congress could simply have said as much—and certainly could have clarified its intentions over the century that federal courts failed to adopt any such rule. Although some cases have concluded that a locomotive in a maintenance facility is not "in use" under the LIA, those cases did not hold that a dedicated maintenance location is a necessary condition for that conclusion as petitioner wrongly argues here. *See, e.g.*, *Angell*, 618 F.2d at 261-62 (holding that the LIA "clearly exclude[s]" injuries occurring within a "maintenance facility" but also that "use" of a locomotive parked on a yard's service track did not occur until after "all servicing, maintenance and inspection work had already been performed and the engine was being moved to its place in the consist").

The proposed distinction also has little grounding in actual railroad operations. Rail vehicles, including locomotives, are frequently repaired and stored in yards and on side tracks rather than in locations exclusively dedicated to those functions. *See, e.g.*, *Delk v. St. Louis & S.F. R.R. Co.*, 220 U.S. 580, 585 (1911) ("The injury to the coupler was one easily repaired without being taken to a repair shop."). Indeed, the government attributes great significance to the LIA's language requiring use "on its railroad line," 49 U.S.C. § 20701, without seeming to appreciate that locomotives necessarily spend their entire lives on tracks, even when being repaired or stored, and that all tracks are ultimately connected to the broader network. The Salem track map, for instance, shows little distinction in form or function between the Salem "round house" (which the

government appears to concede qualifies as a place of repair) and the backtrack on which UP5683 was located. *See* JA95. Ultimately, neither petitioner nor the government offer any workable rule for distinguishing "dedicated" places of repair or storage from tracks like that one.

The government's primary example of its preferred, passive sense of "use"—that a taxi company "uses" 100 taxis even when some of those taxis are parked—illustrates the flaws in its argument. If the taxi company said that it "uses" 100 cars, it would only be as shorthand for saying that it "uses 100 cars, *from time to time*." If the taxi company were asked how many cars it was using *right now*, it would surely include only those cars in active service: cars currently out on assignments, but not cars sitting parked at taxi headquarters or in the driveways of the taxi drivers. "Use" in the LIA plainly refers to *present* use because the statute expressly envisions that locomotives will pass in and out of "use" for inspections. And if the taxi company counted up the taxis it "used" in the broader "from time to time" sense, it would include those taxis currently in the shop for maintenance—illustrating the arbitrary nature of the government's distinctions.

To support their unusual understanding of "use," petitioner and the government invoke *Astor v. Merritt*, 111 U.S. 202 (1884), but that case actually illustrates the importance of the statutory context they ask the Court to ignore. The *Astor* plaintiff sought a refund of customs duties paid on clothing he had purchased in Europe for personal use but had not yet worn when he re-entered the United States. The customs statute provided an exemption for "[w]earing apparel in actual use and other personal effects," but

not for "merchandise" that would be "for sale." *Id.* at 203 (citation omitted). This Court thought it obvious that Congress did not intend the exemption to apply only to clothes worn "on the person at the time" of border crossing, and it found the government's test—extending only to clothes worn *prior* to re-entry—"arbitrary, and without support in the statute." *Id.* at 213. Instead, this Court turned to the larger statutory context and regulatory history, concluding that the phrase "actual use" must be read in light of the basic distinction between "personal effects" and "merchandise." *Id.* at 213-14. The Court thus held that clothing may be deemed in "actual use" as personal effects if it is: (1) "in a condition to be worn at once"; (2) "intended" for personal use; (3) suitable for the season "immediately approaching"; and (4) consistent with the plaintiff's ordinary clothing usage. *Id.* at 212-13.

Petitioner and the government follow none of *Astor*'s guidance here. They ignore statutory context and regulatory history, adopting an interpretation of "use" that departs from ordinary meaning and the LIA's purposes, and is cabined only by a place-of-repair limitation that is "arbitrary, and without support in the statute." *Id.* at 213. If anything, *Astor* shows that any departure from the plain meaning of "use"—current, active "use"—must remain closely tethered to actual use that is "immediately approaching." *Id.* at 212. That is exactly how the Seventh Circuit and other lower courts have always understood the LIA.

