No. 16-405

In the Supreme Court of the United States

BNSF RAILWAY COMPANY,
Petitioner,

v.

KELLI TYRRELL, as Special Administrator for the Estate of Brent T. Tyrrell, and ROBERT M. NELSON,
Respondents.

On Writ of Certiorari to the Supreme Court of Montana

BRIEF FOR RESPONDENTS

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QUESTION PRESENTED

May a state court exercise personal jurisdiction to adjudicate a claim under the Federal Employers' Liability Act over a U.S.-based defendant doing business in the state and at home there without violating the Due Process Clause of the Fourteenth Amendment?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Constitutional Provisions, Statutes, Regulations, and Rules

Other Authorities

STATUTORY PROVISIONS INVOLVED

Section 56 of Title 45, U.S.C., section 1445 of Title 28, U.S.C., section 1 of the Judiciary Act of August 13, 1888, ch. 866, 25 Stat. 434, and section 6 of the Judiciary Act of April 5, 1910, ch. 143, 36 Stat. 291, are reproduced at Appendix 1a-3a, *infra*.

INTRODUCTION

The Federal Employers' Liability Act (FELA), 45 U.S.C. §§ 51-60, provides a federal cause of action to interstate railroad employees injured on the job because of their employers' negligence. In crafting FELA, Congress recognized "the injustice to an injured employee of compelling him to go to the possibly far distant place of habitation" of a railroad to bring suit. *Balt. & Ohio R.R. Co. v. Kepner*, 314 U.S. 44, 49 (1941). Accordingly, since 1910, Congress has permitted railroad workers to bring FELA claims in an expansive set of federal and state jurisdictions beyond those where their employers are headquartered or incorporated, or where the workers' claims arise. Specifically, under 45 U.S.C. § 56, a worker may bring a FELA claim in any jurisdiction where the railroad is "doing business" at the time of suit. For more than a century, federal and state courts alike have adjudicated FELA claims against out-of-state railroads based only on the "doing business" connection required by FELA.

Relying on this established practice, respondents each brought FELA claims against petitioner BNSF Railway Company in state court in Montana, which is adjacent to their home states. The claimants asserted that Montana state courts could exercise personal jurisdiction over BNSF because the company's extensive business operations there constituted "doing business" under FELA and, in any event, were so constant and substantial

as to render BNSF essentially at home in Montana and subject to general jurisdiction there.

BNSF now asks this Court to wipe away a century's worth of case law and established practice to hold that the Montana state courts' exercise of personal jurisdiction violates BNSF's Fourteenth Amendment due process rights under the standard announced in *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014). In BNSF's view, a worker may bring his FELA claim only where a company is headquartered or incorporated, or where the injury occurs. BNSF's position would eviscerate FELA and defy Congress's intent to "load[] the dice a little in favor of" the worker's choice of forum. *Miles v. Ill. Cent. R.R. Co.*, 315 U.S. 698, 707 (1942) (Jackson, J., concurring). It would leave injured rail workers to endure nearly the same injustice they faced when FELA had no forum provision and a worker's only legal remedy was of little utility to a "poor man who" was "injured while in railroad employ." S. Rep. No. 61-432, at 4 (1910). BNSF's attempt to roll back the clock under the guise of due process should be rejected.

STATEMENT

1. In 1908, Congress adopted FELA with the aim of putting "on the railroad industry some of the cost for the legs, eyes, arms, and lives which it consumed in its operations." *Consol. Rail Corp. v. Gottshall*, 512 U.S. 532, 542 (1994) (internal quotation marks omitted). This human cost was massive, described by President Harrison as a "peril of life and limb as great as that of a soldier in time of war." *Johnson v. S. Pac. Co.*, 196 U.S. 1, 19 (1904).

FELA established a federal cause of action to compensate railroad workers for injuries resulting from their employers' negligence. *See* 45 U.S.C. § 51. To ensure its constitutionality, FELA "applies to railroads only

'while [they are] engaging in' interstate commerce," and permits suits only for injuries employees sustain while "themselves engaged 'in such commerce.'" *Norfolk & W. Ry. Co. v. Ayers*, 538 U.S. 135, 160 (2003) (quoting 45 U.S.C. § 51) (emphasis omitted). The statute thus targets an unusually mobile group of workers, many of whom work—and are injured—hundreds of miles from home while employed by an interstate carrier.

FELA overrode many common-law tort standards that were barriers to compensation for injured railroad workers. For example, it "abolished the fellow servant rule, rejected the doctrine of contributory negligence in favor of that of comparative negligence, and prohibited employers from exempting themselves from FELA through contract." *Gottshall*, 512 U.S. at 542-43. FELA thus functions as "a broad remedial statute," *Atchison, Topeka & Santa Fe Ry. Co. v. Buell*, 480 U.S. 557, 562 (1987), and courts give it a "liberal construction" to accomplish Congress's objectives, *Urie v. Thompson*, 337 U.S. 163, 181 (1949).

FELA's focus on employer negligence differs from a no-fault workers' compensation scheme. But in many cases, FELA is railroad workers' closest equivalent to workers' compensation. FELA preempted some state-law remedies otherwise available for injured railroad employees. *See Erie R.R. v. Winfield*, 244 U.S. 170, 174 (1917). And many state workers' compensation laws specifically exclude railroad workers on the assumption that FELA provides them "adequate protection." *Hilton v. S.C. Public Rys. Comm'n*, 502 U.S. 197, 202 (1991).

When FELA was enacted, it did not address the jurisdiction where a worker could bring suit. Instead, a provision of the Judiciary Act provided the applicable general rule: A worker could bring a FELA claim only in

a jurisdiction where the railroad defendant was an "inhabitant," *Kepner*, 314 U.S. at 49, which courts interpreted to mean a railroad's state of incorporation. Congress soon concluded that subjecting employees to the difficulty and expense of litigating in distant forums was inconsistent with FELA's remedial purpose. *Id.* at 49-50.

Accordingly, in 1910, Congress amended FELA to expand workers' choices of where to bring and maintain suits. It added the following language to the section now codified at 45 U.S.C. § 56, which until then consisted only of a two-year statute-of-limitations provision:

> Under this Act an action may be brought in a circuit court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this Act shall be concurrent with that of the courts of the several States, and no case arising under this Act and brought in any state court of competent jurisdiction shall be removed to any court of the United States.

Act of Apr. 5, 1910, ch. 143, 36 Stat. 291. FELA's broad language regarding the proper forum for a plaintiff's claim was "deliberately chosen to enable the plaintiff … to find the corporation at any point or place or State where it is actually carrying on business, and there lodge his action, if he chooses to do so." *Kepner*, 314 U.S. at 50 (internal quotation marks omitted).

Congress subsequently made minor changes to Section 56, changing the reference from "circuit court" to "district court," extending the statute-of-limitations period to three years, and moving to another part of the Code, 28 U.S.C. § 1445(a), the bar on removing state-court

FELA actions to federal courts. In all other respects, Section 56 stands today as it did in 1910.

2. BNSF is a freight rail carrier that operates in 28 states, including Montana, and two Canadian provinces. J.A. 25.[1] Although BNSF is incorporated in Delaware and has its principal place of business in Fort Worth, Texas, J.A. 24, the company (or its corporate predecessor, Burlington Northern) has been registered to do business and conduct its affairs in Montana since 1970, J.A. 34. It maintains a registered agent in Billings, Montana, *see* Tyrrell Opp. to Mot. To Dismiss, Bremseth Decl., Exh. 4, and has a Montana Division headquartered in Billings, *id.* Exh. 7, at 1. That division, which covers portions of North Dakota, South Dakota, and Idaho as well, is now one of ten nationwide. *See* BNSF, Operating Divisions Alignment Map, May 24, 2016.[2] BNSF also maintains a government affairs office in Montana. Bremseth Decl., Exh. 5, at 6. State records indicate that in the 2013-2014 legislative session, BNSF had four Montana-based lobbyists representing its interests before the state legislature. *See* Montana Commissioner of Political Practices, Lobbyist and Principal Search, 2013-2014 Session.[3]

BNSF has a constant presence in Montana. It owns and operates more than 2,100 miles of rail lines there, and

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[1] For a map of the BNSF rail system as of 2013, see BNSF Railway Company, Form 10-K for the Fiscal Year Ended December 31, 2013, submitted to the U.S. Securities and Exchange Commission 6, available at https://www.sec.gov/edgar/searchedgar/company search.html.

[2] *Available at* http://www.bnsf.com/customers/pdf/maps/network -map.pdf.

[3] *Available at* https://app.mt.gov/cgi-bin/camptrack/lobby search/lobbySearch.cgi (by searching the 2013-2014 session, and identifying "BNSF Railway Company" as the "Principal").

in 2013, BNSF's freight trains logged more than 40 million locomotive miles traversing the state. J.A. 39. Since 2010, it has opened approximately 40 new facilities in the state, Bremseth Decl., Exh. 8, at 2, and its facilities include an economic development office, *id.*, Exh. 7, at 1. BNSF employs more than 2,200 people in Montana. *Id.* BNSF earned more than $1.7 billion in 2013 from its Montana operations. J.A. 37.

BNSF has developed a de facto monopoly over rail shipping in Montana. Its in-state activities dwarf those of Union Pacific, the only other Class I carrier operating in the state,[4] which owns a mere 125 miles of track. Nelson Opp. to Mot. To Dismiss, Fain Aff., Exh. 1. Montana Rail Link (MRL), a domestic carrier in the state, also operates on several hundred miles of tracks but leases those tracks from BNSF. *Id.* Since 1987, MRL has maintained an agreement with BNSF that gives BNSF significant control over MRL's pricing when MRL moves freight off its lines to other carriers. *See* Report to the Rail Service Competition [Council] Regarding Requested Research Concerning the Impact of Paper Barriers on Montana Rail Shippers' Competitiveness 2, 12 (2013) (hereinafter, Paper Barriers Study).[5]

Many BNSF employees "do not have a traditional 'work place' as that term is used in other employment settings." J.A. 30. Their work is "highly transitory," taking them to locations along the "entire BNSF rail system." *Id.* For example, in 2014, BNSF used 50 large "production gangs" staffed by employees whom the

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[4] Class I carriers are those "having annual carrier operating revenues of $250 million or more." 49 C.F.R. § 1201.1-1.

[5] *Available at* https://www.mdt.mt.gov/business/rscc/docs/rscc-paper-barrier.pdf (study requested by a council created by the Montana legislature to promote rail service competition in the state).

company solicited from across BNSF's rail system. *Id.* BNSF's production gangs—which function like mobile assembly lines—work around the country, including in Montana. *Id.*

3. Respondent Kelli Tyrrell is a South Dakota resident and the widow of Brent Tyrrell, a former BNSF employee. J.A. 20. Mr. Tyrrell worked for BNSF in South Dakota, Minnesota, and Iowa. Tyrrell's Opp. to Def.'s Mot. to Dismiss 3. Mr. Tyrrell died of renal cell carcinoma (kidney cancer) caused by exposure to harmful industrial chemicals during his BNSF employment. J.A. 20-21. In 2014, Ms. Tyrrell—as the administrator of Mr. Tyrrell's estate—brought a FELA claim against BNSF in a Montana state court based in Billings, where BNSF's registered agent is located and where venue was proper under state law. Pet. App. 3a, 48a; *see* Mont. Code Ann. 25-2-122.

Respondent Robert Nelson is a North Dakota resident who was employed by BNSF as a fuel truck driver. J.A. 16. While working in Washington State, Mr. Nelson fell and suffered disabling knee injuries when a ballast on which he was standing rolled from under him. J.A. 16, 18. In 2011, Mr. Nelson filed a FELA claim against BNSF in the same state court in which Ms. Tyrrell had brought suit. J.A. 15-17.

BNSF moved to dismiss both suits for lack of personal jurisdiction. Pet. App. 3a-4a. The court in Mr. Nelson's case granted BNSF's motion. *Id.* 40a. It held that under *Daimler*, 134 S. Ct. 746, Montana state courts could not, consistent with due process, exercise personal jurisdiction over BNSF to adjudicate Mr. Nelson's claim. Pet. App. 40a. Acknowledging that the same limit would not apply had Mr. Nelson brought his case in the federal court down the street, the court concluded that the case should have

been brought "in a U.S. District Court in one of the 28 states where [BNSF] does business, or in a State Court" in the plaintiff's home state (North Dakota) or the state where the injury occurred (Washington). *Id.* Mr. Nelson appealed.

In Ms. Tyrrell's case, over which a different judge presided, the court denied the motion to dismiss. *Id.* 47a. It concluded that BNSF is "at home" in Montana and subject to general jurisdiction there, *id.* 63a-64a, and, in any event, that FELA permits Montana state courts to exercise personal jurisdiction over BNSF wherever it is doing business, *id.* 72a-73a. The court certified its order for interlocutory appeal, *id.* 41a-42a, which the Montana Supreme Court permitted and consolidated with Mr. Nelson's appeal, *id.* 2a, 35a.

The Montana Supreme Court held that Mr. Nelson and Ms. Tyrrell were entitled to proceed with their claims because FELA authorizes state courts to exercise personal jurisdiction over BNSF wherever it does business. The Montana court emphasized that this Court has consistently interpreted FELA "to allow state courts to hear cases brought under the FELA even where the only basis for jurisdiction is the railroad doing business in the forum state." *Id.* 8a (citing, *e.g.*, *Miles*, 315 U.S. 698). It was "undisputed" that BNSF meets that standard. *Id.* 13a.

The state supreme court rejected BNSF's argument that exercising personal jurisdiction over it would violate the Fourteenth Amendment's Due Process Clause. The court recognized that *Daimler* held that, for Fourteenth Amendment purposes, "general jurisdiction requires foreign corporations to have affiliations so 'continuous and systematic' as to render them 'at home' in the forum state." *Id.* 12a (quoting *Daimler*, 134 S. Ct. at 749). But it

observed that neither *Daimler* nor any of the other cases on which BNSF relied involved congressional power to authorize state courts to exercise personal jurisdiction over defendants for FELA claims. *Id.* 11a. It declined "to depart from the language of 45 U.S.C. § 56—and from a century of U.S. Supreme Court precedent interpreting it." Pet. App. 15a.

Accordingly, the state supreme court reversed the dismissal of Mr. Nelson's complaint and affirmed the denial of BNSF's motion to dismiss Ms. Tyrrell's complaint. *Id.* 2a-3a. The court's holding made it unnecessary to address plaintiffs' alternative argument that BNSF consented to personal jurisdiction by registering to do business in Montana and maintaining an agent for service of process there. *Id.* 19a n.3.

SUMMARY OF ARGUMENT

I. Two sentences in Section 56 work together to permit state courts to exercise personal jurisdiction over an interstate rail carrier doing business in the state.

A. The first relevant sentence (hereinafter, Sentence One) provides that "an action may be brought" in a federal district where, among other places, a railroad is "doing business." This sentence identifies appropriate court venues *and* authorizes those courts to exercise personal jurisdiction over FELA defendants.

Although BNSF urges this Court to apply a bright-line rule distinguishing venue and personal jurisdiction for purposes of Sentence One, the line dividing the two in 1910, when Section 56's relevant amendments were adopted, was not nearly so clear. Rather, this Court's decisions from that period repeatedly interpreted a provision of the Judiciary Act—which permitted federal-question suits against a corporate defendant only in the state of the defendant's "inhabitation"—to govern

personal jurisdiction, not just venue, in federal courts. Congress pointed to two cases adopting this interpretation as examples of the general rule from which it intended to exempt FELA employees by amending Section 56 in 1910.

Moreover, although Congress frequently authorizes the exercise of personal jurisdiction in federal courts by expressly addressing service of process, it need not address personal jurisdiction in this way. The meaning of a statute providing that suit "may be brought" in a particular court must be derived through the full panoply of interpretative tools—which include text, context, purpose, and legislative history. *See Omni Capital Int'l v. Rudolf Wolff & Co.*, 484 U.S. 97 (1987); *Robertson v. R.R. Labor Bd.*, 268 U.S. 619 (1925). Using this approach, numerous federal courts have interpreted federal statutes that do not explicitly use the terms "service of process" or "personal jurisdiction" to authorize federal courts to take personal jurisdiction over defendants or witnesses.

B. Section 56's second relevant sentence (hereinafter, Sentence Two) provides that the "jurisdiction of the courts of the United States under this Act shall be concurrent with that of the courts of the several States." 45 U.S.C. § 56. That sentence confirms that state courts, as well as federal courts, have personal jurisdiction in FELA cases.

Although Sentence Two also confirms the presumptive subject-matter jurisdiction of state courts to adjudicate FELA claims, BNSF is wrong to assert that the term "concurrent" jurisdiction must mean subject-matter jurisdiction and *nothing else*. Some case law at the time of FELA's amendment used the term to refer to personal jurisdiction as well. Moreover, BNSF's attempt to confine Sentence Two's effect to confirming state courts'

preexisting subject-matter jurisdiction over FELA claims would ignore nearly a century of this Court's precedent, which has repeatedly interpreted Section 56's "doing business" language to apply to state courts as well as federal ones.

C. Reading Section 56 as BNSF urges would render largely illusory the "substantial right" that FELA provides to workers "to select [a] forum" for their claims. *Boyd v. Grand Trunk W. R.R. Co.*, 338 U.S. 263, 266 (1949) (per curiam). Under BNSF's position, a worker injured far from home could not even bring suit in his home state, in either state or federal court. For example, Mr. Nelson, a resident of North Dakota, would have to go to Delaware, Texas, or Washington to seek compensation for his work-related injuries, all the while bearing the cost of litigation far from home. Such an outcome cannot be reconciled with statutory language "deliberately chosen to enable the plaintiff … to find the corporation at any point or place or State where it is actually carrying on business, and there lodge his action." *Kepner*, 314 U.S. at 50 (internal quotation marks omitted).

In addition, reading Section 56 as BNSF urges is unnecessary to guard against an imagined onslaught of FELA claims in jurisdictions where the only connection to the claims is that the railroads do business there. For roughly a century, state courts have adjudicated FELA claims under factual circumstances identical in all relevant respects to those at issue in this case, just as Congress anticipated when it amended FELA in 1910. Moreover, in 1947, Congress considered and rejected language to narrow the jurisdictions in which a FELA plaintiff could bring suit, although industry voiced precisely the same concerns about forum-shopping "abuses" as it does today. *Pope v. Atl. Coast Line R.R. Co.*,

345 U.S. 379, 386 (1953). There is every reason to believe that Congress intended to "load[] the dice a little in favor of" workers when it crafted Section 56. *Miles*, 315 U.S. at 707 (Jackson, J., concurring). To the extent that BNSF objects to this established practice, its complaint is best directed to Congress. In the meantime, state courts maintain their power to decline to adjudicate claims brought by out-of-state plaintiffs for out-of-state injuries against defendants neither headquartered nor incorporated in the states, so long as their refusal is based on generally applicable local law. Pet. App. 15a; *see also State of Mo. ex rel. S. Ry. Co. v. Mayfield*, 340 U.S. 1, 4 (1950).

II. The authority provided to a state's courts by Section 56 to exercise personal jurisdiction over companies doing business in the state raises no constitutional concerns. Congress has broad power to permit state courts, as well as federal ones, to exercise personal jurisdiction over U.S.-based defendants to adjudicate federal claims. That congressional power, unlike the power of states to assert their *own* authority over out-of-state defendants, is not constrained by the Fourteenth Amendment's limits on the territorial reach of state authority. Any applicable due process limitations would derive from the Fifth Amendment, but BNSF has waived any personal jurisdiction defense based on that constitutional limitation.

III. Even if this Court were to hold that FELA does not address state-court personal jurisdiction, Montana state courts may nevertheless constitutionally adjudicate the claims in this case because BNSF is "at home" in Montana under this Court's general-jurisdiction jurisprudence. Under *Daimler*, a company's place of incorporation or corporate headquarters is an "exemplar"

of a forum in which a corporation is at home. 134 S. Ct. at 760. However, as *Daimler* recognizes, "a corporation's operations in a forum other than" these exemplar forums "may be so substantial and of such a nature as to render the corporation at home in that State" as well. *Id.* at 761 n.19.

BNSF has integrated itself into Montana's economic and political life just as if it were a local company. BNSF's headquarters for the Montana Division—which spans four states—are located in Montana, and the company has more than 40 facilities and 2,200 employees in the state. BNSF has been registered to do business in the state for decades and has an agent for service of process there. On any given day, BSNF's trains crisscross the state on the company's more than 2,100 miles of permanent tracks, and BNSF represents its interests before the state legislature. BNSF has earned more than $1.7 billion in a single year from its ability to do business in Montana. Under these circumstances, BNSF is "at home" in Montana, and it does not offend traditional notions of substantial justice and fair play to expect BNSF to answer to claims there.