Nor can petitioner rescue his atextual reading by relying on the LIA's extension to locomotives that railroads "allow to be used" on their lines. *See, e.g.*, Pet.Br. 14. Petitioner points to no court that has *ever*

embraced his novel interpretation of this language. For good reason: the government acknowledges that this clause was intended to bring "within the purview of the law many steam locomotives operated by industrial concerns and lumber companies" rather than by railroads themselves. U.S.Br. 21 (quoting ICC *Fourteenth Report* 9). Whether used by a lumber company or a railroad, the LIA still encompasses only those locomotives presently "used" by *someone*.

2. Petitioner's interpretation also makes a mess of the statutory structure. As discussed, the LIA's text and structure make sense only if, at the time of an inspection, the inspected locomotive is not in use and the railroad can choose not to "use" the locomotive again until repairs are made. *See supra* at 21-25. That insight is the foundation of the rule applied by the Seventh Circuit in this case. *See Lyle*, 177 F.2d at 223. By contrast, the government's and petitioner's arguments break the logic of the statute by treating locomotives as perpetually in use except where they are "in a repair shop, storage facility, or other off-line location." U.S.Br. 26. That rule would render compliance with the LIA flatly impossible. If a locomotive remains in "use" until it has "reached" a dedicated place of repair, Pet.Br. 32; U.S.Br. 14, the railroad cannot possibly repair the defect before using the locomotive again. "Use" never ceased, and cannot cease unless the locomotive is teleported to the nearest repair facility—which here, petitioner says, would have been 80 miles away. Pet.Br. 25.

3. Petitioner and the government also ask the Court to adopt an interpretation at odds with the FRA's longstanding interpretation of the statute. *See supra* at 23-26. As the government acknowledges in a footnote, its regulations expressly state that a "[dead

locomotive] movement made in accordance with § 229.9 is not a use" for purposes of calculating "out-of-use" credits that "allow[] a carrier to delay certain periodic inspections when a locomotive has been withdrawn from use for at least one 30-day block during the inspection cycle." U.S.Br. 30 n.4 (citing 49 C.F.R. § 229.33). The government argues that this exclusion is unrelated to the meaning of "use" under the statute. But the LIA requires regular inspections of locomotives that are in "use" to ensure that they are "safe to operate." 49 U.S.C. § 20701(1). And under the regulations a defective locomotive—that is, a locomotive that is *not* safe to operate—may be transported dead over great distances and for extended periods, yet FRA does not count those movements as "uses" for purposes of calculating periodic inspection requirements. *See* 49 C.F.R. §§ 229.33, 229.9(a). If, as the government suggests, the movement of a dead locomotive *really is a use* for purposes of the LIA, then its own regulations are in flagrant violation of the letter and the spirit of a statute that requires regular inspections as a precondition to use.

In another footnote, the government argues that "a locomotive is in use and covered by the LIA whenever it is in employment or service on a line," and cites the regulation permitting the movement of lite and dead locomotives within a yard for the purpose of repair. U.S.Br. 27-28 n.3 (citing 49 C.F.R. § 229.9(c)). On its face, the government's assertion makes no sense. A defective locomotive is not meaningfully engaged in "employment or service" to a carrier when it is being moved dead "within a yard, at speeds not in excess of 10 miles per hour … solely for the purpose of repair." 49 C.F.R. § 229.9(c). And as

explained above, the government's reading contradicts its regulations treating such movement as a *non*-use, *see id.* § 229.33, and construes those regulations in such a way as to make them patently unlawful under the LIA, which forbids all use of defective locomotives. 49 U.S.C. § 20702(a)(3). It makes far more sense to understand the regulations governing dead locomotive movements as expressions of FRA's plenary power to regulate "every area of railroad safety" under the Federal Railroad Safety Act, *id.* § 20103(a).

Petitioner argues that the FRA "regulations regarding inspections and testing" would be "unworkable or nonsensical" unless motionless locomotives are in use. Pet.Br. 42-43. But that argument wrongly assumes that FRA lacks the "regulatory authority" to compel an inspection unless the locomotive is in use at the time of the inspection. *Id.* at 42. To the contrary, the LIA plainly contemplates inspections while locomotives *are not* in "use."

### C. This Court's SAA Precedents Do Not Control When A Locomotive Is In "Use" Under The LIA

This Court's early twentieth-century cases interpreting the SAA do not support a rule that rail vehicles are in "use" whenever they are outside a dedicated place of storage or repair, even under the SAA. They certainly do not support such a holding as to *locomotives*, under a completely different statute with different language, purposes, history, and structure.