BNSF's operations in Montana vastly exceed the attenuated corporate contacts deemed insufficient to support general jurisdiction in *Daimler*, 134 S. Ct. 746, *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915 (2011), and *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408 (1984). Rather, its contacts are more akin to the circumstances in *Perkins v. Benguet Consolidated Mining Co.*, 342 U.S. 437 (1952), a case in which this Court sustained general jurisdiction in a state outside a company's place of incorporation or principal place of business. Although BNSF would have this Court limit general jurisdiction outside of the

paradigmatic forums of incorporation or principal place of business to situations in which a company adopts a surrogate location for its principal place of business, that limitation is unsupported by *Perkins* or any case interpreting it.

IV. The Montana Supreme Court acknowledged that plaintiffs had argued that the state's courts could exercise personal jurisdiction over BNSF for the additional reason that BNSF consented to jurisdiction. However, the court did not reach the issue. Pet. App. 19a n.3. If this Court does not affirm on a ground addressed above, it should remand to the Montana courts to consider in the first instance plaintiffs' consent argument—which hinges in part on Montana state law.

ARGUMENT

I. FELA Authorizes State Courts To Exercise Personal Jurisdiction Over Railroads Wherever They Do Business.

The Montana Supreme Court correctly interpreted FELA to permit the state's courts to exercise personal jurisdiction over BNSF because the company is doing business in Montana. That reading is supported by FELA's text, structure, and purpose and by decades of this Court's jurisprudence.

A. Section 56's Reference To Where Suit "May Be Brought" Governs Personal Jurisdiction In Federal Courts.

1. As originally enacted in 1908, FELA contained no language governing where claims could be brought. Litigants instead had to rely on a provision of the Judiciary Act, as reenacted and amended, to determine where to bring suit. That provision established the "general rule" that, unless a defendant voluntarily

appeared in federal court, the defendant had to be personally served in the district where the federal court was located to subject the defendant to personal jurisdiction. *Robertson*, 268 U.S. at 622. This rule was "in accordance with the practice at the common law." *Id.*

As adopted by the First Congress, the Judiciary Act of 1789 also made clear that not just any federal district court would do for service of process. Rather, no civil suit could be brought in federal court "against an inhabitant of the United States, by any original process in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving the writ." Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 79. In the Jurisdiction and Removal Act of 1875, Congress reenacted that provision, with limited amendment, in its substantial overhaul of the federal court system. *Ex parte Schollenberger*, 96 U.S. 369, 375 (1877); *see* Jurisdiction and Removal Act of Mar. 3, 1875, ch. 137, § 1, 18 Stat. 470 (providing that no civil suit could be brought in federal court "against any person by any original process or proceeding in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving such process or commencing such proceeding").

Twelve years later, however, Congress deleted the reference to the district in which a defendant "shall be found." This deletion was "designed to shut the door against service of process upon a natural person in any place where he might be caught." *Neirbo Co. v. Bethlehem Shipbuilding Corp.*, 308 U.S. 165, 171 (1939). Instead, it provided that where a federal court's subject-matter jurisdiction was based solely on diversity, "suit [could] be brought only in the district of the residence of either the plaintiff or the defend[a]nt." Judiciary Act of Mar. 3, 1887, ch. 373, § 1, 24 Stat. 552, corrected by Judiciary Act of

Aug. 13, 1888, ch. 866, § 1, 25 Stat. 434. In contrast, in cases involving a federal question, civil suit could be brought against a defendant "by any original process or proceeding" only in the district where the defendant was an "inhabitant." *Id.*

In 1908, at the time of FELA's enactment, the amended Judiciary Act provision governing where civil suit could be brought addressed both personal jurisdiction and venue in the federal courts, although—as this Court has recognized—those two concepts are distinct. *See Lindahl v. Office of Pers. Mgmt.*, 470 U.S. 768, 793 n.30 (1985) (venue relates to litigants' convenience); *Leroy v. Great W. United Corp.*, 443 U.S. 173, 180 (1979) (personal jurisdiction "goes to the court's power to exercise control over the parties"). By 1908, this Court had repeatedly recognized that the provision applies to a federal court's authority to subject a defendant to personal jurisdiction.

For example, in *Macon Grocery Co. v. Atlantic Coast Line Railroad Co.*, 215 U.S. 501 (1910), this Court considered whether a federal court "acquired jurisdiction over the person of the defendants." *Id.* at 505. It concluded that—regardless whether subject-matter jurisdiction was based on a federal question or diversity of citizenship—the corporate defendant could not be "compelled to answer in a district of which neither the defendant nor the plaintiff is an inhabitant" under Section 1 of the amended Judiciary Act. *Id.* at 510; *see also id.* at 508-09 (describing relevant portion of Section 1). Accordingly, it held that the case should have been dismissed "for want of jurisdiction over the persons of the defendants." *Id.* at 510. Likewise, in *Davidson Bros. Marble Co. v. United States*, 213 U.S. 10 (1909), corporate defendants moved to "set aside the service of the summons…, and to dismiss the said action upon the ground that the said court ha[d] no jurisdiction

of the persons of the defendants." *Id.* at 13. This Court held that the circuit court was "without jurisdiction" over the suit because the defendants were not inhabitants of the state in which suit was brought, as required by the Judiciary Act in federal-question cases. *Id.* at 17; *see also*, *e.g.*, *In re Keasbey & Mattison Co.*, 160 U.S. 221, 228, 231 (1895).

2. Litigation following FELA's enactment "promptly disclosed what Congress considered deficiencies in" the statute with respect to "the right of railroad employees to bring personal injury actions." *Kepner*, 314 U.S. at 49. Congress was concerned that the Judiciary Act limited FELA plaintiffs to bringing suit in a railroad's place of inhabitation. *Id.* It recognized that forcing a worker to bring suit where a railroad was incorporated could force the worker to travel to "a place in a distant State from the home of the plaintiff," perhaps "a thousand miles or more from the place where the injury was occasioned." S. Rep. No. 61-432, at 4. Congress expressed concern that this requirement would impose on vulnerable workers the "extreme difficulty, if not impossibility," of "securing the attendance of the necessary witnesses at such a distant point," and could "make[] the remedy given by [FELA] of little avail." *Id.*

Both the House and Senate Reports for FELA's 1910 amendment pointed to two cases highlighting the unacceptable limitations of the Judiciary Act for FELA plaintiffs. *See id.*; H.R. Rep. No. 61-513, at 6 (1910); *see also Kepner*, 314 U.S. at 49 & n.6 (discussing this aspect of the legislative history). One was *Macon Grocery*, 215 U.S. at 510, which (as discussed above) held that under the Judiciary Act, a federal-question case should have been dismissed "for want of jurisdiction over the persons of the

defendants" because suit was not brought in the state in which the corporate defendants were inhabitants.

The other was *Cound v. Atchison, Topeka & Santa Fe Railway Co.*, 173 F. 527 (C.C.W.D. Tex. 1909), a FELA case in which a Texas worker injured in New Mexico by a Kansas railroad brought suit in a Texas federal court. *Id.* at 530. As in *Macon Grocery*, the defendant asserted a "plea to the [court's] jurisdiction" on the ground that it was not an inhabitant of Texas. *Id.* at 534. The court determined that because FELA did not then address "whether th[e] court ha[d] jurisdiction," *id.* at 530, "recourse must be had to" the Judiciary Act, *id.* at 532. It therefore dismissed the FELA suit for "want of jurisdiction," *id.* at 534, and remarked that this Court's case law had "definitely and conclusively settled" that "for jurisdictional purposes, a railway corporation [was] a person and inhabitant of the state under the laws of which it [was] incorporated," *id.* at 533.

To avoid the *jurisdictional* dismissals compelled by cases like *Macon Grocery* and *Cound*, Congress added Sentence One to provide that a FELA plaintiff may bring suit "in a [district] court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action." This amendment intentionally "provid[ed] an exception" from the Judiciary Act's *jurisdictional* rule that a federal-question suit could be brought only where a defendant was an inhabitant. *Kepner*, 314 U.S. at 50.

BNSF errs in asserting that a bright line separated venue and personal jurisdiction in 1910, when FELA was amended. BNSF's error appears to stem from its mistaken belief that Section 11 of the Judiciary Act of 1789, which permitted service wherever a defendant could

be found, remained in effect at the time of FELA's amendment in 1910 and governed personal jurisdiction in federal courts, Pet'r Br. 30-31, whereas Section 1 of the Judiciary Act of 1888 governed general venue in federal courts at that time, *id.* 6-7. As discussed above, these two provisions did not exist side-by-side when FELA was amended in 1910; rather, Section 11 of the 1789 Act was reenacted in 1875 and amended in the 1880s. The two provisions equally governed both personal jurisdiction and venue in federal courts during the different time periods in which they were in effect.

In sum, the relevant provision of the Judiciary Act was understood to govern both venue and personal jurisdiction in federal courts. Section 56's "exception," enacted to address the jurisdictional limitations of the Judiciary Act, therefore is properly understood to do so as well.

3. BNSF acknowledges (at 31-32) that Congress has broad authority to set rules for the exercise of personal jurisdiction in federal courts. *See*, *e.g.*, *United States v. Union Pac. R.R. Co.*, 98 U.S. 569, 604 (1878). It contends, however, that "statutes expanding venue without expanding options for service of process do not affect personal jurisdiction," and that Section 56 is such a statute. Pet'r Br. 33. This purported rule is no rule at all.

Some federal statutes include provisions expressly specifying where process may be served. *See*, *e.g.*, Securities Exchange Act, 15 U.S.C. § 78aa; ERISA, 29 U.S.C. § 1132(e)(2). And some "basis for [a] defendant's amenability to service" is necessary to support a court's exercise of personal jurisdiction because "[s]ervice of summons is the procedure by which a court having venue and jurisdiction of the subject matter of the suit asserts jurisdiction over the person of the party served." *Omni*

Capital, 484 U.S. at 104 (internal quotation marks and alteration omitted). However, this Court has never held that Congress must expressly refer to service of process in a statute to authorize it or—by extension—to permit a court's exercise of personal jurisdiction.

Rather, a statute's meaning must be derived through the full panoply of interpretative methods—text, context, purpose, and legislative history. Even absent an express provision for service, context may indicate Congress's intentions regarding service of process. For example, in *Robertson v. Railroad Labor Board*, this Court asked whether the Transportation Act's authorization of the Railroad Labor Board to "invoke the aid of any United States District Court" to compel a witness's appearance, 268 U.S. at 620 (internal quotation marks omitted), "provide[d] that the process of every District Court shall run into every part of the United States," *id.* at 622. Although the Court ultimately held the statute did not, its conclusion was based on an examination of the statute's purpose and the practical implications of authorizing an advisory board to invoke nationwide service of process. *Id.* at 626-27.

Similarly, in *Omni Capital*, although the Court considered and rejected an argument that a "nationwide service provision for a private action" was implicit in a portion of the Commodity Exchange Act, 484 U.S. at 108, it did so only after carefully reviewing the statute's text and amendment history, *id.* at 104-08. It did not, as the United States suggests (at 12-13), adopt a rule requiring statutes to invoke the terms "service" or "personal jurisdiction" expressly to govern jurisdiction over a defendant.

Traditional tools of statutory interpretation may, in some circumstances, confirm that Congress *did* intend to

authorize service of process and the exercise of personal jurisdiction without expressly saying so. For example, 18 U.S.C. § 1965(a), a portion of RICO, states that any civil RICO action "against any person may be instituted in the district court of the United States for any district in which such person resides, is found, has an agent, or transacts his affairs." The weight of authority in recent years holds that this provision "grants personal jurisdiction over an initial defendant in a civil RICO case." *PT United Can Co. Ltd. v. Crown Cork & Seal Co., Inc.*, 138 F.3d 65, 71-72 (2d Cir. 1998); *accord FC Inv. Grp. LC v. IFX Markets, Ltd.*, 529 F.3d 1087, 1099-1100 (D.C. Cir. 2008); *Cory v. Aztec Steel Bldg., Inc.*, 468 F.3d 1226, 1231 (10th Cir. 2006). Courts have adopted this view notwithstanding that the provision does not specifically address service of process, while other subsections of 18 U.S.C. § 1965 do. *See*, *e.g.*, *PT United Can Co.*, 138 F.3d at 72. BNSF is thus incorrect to contend (at 31-32) that RICO is an example of a statute that confers personal jurisdiction only because it expressly "expand[s] the plaintiff's options for service."[6]

This portion of RICO is not the only example of a federal statute that authorizes federal courts to exercise

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[6] Similarly, BNSF dramatically overstates the lower-court authority to support its contention that other statutes addressing venue but silent as to service of process have been held not to govern personal jurisdiction. *See* Pet'r Br. 32-33. *Cable/Home Commc'n Corp. v. Network Prods., Inc.*, 902 F.2d 829, 855-56 (11th Cir. 1990), and *Inamed Corp. v. Kuzmak*, 249 F.3d 1356, 1363 (Fed. Cir. 2001), do not even cite the provisions on which BNSF relies—28 U.S.C. § 1400(a) and (b)—much less interpret the scope of those provisions. BNSF does the same (at 32, 38) with respect to statutes that it says address service of process or concurrent subject-matter jurisdiction but have been held not to confer personal jurisdiction in state courts: *Hoffman v. Chandler*, 431 So. 2d 499, 501-02 (Ala. 1983), did not consider an argument that ERISA confers personal jurisdiction on a state court.

personal jurisdiction over a person without explicitly addressing service of process or personal jurisdiction. *See, e.g.*, *U.S. Int'l Trade Comm'n v. ASAT, Inc.*, 411 F.3d 245, 250-52 (D.C. Cir. 2005) (holding that the Tariff Act, although "completely silent as to service of process," impliedly authorizes it nationwide because such authorization was necessary "to effectuate the underlying statute's purpose"); *FEC v. Comm. to Elect Lyndon La Rouche*, 613 F.2d 849, 858-62 (D.C. Cir. 1979) (statutory provision granting the Federal Election Commission the power to enforce subpoenas "require[s] an implied grant of authority for extraterritorial service of process to effectuate the purpose of the regulatory scheme"); *FTC v. Browning*, 435 F.2d 96, 99 (D.C. Cir. 1970) (declining to interpret Section 9 of the Federal Trade Commission Act "as simply a venue statute" and instead reading the provision to contain implicit authorization for extraterritorial service of process).

The proper question, then, is whether FELA was intended to ensure that a plaintiff could bring a claim against a railroad in a district court in any state where that railroad is doing business, with service of process in such a state implicitly authorized as being necessary to effectuate that intention. Nothing in Sentence One compels the conclusion that it addresses only venue and *not* also personal jurisdiction. It does not use the term venue. It speaks in terms of where a suit "may be brought" in federal court. Moreover, as discussed above, FELA's structure, legislative record, and purpose demonstrate that Section 56 governs personal jurisdiction, regardless whether some other federal statutes do so more directly.[7]

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[7] The United States attributes special significance to Congress's adoption of the Clayton Act four years after amending FELA in 1910. The Clayton Act addresses both where an action "may be brought"

B. FELA's Reference To State-Court "Jurisdiction" Permits State Courts To Exercise Personal Jurisdiction Over Defendants Doing Business In Their States.

The second relevant sentence of Section 56 (Sentence Two) provides that the "jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several States." The better reading of Sentence Two is that it both confirms that state courts have subject-matter jurisdiction *and* extends to state courts the authority to exercise personal jurisdiction provided in Sentence One.

One purpose of Sentence Two is to confirm the subject-matter jurisdiction of the state courts to adjudicate FELA claims. Although state courts are "presumptively competent" to adjudicate federal claims, *Tafflin v. Levitt*, 493 U.S. 455, 458 (1990), a state-court decision issued in 1909 held otherwise with respect to FELA claims. *See Hoxie v. N.Y., New Haven & Hartford R.R. Co.*, 73 A. 754 (Conn. 1909). Section 56 was amended in part to supersede this erroneous decision. *See* S. Rep. No. 61-432, at 5; H.R. Rep. No. 61-513, at 7.

BNSF and the United States wrongly contend that Sentence Two stops there and has no impact on state courts' personal jurisdiction over defendants. The term

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and where process "may be served." U.S. Br. 13 (citing Clayton Act, ch. 323, § 12, 38 Stat. 736, now codified at 15 U.S.C. § 22). However, the interpretation of "a different statute enacted by a different Congress" is of little use. *DeVargas v. Mason & Hanger-Silas Mason Co.*, 911 F.2d 1377, 1386 (10th Cir. 1990). And as the other statutory examples described at pp. 21-22 demonstrate, Congress has not been consistent over time in the extent to which it expressly invokes "service" when it intends to authorize the exercise of personal jurisdiction.

"jurisdiction" in Section 56 need not have only one meaning: subject-matter jurisdiction. Rather, the term, when modified by neither "subject-matter" nor "personal," may apply to both. *See Lightfoot v. Cendant Mortg. Corp.*, 137 S. Ct. 553, 562 (2017) (holding that although "court of competent jurisdiction" usually means subject-matter jurisdiction, it may in some cases refer as well to personal jurisdiction); *Intera Corp. v. Henderson*, 428 F.3d 605, 620-21 (6th Cir. 2005) (recognizing that Federal Rule of Civil Procedure 41(b)'s reference to dismissals for "lack of jurisdiction" covers both dismissals for lack of subject-matter and personal jurisdiction).

Nor does the statute's reference to the "concurrent" nature of the jurisdiction rebut that presumption or resolve the ambiguity. BNSF points to various statutes using "concurrent" jurisdiction to refer to subject-matter jurisdiction. Pet'r Br. 38. But the text and structure of some are entirely different. *See*, *e.g.*, 29 U.S.C. § 1132(e)(1) (ERISA provision allowing for "concurrent jurisdiction of [specified] *actions*" but specifying "exclusive [federal] jurisdiction" of certain other "actions"); 49 U.S.C. § 11501(c) (giving federal district courts "concurrent" jurisdiction "to prevent a [specified statutory] violation" regardless of "the amount in controversy or citizenship of the parties").

Moreover, the fact that some statutes or cases use "concurrent" jurisdiction to refer only to subject-matter jurisdiction hardly establishes that "concurrent" jurisdiction is susceptible to only one meaning here. A term "may mean one thing for one purpose and something different for another." *United States v. Memphis Cotton Oil Co.*, 288 U.S. 62, 68 (1933). Some courts, including this Court, have used "concurrent" jurisdiction to refer to jurisdiction over persons, not subject matter. *See Claflin*

v. Houseman, 93 U.S. 130, 136 (1876) ("Every citizen of a State is a subject of two distinct sovereignties, having concurrent jurisdiction in the State,—concurrent as to place *and persons*…." (emphasis added)); *Ala. Great S. R.R. Co. v. Fed. Maritime Comm'n*, 379 F.2d 100, 102 (D.C. Cir. 1967) (per curiam) (Shipping Act "does not preclude concurrent jurisdiction over the same 'persons'"). In light of this ambiguity and FELA's remedial purpose, Sentence Two should be liberally construed to accomplish Congress's objective, *Buell*, 480 U.S. at 561, of permitting FELA plaintiffs a broad range of jurisdictions in which to bring their suits.

The United States (at 11) attributes special significance to Sentence Two's focus on the "jurisdiction of the courts of the United States *under this chapter*," which is "concurrent with that of the courts of the several States." (Emphasis added.) It contends that Congress's use of "under this chapter" indicates that "both state and federal courts have jurisdiction over a particular type of action," not jurisdiction over a defendant. The term may help confirm concurrent subject-matter jurisdiction. However, because "under this chapter" modifies only the "jurisdiction of the courts of the United States," it also supports the conclusion that elsewhere—that is, in Sentence One—FELA does in fact confer *new* jurisdiction on federal courts, not just venue.

Further, the structure of Section 56 supports reading Sentence Two as extending to state courts the personal jurisdiction granted federal courts by Sentence One. When Congress amended FELA in 1910, it added Sentences One and Two as a single paragraph within the same section, indicating that it intended them to work as a package. *See Davis v. Mich. Dep't of Treasury*, 489 U.S. 803, 809 (1989) (holding that two portions of a statutory

section must be "read together" and "with a view to their place in the overall statutory scheme"); *see also Dada v. Mukasey*, 554 U.S. 1, 16 (2008) ("We must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law…." (internal quotation marks omitted)). Sentence Two, as adopted in 1910, also included an unusual clause forbidding removal to federal court of a federal cause of action filed in state court. The language reinforces the conclusion that Congress intended to confer on workers a cohesive right to "find the corporation at any point or place *or State* where it is actually carrying on business, and there lodge his [FELA] action." *Kepner*, 314 U.S. at 50 (emphasis added) (internal quotation marks omitted).