1. This Court's SAA decisions relied on several structural features of that statute not shared by the

LIA. First, in most of the SAA cases cited by petitioner and the government, the accident occurred in the course of coupling two vehicles with the immediate objective of moving the rail car, and the hard question was whether the car was engaged in *interstate commerce* at the time. The accident in *Johnson v. Southern Pacific Co.* happened, for example, as a railroad employee was caught between the dining car and a locomotive while trying to couple the two together. 196 U.S. 1, 12 (1904). As this Court emphasized, "[t]he risk in coupling and uncoupling was the evil sought to be remedied" by the SAA, so an understanding of the "use" or "haul" language that did not embrace coupling activity would have defeated the core purpose of the statute. *Id.* at 19. And the entire point of the coupling was an imminent actual movement of the car. The railroad's argument was instead that the use or "the character" of the dining car was "local only," and therefore not embraced by the 1893 SAA's interstate commerce language. *Id.* at 22. This Court held that the dining car "was under the control of Congress" because it was "an instrument regularly used in moving interstate commerce," although "stopped temporarily in making its trip between two points in different states." *Id.*

The injury in *Delk* similarly happened while the railroad was breaking up a string of cars on a "team track." 220 U.S. at 583. One car was fully loaded and in the middle of an interstate journey, but had been left in that string the day before because of a coupler fault. Because of the defect the plaintiff needed to go between the cars to couple them, and was seriously injured. This Court agreed with the court of appeals that it was "the duty of the railroad company to withdraw the car from use, and have it repaired to

conform with the law before using it further." *Id.* at 585. By "use," the court clearly meant "movement." And, key to the Court's opinion, the car was still "engaged in interstate commerce" because it was fully loaded and "'had not reached its destination,'" at which point "'the commerce would have ended.'" *Id.* at 584 (citation omitted).

Second, this Court explicitly recognized that the defective-movement provision now codified as § 20303 demonstrated that the concept of "use" in the SAA extended to movements for repair purposes. In *Rigsby*, the plaintiff was injured when a grabiron broke while he was riding on top of a "bad order" car that he was cutting out of a string to take to the repair shop. 241 U.S. at 36. This Court noted that the inference of a right of action for the injured worker was "rendered irresistible" by the language in "the proviso in § 4 of the 1910 Act" (now § 20303) that movements of defective cars for purposes of repair were immune from civil penalties but performed at the railroad's own risk if injuries occurred and resulted in litigation. *Id.* at 40. This Court made the same point in *Great Northern Railway Co. v. Otos*. *See* 239 U.S. 349, 352 (1915) ("[T]he act of 1910 imports, with unmistakable iteration, that the liability exists."). And once again, in both *Otos* and *Rigsby* the injury occurred during efforts to move the car. *See also, e.g.*, *Chicago Great W. R.R. Co. v. Schendel*, 267 U.S. 287 (1925) (defective drawbar pulled out while freight car was moving on the main line).

Third, this Court held in *Brady* that an injury caused by a defective grab bar during the inspection of a motionless freight car was covered by the SAA. But the SAA does not mandate periodic inspections and contains no counterpart to § 20702(a)(3)'s

requirement that repairs detected during inspections must be repaired "before a defective locomotive, tender, part or appurtenance is used again." This Court therefore was not confronted with the very different structural features of the LIA that have led the lower courts to conclude that injuries incurred during or before required inspections *are not* covered by the LIA. And in the context of a fully loaded freight car that had not reached its "destination," but was merely being switched from one railroad to another so that its journey could continue, it was very natural to say that the car "had not been withdrawn from use" in any meaningful sense. 303 U.S. at 13. Freight cars are passive receptacles for holding freight that is moved from one place to another, and as a matter of plain language their "use" often continues throughout that process. Locomotives are, as discussed, different.

None of this Court's SAA cases articulated a simplistic rule that rail cars are always in "use" when outside a place of repair, and the lower courts have never understood them that way. Although they have articulated a variety of tests, the lower courts have generally recognized that rail cars and trains come out of "use" under the SAA when they reach their destinations, and are not put *back* in use until the railroad puts together a new train, finishes its inspections, and authorizes a new movement. *See, e.g.*, *Phillips v. CSX Transp., Inc.*, 190 F.3d 285, 289-90 (4th Cir. 1999) (SAA did not apply where a "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); *Wright v. Arkansas & Missouri R.R. Co.*, 574 F.3d 612, 621-22 (8th Cir. 2009) (train 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 after inspection); *Trinidad v. Southern Pac. Transp. Co.*, 949 F.2d 187, 189 (5th Cir. 1991) (train not in use because it "had not been released following inspection").