C. This Court's Case Law Supports The Montana Supreme Court's Reading Of Section 56.

1. This Court's precedent confirms that Section 56 permits state courts to exercise personal jurisdiction over defendants doing business within their jurisdiction.

In *Miles*, for example, a Tennessee resident brought a FELA claim in Missouri state court for injuries sustained in Tennessee. 315 U.S. at 699. Holding that the Tennessee court could not enjoin the Missouri court from adjudicating the claim on grounds of inequity or harassment, this Court emphasized—mirroring the language of Sentence One—that "[t]he permission granted by Congress to sue in state courts may be exercised only where the carrier is found doing business." *Id.* at 705. The Court concluded that such suits could not be "burdensome" when "suits in federal district courts at those [same] points do not unduly burden interstate commerce." *Id. Miles* thus reflects this Court's clear understanding that Section 56's "doing business" language applies to federal *and* state courts. *See also id.*

at 706-07 (Jackson, J., concurring) (concluding that "the injured workman or his surviving dependents may choose from the entire territory served by the railroad any place in which to sue, and in which to choose either a federal *or a state court* of which to ask his remedy" (emphasis added)).

Similarly, in *Kepner*, this Court held that an Ohio state court could not, on grounds of "inequity based on cost, inconvenience or harassment," 314 U.S. at 54, "validly exercise its equitable jurisdiction to enjoin" an Ohio resident from prosecuting a FELA claim based on an Ohio injury in a federal court of New York, where the defendant did business, *id.* at 47. *Kepner* confirmed the broad range of *federal* courts in which suit could be brought by reciting the legislative record, *see supra* pp. 17-18, that demonstrates FELA was intended as an exception to a more general provision in the Judiciary Act governing personal jurisdiction in federal courts, *see* 314 U.S. at 49-50.[8] In that same discussion, *Kepner* recognized that FELA's language was "deliberately chosen to enable the plaintiff … to find the corporation at any point or place *or State* where it is actually carrying on business, and there lodge his action." *Id.* at 50 (emphasis added) (internal quotation marks omitted). *Kepner* thus lends further support to the application of Section 56 to state courts' personal jurisdiction.

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[8] *Kepner*'s reference to Section 56 as a provision "'establish[ing] venue' in *federal* cases," Pet'r Br. 29 (quoting *Kepner*, 314 U.S. at 52) (emphasis added), is neither surprising—since the case involved an attempt to enjoin a FELA claim in *federal court*—nor contrary to respondents' position that *for federal courts* Section 56 establishes both venue and personal jurisdiction. Contrary to BNSF's assertion, *Kepner* contain no language "explain[ing] that Section 56 does not confer personal jurisdiction." Pet'r Br. 29.

BNSF waves off these and other of this Court's cases on the ground that they offer no more than drive-by jurisdictional rulings and should be disregarded because they generally arose before *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), which initiated the Court's modern due-process analysis. *See* Pet'r Br. 34. However, it bears emphasis just how many FELA cases this Court reviewed from state and federal court judgments involving out-of-state plaintiffs and defendants and injuries that were not alleged to have occurred in the state. *See*, *e.g.*, *Mayfield*, 340 U.S. 1; *Miles*, 315 U.S. 698; *Kepner*, 314 U.S. 44; *McKnett v. St. Louis & S.F. Ry. Co.*, 292 U.S. 230, 233-34 (1934); *Denver & Rio Grande W. R.R. Co. v. Terte*, 284 U.S. 284 (1932). The established practice since FELA's earliest days, which these cases demonstrate, provides a good indicator of how courts, workers, and railroads alike traditionally understood FELA.

International Shoe did nothing to alter the traditional understanding that Section 56 provides for personal jurisdiction in federal and state courts. For example, the Second Circuit's post-*International Shoe* decision in *Kilpatrick v. Texas & Pacific Railway Co.*, 166 F.2d 788 (2d Cir. 1948) (L. Hand, J.), relied on *Miles* and *Kepner* to hold that "once a railroad '[does] business' in any jurisdiction," Section 56 "subject[s] it to personal service" in that jurisdiction's courts. *Id.* at 790. It recognized that the "doing business" standard under Section 56 diverged from the test for state-court specific personal jurisdiction under *International Shoe*. *Id.*; *see also Kilpatrick v. Texas & P. Ry. Co.*, 337 U.S. 75, 76 (1949) (acknowledging that an earlier court of appeals decision had "held that the railroad was subject to service in New York" under FELA).

And in 1953, also after *International Shoe*, this Court held in *Pope*, 345 U.S. 379, that the federal transfer statute, 28 U.S.C. § 1404(a), did not abrogate *Kepner*'s holding barring a state court from enjoining on grounds of inequity a FELA claim brought by one of its citizens in another jurisdiction. The plaintiff in *Pope* resided in Georgia and was injured there but had instead brought his claim in an Alabama state court. 345 U.S. at 380-81. This Court emphasized that Section 56 "establish[ed] [the plaintiff's] right to sue in Alabama" by providing "that the employee may bring his suit wherever the carrier 'shall be doing business,'" and the carrier "admittedly [did] business in Jefferson County, Alabama." *Id.* at 383. This Court therefore held that Georgia courts could not exercise their traditional equitable power to prevent the plaintiff from bringing suit there. *Id. Pope* necessarily held that Section 56 provides a worker a right to sue, in state courts as well as federal ones, wherever a railroad is doing business.

2. To be sure, this Court has never held that a state court *must* exercise the personal jurisdiction that FELA authorizes, where generally applicable local law would forbid it. Many of the cases on which BNSF and the United States rely may be distinguished on this ground.

Mayfield, for example, holds that a state court may rely on its forum non conveniens statute to decline to hear FELA claims so long as the declination does not discriminate against that species of claim. 340 U.S. at 4-5. BNSF points (at 35) to *Mayfield*'s assumption in dictum that a state must have "acquired jurisdiction over the defendant" to adjudicate a FELA claim. *Id.* at 3. But that observation in context refers to the limitations of a state's local law, not FELA. *See Haywood v. Drown*, 556 U.S. 729, 738 (2009) (describing *Mayfield* and other FELA

decisions as permitting state courts to decline to adjudicate FELA claims based on a "state rule" that "treated state and federal claims equally").

BNSF also places much stock in statements in *Mondou v. New York, New Haven & Hartford Railroad Co.*, 223 U.S. 1 (1912) (*Second Employers' Liability Cases*), that FELA "'may be enforced, as of right, in the courts of the States when their jurisdiction, as prescribed by local laws, is adequate to the occasion.'" Pet'r Br. 39 (quoting *Second Employers' Liability Cases*, 223 U.S. at 59). But this Court in *Second Employers' Liability Cases* explained precisely what it meant by that statement, which concerned the subject-matter jurisdiction of the state court involved in the case and had nothing to do with personal jurisdiction: "We say 'when its ordinary jurisdiction, as prescribed by local laws, is appropriate to the occasion,' because … the superior courts of [Connecticut] are courts of general jurisdiction, are empowered to take cognizance of actions to recover for personal injuries and for death, and are accustomed to exercise that jurisdiction" in cases under the laws of Connecticut and other states. *Id.* at 57. Thus, this Court's reference to "jurisdiction" clarified that specialized state courts that lack general subject-matter jurisdiction under the state's judicial scheme need not hear FELA claims.[9] It was likewise in this context that *Second Employers' Liability Cases* stated that FELA was not intended "to

[9] For the same reason, BNSF's attempt to cast FELA's removal provision as evidence of Congress's intent to place a federal-law constraint on FELA's jurisdictional grant is unavailing. Pet'r Br. 39. In context, the provision's reference to a state court of "competent jurisdiction" merely confirms that FELA leaves states free to maintain voluntary constraints on *their own* subject-matter jurisdiction within the state judicial system.

enlarge or regulate the jurisdiction of state courts or to control or affect their modes of procedure." *Id.* at 56.

The decision below is consistent with these opinions, however they may be read. The Montana Supreme Court concluded that the exercise of personal jurisdiction over BNSF here was permitted by FELA *and* consistent with Montana law. *See* Pet. App. 15a, 19a.

3. This Court's holding that Section 56 confers a "substantial right" to bring suit in state court further supports the Montana Supreme Court's reading of Section 56. In *Boyd v. Grand Trunk Western Railroad Co.*, 338 U.S. 263 (1949) (per curiam), the Court addressed the scope of another FELA provision that provided then, as it does now, that a contract that "enable[s] any common carrier to exempt itself from any liability created by" FELA "shall to that extent be void." *Id.* at 266; 45 U.S.C. § 55. An injured worker had contractually agreed with his employer that if he later filed a FELA suit, he would do so in the place where he was injured or where he resided, that is, "either the Circuit Court of Calhoun County, Michigan, or the United States District Court for the Eastern District of Michigan." *Boyd*, 338 U.S. at 264. Instead, the worker brought suit in state court in Illinois, *id.*, a jurisdiction where the railroad was doing business. *See Boyd v. Grand Trunk W. R.R. Co.*, Pet'r Br. at 14, 1949 WL 50308 (U.S. 1949).

This Court held the contract void on the ground that the worker's "right to select the forum granted in" Section 56 was a "substantial right" that could not be contractually waived. *Boyd*, 338 U.S. at 266. It quoted both the first and second sentences of FELA—those regarding where an action "may be brought" in federal court and addressing the "jurisdiction" of state courts—and did not question the view that the employer was "liable to suit in Cook

County, Illinois, in accordance with *this* provision" as a whole. *Id.* at 265 (emphasis added). *Boyd* thus supports reading Section 56 to go beyond providing for the convenience of the parties (as in venue) or reaffirming a state court's preexisting subject-matter jurisdiction over FELA claims.

D. BNSF's Reading Of Section 56 Would Harm Injured Workers And Is Unnecessary To Protect State Courts and Defendants.

1. BNSF attempts to paint respondents as engaged in nefarious forum-shopping that harms state courts and defendants. However, the suggestion that injured railroad workers, as a matter of course, scour the nation for hospitable forums in which to bring suit is divorced from reality. In general, injured workers or their individual survivors who bring suit under FELA will be far more burdened by litigating in a forum far from their homes than interstate transportation companies already doing business in that forum have been throughout the last century.