Indeed, FRA's own *Motive Power and Equipment Compliance Manual* says that when enforcing the SAA the agency "will consider a vehicle in use or allowed to be used as long as the railroad has or should have completed its required inspections and the vehicle is deemed ready for service."[8]

That interpretation is echoed in the only place that the regulations attempt to define the meaning of "use" under the SAA. 49 C.F.R. § 232.9(a) ("For purposes of this part, 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."). While § 232.9(a)'s definition is formally applicable only to the brake safety regulations, it is not (as the government suggests) limited to whole-train brake systems but instead applies on its face to defects in the braking systems of any "train, railroad car, or locomotive." And even accepting the government's point (U.S.Br. 27 & n.3) that some brake systems cannot be inspected until a "train" has been assembled, § 232.9(a) reflects and implements the view (long accepted in the case law) that a locomotive is not in "use" during inspections or while awaiting inspections. There is no justification for

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[8] FRA, *Motive Power and Equipment Compliance Manual* 10-2 ("FRA *Compliance Manual*") (July 2012), https://railroads.dot.gov/sites/fra.dot.gov/files/2020-05/MPEComplianceManual2013.pdf.

adopting a completely different understanding of the relationship between "use" and inspection when considering other locomotive systems.

When promulgating § 232.9(a) in 2001, FRA explained that until that point, and "in accordance with existing case law," the agency had "interpret[ed] the 'use' or 'haul' language previously contained in the Safety Appliance Acts narrowly to require that a train or car not in compliance with the power brake regulations actually engage in a train movement before a violation under the power brake regulations could be assessed against a railroad." 66 Fed. Reg. 4104, 4149 (Jan. 17, 2001). FRA explained that it believed "a broader interpretation is possible based upon the case law interpreting the 'use' language contained in the Safety Appliance Acts and based upon FRA's general rulemaking authority under the Federal railroad safety laws." *Id.* But even the "broader interpretation" it articulated—that "use" does not begin until after pre-departure inspection—is quite close in spirit to the rule applied by the Seventh Circuit in this case, and completely inconsistent with the rule advocated by petitioner and the government here.

2. Even if this Court concludes that the lower courts (and FRA) have misunderstood the SAA, the LIA demands a narrower interpretation. The LIA conspicuously does not contain any equivalent to § 4 of the 1910 SAA, which drove this Court to an expansive understanding of the SAA's scope in *Rigsby* and *Otos*. This Court understood in *Johnson* that the SAA's core purposes demanded an interpretation under which all coupling accidents would be covered; if anything the core purposes of the LIA—ensuring that locomotives and particularly boilers are not

"use[d]" unless they are "safe to *operate*"—cut against petitioner's interpretation. And the core question posed in *Brady*—whether injuries incurred during inspections are covered—takes on a very different cast under the LIA's language that addresses inspections specifically.

Petitioner conspicuously fails to address *any* cases actually decided under the LIA. The government frankly acknowledges that "this Court has never squarely considered the meaning of the term 'use' in the LIA." U.S.Br. 13. The government discusses only this Court's decision in *Lilly v. Grand Trunk Western Railroad Co.*, 317 U.S. 481 (1943), while acknowledging that *Lilly "*did not expressly consider the significance of the term 'use' in the LIA." U.S. Br. 17. And although the government claims that "this Court explicitly affirmed the application of the LIA where the locomotive was not hauling cars on a track," *id.*, *Lilly* did not address the LIA's application to a *locomotive* at all. Rather, it applied the statute to a tender, which is a fuel car hauled behind locomotives. The plaintiff had slipped on ice as he stood on the tender filling its tank. 317 U.S. at 483. This Court's focus was exclusively on that tender: "The *use of a tender*, upon whose top an employee must go in the course of his duties, which is covered with ice seems to us to involve 'unnecessary peril to life or limb'—enough so as to permit a jury to find that the Boiler Inspection Act has been violated," particularly in light of an ICC regulation addressing that hazard specifically. *Id.* at 486 (emphasis added). Thus, to the extent that *Lilly* can be said to concern "use" at all, it addressed whether the *tender* was in use, not the locomotive itself. And that is a very different question. A tender's purpose is to carry fuel

and water for a locomotive, and a tender therefore is in "use" while being refueled even if its locomotive is not.