In any event, Congress intended through Section 56 to give plaintiffs an unusually broad right with respect to where to bring suit. And in 1947, Congress declined to narrow the set of jurisdictions in which a plaintiff could bring suit under Section 56. It did so even in the face of evidence that between 1941 and 1946, "employees of 51 railroads" filed "2,512 suits, in remote jurisdictions rather than in the district where the accident took place or the plaintiff lived" and that "[m]ore than 92 percent of all these imported suits were filed in five States: Illinois, California, New York, Minnesota, and Missouri." H.R. Rep. No. 80-613, at 3 (1947). In short, BNSF's cries of foul over forum-shopping are nothing new, and to the extent

that they reflect an outcome BNSF finds undesirable, they are more appropriately directed at Congress.

The long history of FELA claims brought in states where the only connection is that the railroad does business there also casts doubt on BNSF's contention that state courts will be flooded with FELA suits under the Montana Supreme Court's decision. *See supra* p. 28 (citing cases). To the contrary, courts are likely to see exactly the same flow they have experienced to date. In any event, if state courts believe that they are inundated by unwelcome, out-of-state claims, they may deny access to individuals bringing those claims so long as "in similar cases the State for reasons of local policy," such as venue or forum non conveniens statutes, "denies resort to its courts and enforces its policy impartially." *Mayfield*, 340 U.S. at 4; *see Herb v. Pitcairn*, 324 U.S. 117, 123 (1945); *Douglas v. N.Y., N.H. & H.R. Co.*, 279 U.S. 377, 387-88 (1929).

BNSF is, therefore, incorrect (at 46-47) that under the Montana Supreme Court's interpretation of Section 56, railroads could be sued "in any county in any state where they operate, even if the railroad does no business in that county." For example, here, BNSF *does* do business in the county where it was sued, and Montana requires non-residents bringing out-of-state tort suits against corporations incorporated in other states to bring their claims in the Montana county where the corporation's registered agent is located. *See* Mont. Code Ann. 25-2-122(2); *see also* U.S. General Accounting Office, Federal Employers' Liability Act: Issues Associated With Changing How Railroad Work-Related Injuries Are Compensated 33 (1996), *available at* http://www.gao.gov/products/RCED-96-199 (finding that many states apply their forum non conveniens statutes to FELA claims).

This Court need not save the Montana state courts or those of any other state from a "problem" that the states can address on their own if they see fit.

2. BNSF's cure for the purported forum-shopping problem that it identifies goes far beyond the supposed illness and would severely impair workers' ability to bring their claims. If BNSF were correct that Section 56 does not address *any* court's authority to exercise personal jurisdiction, then even railroad workers who reside in Montana and seek to bring suit in their home-state federal court would be locked out of court there unless the accident occurred in the state or they could otherwise show sufficient minimum contacts to justify the exercise of specific jurisdiction.

Specifically, a federal court's personal jurisdiction over a defendant is now governed by Federal Rule of Civil Procedure 4, which provides that a federal court generally relies on the state long-arm statute of the state in which it sits. *See* Fed. R. Civ. P. 4(k)(1)(A); *see also Daimler*, 134 S. Ct. at 753. Rule 4 also provides that service of summons may establish personal jurisdiction over a defendant "when authorized by a federal statute." Fed. R. Civ. P. 4(k)(1)(C). Under BNSF's view of FELA, and of the Fourteenth Amendment's limitations on state long-arm statutes, neither of these Rule 4 bases could justify the exercise of personal jurisdiction over BNSF in Montana. For example, BNSF's theories would direct Mr. Nelson—a North Dakota resident—to go to Washington, Texas, or Delaware to seek the compensation to which he is entitled under FELA.

The United States attempts to avoid the harshness of its position by leaving open the possibility that a state court *might* "exercise personal jurisdiction over a railroad if the State was the employee's place of residence and

principal place of work in his ongoing employment relationship with the railroad, based on a work-related injury incurred while the employee was on assignment out of the State." U.S. Br. 29 n.9. This narrow possibility is not a substitute for permitting an injured worker to "find the corporation at any point or place or State where it is actually carrying on business, and there lodge his [FELA] action." *Kepner*, 314 U.S. at 50 (internal quotation marks omitted).

II. FELA's Conferral Of Authority On State Courts To Exercise Personal Jurisdiction Is Consistent With Due Process Limitations.

Absent a defendant's consent, or the defendant's having been personally served while present in the forum state, a state court may not on its own authority—consistent with the Fourteenth Amendment—exercise personal jurisdiction over the defendant unless the defendant has "certain minimum contacts with [the state] such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." *Int'l Shoe*, 326 U.S. at 316 (internal quotation marks omitted). With respect to the nature of these "minimum contacts" for corporate defendants, this Court has "differentiated between general or all-purpose jurisdiction, and specific or case-linked jurisdiction." *Goodyear*, 564 U.S. at 919. A court may subject a corporate defendant to its "specific jurisdiction" if "a suit aris[es] out of or relate[s] to the defendant's contacts with the forum." *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 n.8 (1984). Where a suit does not arise from or relate to these contacts, a state court may exercise its "general jurisdiction" so long as the corporate defendant's affiliations with the forum state "are so constant and pervasive as to render it essentially at home"

there. *Daimler*, 134 S. Ct. at 751 (internal quotation marks and alteration omitted).

BNSF argues that if FELA permitted state courts to exercise personal jurisdiction over a railroad defendant anywhere it does business, the statute would violate the Fourteenth Amendment's limitation on the exercise of general jurisdiction and thus should be interpreted to avoid this constitutional concern. Pet'r Br. 48. In BNSF's view, Congress may not authorize states to do what they are constitutionally unable to do on their own accord. However, any due process limitations that apply to Congress's jurisdictional choices stem not from the Fourteenth Amendment, but from the Fifth Amendment as it applies to exercises of federal authority.

A. This Court has not addressed whether Congress may confer on state courts the authority to exercise personal jurisdiction over defendants for the adjudication of federal claims when the state could not do so alone. Many cases instead address whether a state court, on its own accord, may exercise personal jurisdiction over out-of-state defendants. *See Goodyear*, 564 U.S. 915; *J. McIntyre Machinery, Ltd. v. Nicastro*, 564 U.S. 873 (2011) (plurality op.); *Helicopteros*, 466 U.S. 408; *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980); *Int'l Shoe*, 326 U.S. 310. Restrictions on personal jurisdiction in this context "are a consequence of territorial limitations on the power of the respective States." *Hanson v. Denckla*, 357 U.S. 235, 251 (1958). Personal jurisdiction "is in the first instance a question of authority rather than fairness." *Nicastro*, 564 U.S. at 883 (plurality op.).

Even where this Court's personal jurisdiction cases have arisen from federal court actions, questions of Fourteenth Amendment limits on state authority have

been decisive because, under Rule 4, a federal court (with few exceptions) is subject to the same limits on personal jurisdiction as a court of the state in which it sits absent a federal statute authorizing the exercise of personal jurisdiction. *See Walden v. Fiore*, 134 S. Ct. 1115, 1121 (2014); *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 487 (1985); *Daimler*, 134 S. Ct. at 753.

In *Nicastro*, however, a plurality of this Court suggested that Congress could exercise its power to confer personal jurisdiction on state courts in a manner similar to the approach used in FELA. *Nicastro* held that a state court lacked specific jurisdiction over a foreign corporation to adjudicate a state products liability suit where the corporation did not have sufficient contacts with the state. 564 U.S. at 877. The plurality opinion nevertheless stated that if Congress "were otherwise empowered to legislate on the subject," it might be able to "authorize the exercise of jurisdiction in appropriate courts." *Id.* at 885. Absent such a statute, however, the plurality found it "neither necessary nor appropriate" to decide that question. *Id.* Later in the same paragraph, the plurality stated that it was similarly not "necessary to determine what substantive law might apply were Congress to authorize jurisdiction in a federal court in New Jersey." *Id.* at 885-86. Contrary to BNSF's reading of this passage (at 50-51), the juxtaposition of the reference to a single "federal court in New Jersey" and the previous reference to Congress's power to authorize personal jurisdiction in "appropriate courts" indicates that the latter statement potentially encompassed state courts whose authority to exercise personal jurisdiction might be governed by federal legislation as well.

B. BNSF contends that FELA cannot override the Fourteenth Amendment's protections for defendants in

state court because, as recognized in *Nicastro*, "'personal jurisdiction requires a forum-by-forum, or sovereign-by-sovereign, analysis.'" Pet'r Br. 51 (quoting *Nicastro*, 564 U.S. at 884 (plurality op.)). That observation simply begs the question: Which sovereign matters in a case like this one? As BNSF recognizes, the United States is a sovereign separate from the states. *Id.* And because it is the sovereign responsible for authorizing the exercise of personal jurisdiction under FELA, the Fourteenth Amendment's limitations have no application here.

Even if this Court were to view the personal jurisdiction analysis as involving a hybrid of federal (legislative) and state (judicial) power, Section 56 would still be constitutional. Whether a state may exercise power that would be constitutionally impermissible, but for authority conferred by Congress, depends on the specific constitutional prohibition at issue. For example, Congress may "certainly" exercise its power under the Commerce Clause to "authorize state regulations that burden or discriminate against interstate commerce," even though such state regulation would otherwise be prohibited by the dormant Commerce Clause. *Hillside Dairy Inc. v. Lyons*, 539 U.S. 59, 66 (2003); *see also Int'l Shoe*, 326 U.S. at 315 ("It is no longer debatable that Congress, in the exercise of the commerce power, may authorize the states, in specified ways, to regulate interstate commerce or impose burdens upon it.").

A recognition that Congress may authorize states to exercise personal jurisdiction in federal-question cases like this one would be consistent with the purposes of the Fourteenth Amendment's Due Process Clause, which in this context works to ensure that "States through their courts[] do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal

system." *World-Wide Volkswagen*, 444 U.S. at 292. Where Congress supplies authority to exercise personal jurisdiction, there is no concern about state power grabs, just as federal authorization of state regulation of commerce resolves any concerns about state hostility toward interstate commerce. *Cf. Second Employers' Liability Cases*, 223 U.S. at 57 ("When Congress, in the exertion of the power confided to it by the Constitution, adopted [FELA], it spoke for all the people and all the states, and thereby established a policy for all.").