Lower court case law interpreting the LIA also cuts against petitioner's position. Union Pacific's opposition to certiorari explained that courts have articulated the standard in a variety of ways, but their analysis has been broadly consistent with the rule that the Seventh Circuit recognized more than 70 years ago and applied in this case: locomotives are not in use when being prepared for use. In fact, the sole LIA precedent that can be squared with petitioner's proposed rule involved a Fifth Circuit ruling that a locomotive remained in "use" after a derailment left it gutted by fire and inoperable, *Southern Railway Co. v. Bryan*, 375 F.2d 155, 157-58 (5th Cir. 1967)—a holding that even the government has conceded "may have gone too far." U.S.Cert.Br. 19 n.3.

The question presented is an issue of first impression in this Court. This Court should approach it with all of the available tools of statutory interpretation, rather than blindly extending the interpretation of similar language in a different law, or attempting to divine an implicit ruling in *Lilly* on an issue that was neither considered nor presented.

### D. Petitioner's Interpretation Threatens To Impose Extraordinary And Pointless Burdens On Railroads

Public policy also cuts against the interpretation of the LIA urged by petitioner and his *amici*.

Railroad workers already have a vigorous remedial scheme for workplace injuries under FELA, which is significantly more favorable than a common-law tort framework would provide. Even when

locomotives are not in active service as locomotives, they will frequently be within the coverage of the SAA as interpreted by this Court—which means strict liability for any accident caused by a defect in the safety appliances that Congress and FRA have deemed necessary for all rail vehicles, and that are the most likely source of accidents when a locomotive is not in active service as a locomotive. The LIA imposes additional and special safety requirements that are necessary to ensure that a locomotive is "safe to *operate* without unnecessary danger of personal injury." 49 U.S.C. § 20701(1) (emphasis added). But the slip-and-fall accident here had nothing to do with UP5683's operation as a locomotive. Indeed, there is no comparable strict liability for slipping hazards on *other* rail vehicles under the SAA, and a non-operating locomotive is, in this respect, no different than a freight car.

Extending the LIA's scope in the manner advocated here also would work all manner of practical mischief.

First, prior to petitioner's inspection of UP5683 Union Pacific had no way to know of the purported spot of oil on the exterior walkway. When the law imposes strict liability, it does so to incentivize strong precautions. But no railroad could maintain 24-hour surveillance of every locomotive, or isolate every locomotive from conditions that might introduce a small spot of oil. And Union Pacific maintains—and would prove at trial if necessary—that it was *petitioner's* job to inspect UP5683 to ensure that it complied with safety regulations.

Second, on any given day there are thousands and thousands of locomotives out of active use all over this country. *See, e.g.*, Jim Blaze, *Commentary: Many*

*freight locomotives no longer needed*, Freight Waves (Apr. 23, 2020), https://www.freightwaves.com/news/commentary-many-freight-locomotives-no-longer-needed (noting that "Union Pacific has about 3,000 to 4,000 sidelined [locomotives]"). Some may be in locations that petitioner or the government would bless as sufficiently "dedicated" places of repair and/or storage, but many are simply parked until needed in yards, on sidings, or on rarely used trackage.[9] If those locomotives are "used" simply because they are theoretically available for use and not in a place of repair, then each one must be inspected every single day. Railroads have never conducted daily inspections on locomotives that no one intends to move, and to our knowledge FRA has never hinted at such a requirement in its enforcement program. FRA's compliance manual says that "[t]he purpose of the calendar-day inspection is to ascertain that the locomotive is safe to operate in the service for which it is used, and is in total compliance with part 229 *prior to being placed in service*" and that "[t]he locomotive cannot legally be used until all Federal defects are corrected." FRA *Compliance Manual* 8-18 (emphasis added). It also says that "[a]n inspection is not needed unless the locomotive is used during the calendar day," and that "[i]f a locomotive completes an assignment prior to the expiration of the calendar day and is not returned to service for several days, it would need a daily inspection before midnight of the

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[9] *See, e.g.*, *As Freight Demand Falls, Idle Locomotive Queue Grows*, Ursa Space (July 17, 2020), https://ursaspace.com/blog/as-freight-demand-falls-idle-locomotive-queue-grows/ ("It is not uncommon to spot hundreds of idle locomotives at a 3-mile stretch of track snaking through the Arizona desert outside Tucson.").

day it is put back into service." *Id.* at 8-19. The manual, like the Part 229 regulations it interprets, plainly does not contemplate senseless and burdensome inspections of locomotives that are not going to move that day and may be parked in remote locations.

Third, the proposed distinction between "dedicated" places of repair (and perhaps storage) and everywhere else tells railroads that they cannot avoid civil penalties and strict liability unless they move temporarily unused locomotives to remote locations, rather than leaving them staged in the yards and on the sidings where they are most likely to be needed next. Petitioner insists that the nearest location that would meet his (undisclosed) criteria for a "dedicated place of repair" was 80 miles from the Salem facility. So his position is that Union Pacific cannot withdraw a locomotive from active service in Salem, but must transport it half a day's journey away—a voyage that would itself violate the statute if the locomotive is in any way out of compliance. The resulting inefficiencies and delays will ultimately be borne by the businesses that depend on railroads as one of the most crucial links in our national supply chain.

Fourth, these proposals would inevitably multiply fraudulent claims. Invoking strict liability under the SAA at least requires proof that a safety appliance was tangibly defective. And when locomotives are genuinely in active service, there are plenty of people around and the railroad has had a fair chance to ensure that the locomotive is in safe operating condition. A locomotive sitting unused on a siding in the middle of the night becomes a magnet for slip-and-fall claims under the interpretation proposed here.

Finally, and most importantly, the rule urged by petitioner and the United States sets up a situation in which railroads will be unable to avoid hundreds if not thousands of violations of the LIA every day, because they have no opportunity to correct non-complying conditions "before a defective locomotive, tender, part, or appurtenance is used again." 49 U.S.C. § 20702(a)(3). FRA already exercises significant enforcement discretion under the statute, but a regulatory regime in which massive non-compliance is unavoidable and regulated parties are constantly at the mercy of the agency is not desirable and obviously not what Congress intended.

## II. UP5683 WAS NOT BEING USED AS A LOCOMOTIVE AT THE TIME OF PETITIONER'S ACCIDENT

Once the overly broad bright-line rule proposed by petitioner and the government is rejected, this case becomes highly factbound. Considering all the relevant facts here, the district court and Seventh Circuit did not err in concluding that Union Pacific was not "us[ing]" UP5683 at the time of petitioner's accident. The record reveals no active employment of UP5683 *as a locomotive—i.e.*, actual or imminent application of tractive power. UP5683 was not even in "use" under the SAA definition from FRA's compliance manual, which "consider[s] a vehicle in use or allowed to be used as long as the railroad has or should have completed its required inspections and the vehicle is deemed ready for service." FRA *Compliance Manual* 10-2.

At the time of petitioner's alleged slip-and-fall, UP5683 was inert and idle on a remote "back track" of Union Pacific's Salem railyard. Pet.App. 7a-8a;

JA27-30; JA33-34. That backtrack is used to perform yard work and is not part of the main line. *See* JA94. The locomotive itself was doing no work at the time, and had no immediate prospect of doing work. To the contrary, petitioner conceded that at least three different switching operations would be needed to "put [the] train back together." Pet.App. 15a (quoting petitioner's deposition). Those operations took at least four hours, for reasons that had nothing to do with petitioner's accident. Petitioner never even intended to use UP5683 in those switching operations; he was on his way to tag it dead when he fell. *Supra* at 11.

In addition, UP5683 had just been transferred back into Union Pacific's possession hours before, after a month on loan to a different railroad. Petitioner himself has insisted from the outset of this litigation that the locomotive had not been inspected in days.[10] The most reasonable inference on this record is that Union Pacific had not yet put UP5683 into use and had no plans to do so until after the scheduled maintenance that was performed the next day. *See supra* at 10.