BNSF contends that if FELA confers on state courts the authority to exercise personal jurisdiction in this case, the federal government could authorize states to discriminate against women, refuse to recognize same-sex marriages performed in other states, impinge on individuals' right to travel, or deny individuals notice and a right to a hearing before deprivation of property or liberty. Pet'r Br. 48-50. Not so: Congress could not take these actions consistent with its own constitutional obligations under the Fifth Amendment. *See*, *e.g.*, *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 217 (1995) (recognizing that "equal protection obligations" under the Fifth and Fourteenth Amendments are usually "indistinguishable"); *Shapiro v. Thompson*, 394 U.S. 618, 641-42 (1969), *overruled in part on other grounds by Edelman v. Jordan*, 415 U.S. 651, 671 (1974) (holding that a District of Columbia welfare rule that impinged on new residents' right to travel violated the Fifth Amendment). It thus necessarily could not authorize states to do so. In this case, BNSF does not dispute that Congress *could* provide for the exercise of personal jurisdiction to adjudicate FELA claims in a Montana federal court, only that it has done so.

BNSF's reliance on *Graham v. Richardson*, 403 U.S. 365 (1971), is misplaced for the same reason. *Graham* held that state statutes denying welfare benefits to resident aliens violated the Equal Protection Clause. *Id.* at 376. *Graham* rejected the contention that the discriminatory state statutes were permissible because they were authorized by federal law, instead determining that federal law did not permit such discrimination. *Id.* at 381-83. In so doing, *Graham* remarked that a federal law that "permit[ted] state legislatures to adopt divergent laws on the subject of citizenship requirements" might violate Congress's constitutional obligation to "establish an uniform Rule of Naturalization." *Id.* at 382 (quoting U.S. Const., art. I, § 8, cl. 4).

Graham thus "stand[s] for the broad principle that state regulation *not* congressionally sanctioned that discriminates against aliens lawfully admitted to the country is impermissible if it imposes additional burdens *not contemplated by Congress*." *Toll v. Moreno*, 458 U.S. 1, 12-13 (1982) (emphasis added) (internal quotation marks and footnote omitted). Subsequent appellate decisions have therefore upheld state regulations based on alienage that would be constitutionally impermissible under the Fourteenth Amendment but for their effectuation of federal policy lawfully adopted by Congress. *See*, *e.g.*, *Korab v. Fink*, 797 F.3d 572, 583 (9th Cir. 2014) ("The constitutional question before us is not whether Congress may authorize Hawai'i to violate the Equal Protection Clause but rather what constitutes such a violation when Congress has (clearly) expressed its will regarding a matter relating to aliens…." (internal quotation marks omitted)).

BNSF is similarly wrong to contend that the Fourteenth Amendment's Due Process Clause must be

treated like other prohibitions on state conduct that cannot be overridden by congressional approval—such as the prohibition on entering into treaties or on impairing the obligation of contracts. Pet'r Br. 53-54 (citing, *e.g.*, *White v. Hart*, 80 U.S. 646 (1871)). BNSF relies heavily on prohibitions on state authority that arise from the first clause of Article I, Section 10, of the U.S. Constitution. That clause identifies what "[n]o State shall" do and is immediately followed by two additional clauses that specify what "[n]o State shall" do "without the Consent of the Congress." U.S. Const., art. I, § 10, cls. 1-3. BNSF cites no authority for the proposition that the Fourteenth Amendment, which contains no such juxtaposition of provisions concerning congressional consent, must be interpreted as if it explicitly prohibits congressional authorization of action that the Amendment otherwise forbids solely because of the implicit limits it places on the scope of state territorial authority.

C. To the extent that due-process limitations apply to FELA's authorization of the exercise of personal jurisdiction, those limitations stem not from the Fourteenth Amendment, but the Fifth Amendment to the U.S. Constitution. This Court has repeatedly reserved the question of how Fifth Amendment due process principles may apply to federal laws conferring personal jurisdiction. *See Nicastro*, 564 U.S. at 885 (plurality op.); *Omni Capital*, 484 U.S. at 102 n.5; *Asahi Metal Indus. Co. v. Superior Court of Cal.*, 480 U.S. 102, 113 n.* (1987).

The Court should do so here as well because BNSF did not raise a Fifth Amendment due-process defense below, and the Montana Supreme Court therefore did not consider such an argument. Moreover, BNSF's question presented in this Court referred only to the application of "this Court's decision in *Daimler AG v. Bauman*"—a

Fourteenth Amendment decision—in a FELA suit. BNSF never complied with Supreme Court Rule 29.4(b) or suggested in any other manner, including in its opening brief, *see* Pet'r Br. 33 n.4, that it is challenging FELA's constitutionality under the Fifth Amendment.

III. Regardless Of FELA, Montana Courts May Exercise General Jurisdiction Over BNSF Because It Is At Home In Montana.

Even if this Court were to conclude that FELA does not itself authorize service on BNSF for state-court suits, the Montana Supreme Court held that Montana's long-arm rule does, Pet. App. 15a-19a, a conclusion that BNSF does not challenge. Thus, so long as BNSF has constitutionally sufficient contacts with Montana, *see Omni Capital*, 484 U.S. at 104, it may be required to answer the FELA claims in this case. Consistent with the Fourteenth Amendment, a state court may assert general jurisdiction over a corporate defendant where the company's connections to the state are sufficiently "continuous and systematic as to render" it "essentially at home" there. *Daimler*, 134 S. Ct. at 761 (internal quotations marks omitted). BNSF's Montana contacts meet this standard.

A. Since *International Shoe*, which initiated the Court's modern due-process analysis of personal jurisdiction, this Court has addressed the scope of a court's general jurisdiction over a corporation on only four occasions. Together, those decisions establish that discontinuous, insubstantial, or merely transactional ties to a state are insufficient to justify general jurisdiction. A corporation's substantial, ongoing *presence* in a state, however, can subject it to general jurisdiction in the state's courts. The paradigmatic instances of such presence are when a company is incorporated in or has its

principal place of business in a state, but the Court has made clear that those are not the only circumstances in which a corporation's presence may be extensive enough to subject it to general jurisdiction.

The first of this Court's post-*International Shoe* general-jurisdiction decisions was *Perkins v. Benguet Consolidated Mining Co.*, 342 U.S. 437, which considered whether Ohio courts could exercise general jurisdiction over a foreign mining company. During World War II, the company's mining operations had been suspended, and the company's president, who also served as the general manager, returned to his Ohio home, where the plaintiff attempted to serve process on the company during this period. *Id.* at 447. This Court began by examining the company president's activities in Ohio. There, he carried on correspondence related to the business, maintained office files, drew checks for his salary and those of two company secretaries also working in Ohio, held occasional directors' meetings, and relied on local banks. *Id.* at 448. However, he had not secured a business license in Ohio or identified an agent for service of process, *id.* at 439 n.2, and the company did not own or operate any mining properties there, *id.* at 448. The Court ultimately concluded that the exercise of personal jurisdiction would not offend due process because many of the company's "wartime activities were directed from Ohio and were being given the personal attention of its president in that State at the time he was served with summons." *Id.*

More than three decades later, in *Helicopteros*, the Court considered whether a Texas state court could exercise general jurisdiction over a company, Helicol, that was incorporated in Colombia and had its principal place of business there. 466 U.S. at 409. Survivors and representatives of individuals who were killed when one of

Helicol's helicopters crashed in Peru sued Helicol in Texas. *Id.* at 409-10. Again, this Court examined the defendant's contacts with the forum state but, this time, found them wanting:

> Helicol never has been authorized to do business in Texas and never has had an agent for the service of process within the State. It never has performed helicopter operations in Texas or sold any product that reached Texas, never solicited business in Texas, never signed any contract in Texas, never had any employee based there, and never recruited an employee in Texas. In addition, Helicol never has owned real or personal property in Texas and never has maintained an office or establishment there. Helicol has maintained no records in Texas and has no shareholders in that State.

Id. at 411. *Helicopteros* rejected the contention that one-time meetings in Texas, brief visits by staff there, and purchases from the state were sufficient to support general jurisdiction. *Id.* at 416.

More than two decades would again pass before this Court revisited its general-jurisdiction jurisprudence in *Goodyear*, 564 U.S. 915. The claims in *Goodyear* arose from a bus accident near Paris allegedly caused by a defective Goodyear tire manufactured by a foreign subsidiary of Goodyear USA. *Id.* at 918. Survivors of children killed in the accident sued Goodyear USA and several foreign subsidiaries in North Carolina state court, where Goodyear USA (but not the subsidiaries) was registered to do business and had plants. *Id.* Goodyear USA did not contest jurisdiction. *Id.* at 921.

This Court held that the foreign subsidiaries could not be haled into North Carolina state court, explaining:

> [The foreign subsidiaries] are not registered to do business in North Carolina. They have no place of business, employees, or bank accounts in North Carolina. They do not design, manufacture, or advertise their products in North Carolina. And they do not solicit business in North Carolina or themselves sell or ship tires to North Carolina customers.

Id. The Court rejected the assertion that general jurisdiction over the subsidiaries in North Carolina was warranted because the subsidiaries had placed their tires into the "stream of commerce," and some of those tires (but not the tires involved in the accident) had reached North Carolina through the distribution activities of other Goodyear USA affiliates. *Id.* at 921, 926. It concluded that the "sporadic[]" tire sales made in North Carolina were too attenuated to justify general jurisdiction and likened them to the purchases deemed insufficient in *Helicopteros*. *Id.* at 929.

Daimler, this Court's most recent decision in the area, involved claims by residents of Argentina against Daimler AG, a German car company, for the role that its subsidiary in Argentina played in that country's "Dirty War." 134 S. Ct. at 750-51. The complaint alleged that the subsidiary "collaborated with state security forces to kidnap, detain, torture, and kill" the plaintiffs or related persons. *Id.* at 751. The plaintiffs brought suit in a California federal court, whose authority to exercise personal jurisdiction under Rule 4(k)(1)(A) was coextensive with that of a California court. *Id.* at 753. This Court rejected plaintiffs' contention that California courts could exercise general jurisdiction over Daimler AG because it also had a U.S. subsidiary that, although neither incorporated nor principally based in California,

maintained multiple California facilities and distributed cars to independent dealerships in the state. *Id.* at 751-52. The Court assumed that the U.S. subsidiary was at home in California, and that the subsidiary's California contacts could be imputed to Daimler AG. *Id.* at 760. But it held that Daimler AG's contacts were insufficient to support the exercise of personal jurisdiction by California courts, where Daimler AG's California activities accounted for only 2.4 percent of Daimler's global sales. *Id.* at 752, 760.