Unhappy with these facts, petitioner blurs the factual record. He suggests that the train "was to leave in less than an hour," Pet.Br. 22, but cites no evidence for that assertion. In fact, petitioner testified

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[10] That may or may not ultimately be true. The FRA *Compliance Manual* provides (at 8-17) that locomotives in a multi-locomotive consist may be inspected together and the inspection may be memorialized once, generally on the inspection card of the lead locomotive. So the fact that UP5683's card does not show a recent inspection actually proves little. But since petitioner has strategically insisted throughout this litigation that the locomotive had not been inspected, he should not benefit from the uncertainty.

that the "train was not set up and ready to go" when he arrived, JA30, and that he still had "[m]ore than three" moves to make "on a couple of different tracks and then put our train back together" before departure, JA60-61. Petitioner continued working to prepare the train for departure until "somewhere in the vicinity of 7:00 [AM]." JA59.

Petitioner similarly seeks to characterize the locomotive as "partway through a journey from Chicago to Dexter." Pet.Br. 22. But petitioner cites no evidence that the two movements from Chicago to Salem and from Salem to Dexter were two parts of a single unified itinerary. The only record evidence that would support that characterization—that UP5683 was scheduled for regular maintenance in Dexter—supports, if anything, an inference that it *was not* in "use."

Finally, it is undisputed that the *only* thing UP5683 was being prepared to do was to run "dead" as a nonoperational locomotive. The reason that petitioner stepped aboard UP5683 was to place a tag in the cab of the locomotive's window to identify it as "dead." So UP5683 was not just out of "use"; the record shows that no future use was contemplated, at least not until after the completion of the scheduled maintenance work in Dexter.

Against all of that, the only consideration potentially supporting a conclusion that UP5683 was in use at the time of petitioner's accident is his assertion that the locomotive was "powered on" until he shut it down. Pet.Br. 7 (quoting Pet.App. 2a). But the sole piece of evidence for that claim was petitioner's own equivocal and self-serving testimony that "I don't recall every motion, but … the Union Pacific locomotive, I think, was actually running and

I had to shut it down." JA30. And in any event, FRA's guidance documents make clear that a "dead locomotive can have the diesel engine either idling or shut down" so long as it does not "supply tractive effort." FRA *Compliance Manual* 8-8. Petitioner's equivocal testimony on a non-dispositive question (whether the engine was idling) is not enough to save his claim.

## III. PETITIONER CANNOT CONNECT HIS INJURY TO ANY VIOLATION

The question presented embraces only the "use" issue, but this Court has discretion to affirm on other grounds. *Dahda v. United States*, 138 S. Ct. 1491, 1498 (2018). Petitioner's claim fails as a matter of law because he cannot establish a violation of the LIA.

In his operative complaint, petitioner broadly asserted that Union Pacific violated the LIA (1) by operating a locomotive that was "not in proper condition," (2) by using a locomotive that had not been adequately inspected, and (3) by "fail[ing] to keep [the] floors of [UP5683] … *free from oil, water, waste, or* [other] obstruction," in violation of 49 C.F.R. § 229.119(c). *See* JA16-17. At summary judgment and on appeal, however, petitioner rested his claim exclusively on the latter two theories. *See* LeDure CA7 Br. 11; LeDure MSJ 5, Dkt. No. 50; LeDure Opp. to MSJ 11, 15-16, Dkt. No. 55.

The first theory fails because, as the Seventh Circuit and district court explained, there is no evidence "that an earlier inspection would have cured the hazard." Pet.App. 5a. Petitioner testified that the "spot was small, isolated, and without explanation." *Id.* His theory that an inspection could have turned up that spot rested "on mere speculation

and conjecture." *Id.* at 20a (citation omitted). Whether couched as a matter of but-for causation or "reasonabl[e] foreseeab[ility]," *id.* at 17a, petitioner cannot establish any connection between a claimed inspection failure and his injury. This Court denied review of that issue.

Petitioner's second rationale depends on an atextual reading of 49 C.F.R. § 229.119(c). Exterior walkways are not "floors" of anything, let alone of "cabs, passageways, and compartments"—all of which are interior features of locomotives. And petitioner's reading would require that railroads keep exterior walkways constantly free from water, which is impossible and would imply a violation and civil penalties every time it rains.

Finally, FRA's compliance manual explains (at 8-1) that "a locomotive may not be absolutely clean and free from all accumulations of oil, but still be in compliance," because the regulations "address[] conditions that create an unsafe working environment," not the "housekeeping practices of a railroad." Even if § 229.119(c) applies to exterior walkways, this spot of oil was not a violation.

If the Court declines to reach these issues, Union Pacific respectfully asks that the Court take care not to use language that could be understood as foreclosing their consideration on remand.

## CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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