Daimler did not foreclose general jurisdiction in a case like this one. *Daimler* rejected the view "that a corporation may be subject to general jurisdiction *only* in a forum where it is incorporated or has its principal place of business"; rather, those places are merely "exemplar bases" of general jurisdiction. *Id.* at 760. Moreover, although *Daimler* clarified that the general jurisdiction inquiry considers a corporate defendant's forum-state contacts in relation to its business "activities in their entirety, nationwide and worldwide," the inquiry continues to focus "on the *magnitude* of the defendant's in-state contacts," *id.* at 762 n.20 (emphasis added) (internal quotation marks and alteration omitted), as well as their "nature," *id.* at 761 n.19. *Daimler* held that a corporation must do something more than "engage[] in a substantial, continuous, and systematic course of business" touching a state, *id.* at 761, but its particular facts "present[ed] no occasion to explore" the precise outer contours of general jurisdiction, *id.* at 761 n.19.

Daimler also reaffirmed in full this Court's post-*International Shoe* decisions on general jurisdiction, including *Perkins*. Accordingly, whether a company is registered to do business, has an agent for service of process, maintains records and offices, employs workers, owns or operates physical facilities, and provides services

in a state remain relevant considerations in the general jurisdiction inquiry.

B. Under this Court's case law, BNSF is at home in Montana and subject to general jurisdiction there because it is akin to a local business. BNSF has established a permanent corporate infrastructure in the state. It maintains an agent for service of process in Montana, and, for nearly five decades, it has been registered to do business there. In this respect, BNSF stands in sharp contrast to the defendants in *Helicopteros* and *Goodyear*, and—for that matter—even *Perkins*, who had not registered to do business in the forum states. Moreover, Montana is among the states in which BNSF maintains one of its division headquarters. *See* Bremseth Decl., Exh. 7, at 1; *see also* BNSF, Map of BNSF Divisions, May 24, 2016.

BNSF's physical presence in Montana is comparable to—in fact, exceeds—that of local businesses. It has a de facto monopoly in the state over rail shipping, dwarfing the presence of the only other Class I carrier in the state and exercising significant control over Montana Rail Link, a domestic rail carrier there. *See* Fain Aff., Exh. 1; Paper Barriers Study 2, 12. It employs more than 2,200 workers in Montana. Bremseth Decl., Exh. 7, at 1. BNSF's trains logged more than 40 million locomotive miles in 2013. J.A. 39. And it earned more than $1.7 billion in revenues in 2013 from Montana operations. J.A. 37. Its contacts in this respect far exceed regular purchases from and occasional visits to a forum state, *see Helicopteros*, 466 U.S. at 416, or "sporadic" product sales reaching a forum state by way of the stream of commerce, *Goodyear*, 564 U.S. at 929.

In addition, BNSF's close, ongoing political relationship with Montana bespeaks an insider status. The company has established a government affairs office

there. Bremseth Decl., Exh. 5, at 6. And in 2013, it relied on four Montana-based lobbyists to represent its interests before the Montana state legislature. *See* Montana Comm'r of Political Practices, Lobbyist and Principal Search.

The United States is incorrect to contend (at 30-31) that BNSF's contacts with Montana are comparable to those held insufficient to support general jurisdiction in *Daimler*. The contacts here are based on the presence of BNSF itself, not a subsidiary, in Montana. In *Daimler*, even assuming that the California contacts of the U.S.-based subsidiary were imputed to the parent Daimler AG, the nature of those contacts became increasingly attenuated up the corporate chain. Daimler AG had no employees, property, or business of its own in California. In this regard, BNSF is more analogous to the U.S. subsidiary in *Daimler* that the Court assumed to be at home in California on the basis of the same contacts attributed to its corporate parent. In addition, there was no indication in *Daimler* that Daimler AG or even its U.S. subsidiary had inserted itself into the political processes of California. In contrast, BNSF has operated in Montana for decades and has become an active participant in Montana political decisions.

The magnitude of forum-state contacts is also greater in this case than it was in *Daimler*. For example, while Daimler AG's in-forum activities generated only 2.4 percent of the company's worldwide sales, 134 S. Ct. at 766-67 (Sotomayor, J., concurring), here BNSF's Montana earnings—$1.7 billion in 2013—are closer to 10 percent of total revenue, J.A. 27, 37. And whereas the U.S. subsidiary in *Daimler* had some facilities in California, 134 S. Ct. at 767, BNSF operates more than 40 of them in Montana. Importantly, BNSF owns more than 2,100 miles

of permanent railroad tracks in Montana, J.A. 39, enough to cover the entire length of the state nearly four times. *Cf. Barrett v. Union Pac. R.R. Co.*, __P.3d__, 361 Or. 115, 139-40 (2017) (en banc) (Walters, J., dissenting) (explaining why an interstate railroad's "permanent, physical presence" in a state "is, by its nature, unique" and thus justifies the exercise of general jurisdiction under *Daimler*).

BNSF wrongly states (at 24) that *Daimler* stands for the proposition that a forum state in which a company is neither incorporated nor has its principal place of business must serve as a surrogate for the principal place of business to justify considering the company at home there. While a "corporation that operates in many places can scarcely be deemed at home in all of them," *Daimler*, 134 S. Ct. at 762 n.20, nothing in *Daimler* indicates that a corporation may have two—and only two—forums in which it is subject to general jurisdiction. *Daimler*'s only reference to a "surrogate" corporate home is in its description of *Perkins*, not in a passage about general jurisdiction more generally. *See id.* at 756 n.8 ("Given the wartime circumstances [in *Perkins*], Ohio could be considered a surrogate for the place of incorporation or head office." (internal quotation marks omitted)).

Moreover, *Daimler* left *Perkins*, *Helicopteros*, and *Goodyear* intact. Those decisions consider a variety of contacts—such as registration to do business in a state, the maintenance of office files, and the ownership of property—to assess whether the exercise of general jurisdiction is proper. *See supra* pp. 43-45. Such discussion would have been wholly unnecessary if the only relevant question were whether a company had replaced its principal place of business with a substitute.

IV. Should This Court Disagree With Respondents' Position, Remand Is Appropriate.

In the state-court proceedings, respondents argued in the alternative that BNSF had consented to personal jurisdiction by seeking a certification of authorization to do business in Montana and by designating an in-state agent for service of process. The state supreme court acknowledged the argument but concluded that it "need not address" it. Pet. App. 19a n.3. If this Court does not affirm the decision below, it should remand to the Montana state courts to consider this alternate ground in the first instance.

Limitations on a state court's general jurisdiction do not apply where a defendant has "consented to suit in the forum." *Daimler*, 134 S. Ct. at 756 (internal quotation marks omitted). Historically, consent to suit by registration to do business in a state was a viable basis for the exercise of personal jurisdiction. *See Neirbo*, 308 U.S. at 175; *Pa. Fire Ins. Co. of Phila. v. Gold Issue Mining & Milling Co.*, 243 U.S. 93, 95 (1917). Post-*International Shoe*, some courts have continued to hold that a company's registration to do business in a state or designation of an agent for service of process constitutes consent to personal jurisdiction. *See*, *e.g.*, *Bane v. Netlink, Inc.*, 925 F.2d 637, 641 (3d Cir. 1991); *Knowlton v. Allied Van Lines, Inc.*, 900 F.2d 1196, 1199 (8th Cir. 1990).

Whether BNSF has consented to suit by plaintiffs in Montana state courts hinges, at least in part, on the legal function that Montana's corporate registration statute is intended to serve. *See*, *e.g.*, *Knowlton*, 900 F.2d at 1200; Restatement (Second) of Conflict of Laws § 44, cmt. c (1971). If this Court does not affirm on the grounds raised in Parts I, II, and III, it should remand for Montana courts to consider the consent argument, which may be

complicated in its own right, in the context of the state's own law.

CONCLUSION

For the foregoing reasons, the decision below should be affirmed.

Respectfully submitted,

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APPENDIX

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28 U.S.C. § 1445, Nonremovable actions, provides in relevant part:

> (a) A civil action in any State court against a railroad or its receivers or trustees, arising under sections 1–4 and 5–10 of the Act of April 22, 1908 (45 U.S.C. 51–54, 55–60), may not be removed to any district court of the United States.

45 U.S.C. § 56, Actions; limitations; concurrent jurisdiction of courts, provides:

> No action shall be maintained under this chapter unless commenced within three years from the day the cause of action accrued.
>
> Under this chapter an action may be brought in a district court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several States.

Act of April 5, 1910, ch. 143, 36 Stat. 291, amending Section 6 of the Federal Employers' Liability Act provided:

> Under this Act an action may be brought in a circuit court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this Act shall be concurrent

> with that of the courts of the several States, and no case arising under this Act and brought in any state court of competent jurisdiction shall be removed to any court of the United States.

Section 1 of the Judiciary Act of August 13, 1888, ch. 866, 25 Stat. 434, correcting the enrollment of the Judiciary Act of March 3, 1887, ch. 373, § 1, 24 Stat. 552, provided in relevant part:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the first section of an act entitled "An act to determine the jurisdiction of circuit courts of the United States and to regulate the removal of causes from State courts, and for other purposes," approved March third, eighteen hundred and seventy-five, be, and the same is hereby, amended so as to read as follows:
>
> That the circuit courts of the United States shall have original cognizance, concurrent with the courts of the several States, of all suits of a civil nature, at common law or in equity, where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of two thousand dollars, and arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, or in which controversy the United States are plaintiffs or petitioners, or in which there shall be a controversy between citizens of different States, in which the matter in dispute exceeds, exclusive of interest and costs, the sum or value aforesaid, or a controversy between citizens of the same State claiming lands under grants of different States, or a controversy between citizens of a State and foreign states, citizens, or subjects, in which the matter in

dispute exceeds, exclusive of interest and costs, the sum or value aforesaid, and shall have exclusive cognizance of all crimes and offenses cognizable under the authority of the United States, except as otherwise provided by law, and concurrent jurisdiction with the district courts of the crimes and offenses cognizable by them. But no person shall be arrested in one district for trial in another in any civil action before a circuit or district court; and no civil suit shall be brought before either of said courts against any person by any original process or proceeding in any other district than that whereof he is an inhabitant, but where the jurisdiction is founded only on the fact that the action is between citizens of different States, suit shall be brought only in the district of the residence of either the plaintiff or the defendant; nor shall any circuit or district court have cognizance of any suit, except upon foreign bills of exchange, to recover the contents of any promissory note or other chose in action in favor of any assignee, or of any subsequent holder if such instrument be payable to bearer and be not made by any corporation, unless such suit might have been prosecuted in such court to recover the said contents if no assignment or transfer had been made; and the circuit courts shall also have appellate jurisdiction from the district courts under the regulations and restrictions prescribed by law.