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 Petition for a Writ of Certiorari to the Supreme Court of Montana

RESPONDENTS' BRIEF IN OPPOSITION

FREDRIC A. BREMSETH
BREMSETH LAW FIRM, P.C.
601 Carlson Parkway
Suite 995
Minnetonka, MN 55305

ROBERT S. FAIN, JR.
2060 Overland Avenue
Suite D
P.O. Box 80886
Billings, MT 59108

JULIE A. MURRAY
Counsel of Record
SCOTT L. NELSON
PUBLIC CITIZEN
LITIGATION GROUP
1600 20th Street NW
Washington, DC 20009
(202) 588-1000
jmurray@citizen.org

Counsel for Respondents

November 2016

QUESTION PRESENTED

Did the court below correctly hold that Congress may confer on state courts the authority to exercise personal jurisdiction over a U.S.-based defendant to adjudicate a claim under the Federal Employers' Liability Act, 45 U.S.C. § 56, without violating the Due Process Clause of the Fourteenth Amendment?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes

Rules

Other Authorities

INTRODUCTION

The Federal Employers' Liability Act (FELA), 45 U.S.C. §§ 51-60, provides a federal cause of action to common-carrier railroad employees who are injured on the job due to their employers' negligence. In crafting FELA's protections, Congress recognized "the injustice to an injured employee of compelling him to go to the possibly far distant place of habitation" of a carrier to bring suit. *Balt. & Ohio R.R. Co. v. Kepner*, 314 U.S. 44, 49 (1941). Congress therefore permitted an expansive set of federal and state courts to serve as proper venues and to exercise personal jurisdiction over railroads in FELA cases. In particular, a railroad may be sued under FELA in any jurisdiction where it is "doing business" at the time of suit. 45 U.S.C. § 56.

The Montana Supreme Court held that the state's courts had personal jurisdiction over defendant BNSF Railway Company to adjudicate FELA claims brought by an injured worker and another worker's widow because (1) FELA permitted them to do so where BNSF was "doing business" in Montana and (2) the state's long-arm statute encompassed BNSF for the purpose of these disputes. BNSF contends that this exercise of personal jurisdiction violates its Fourteenth Amendment due process rights under the standard for assessing general jurisdiction set forth in *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014).

The petition for a writ of certiorari should be denied for three related reasons. First, neither *Daimler* nor any other case cited by BNSF addresses the question whether the Fourteenth Amendment limits *Congress's* power to establish where within the United States a U.S.-based defendant can be sued on a federal claim. *Daimler* addresses a court's power to exercise all-

purpose jurisdiction over a defendant, that is, to hear any and all claims against the defendant, and the state supreme court did not purport to do that here.

Second, although BNSF asserts a split in authority with respect to whether FELA obviates the need to consider whether state courts have personal jurisdiction over defendants, the cases it cites manifest no such conflict. All of the state supreme court cases that BNSF claims conflict with the decision below hold that even where FELA would authorize a state court to exercise personal jurisdiction over a FELA defendant, the court may do so only if the state's long-arm statute also permits it. Although it interprets Montana's long-arm law to permit adjudication of the claims in this case, the decision below expressly agrees with that proposition.

Third, the decision below is correct. Congress has broad power to permit state courts to exercise personal jurisdiction over U.S.-based defendants for the adjudication of 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 limits on the territorial reach of state authority incorporated in the Fourteenth Amendment. And for roughly a century, state courts have adjudicated FELA claims, and this Court has reviewed such adjudications without objection, where the only connection between the state and the defendant was the defendant's ongoing business in the forum. To the extent that BNSF objects to this established practice, its complaint is best directed to Congress.

STATEMENT

I. Statutory Background

In 1908, Congress adopted FELA in recognition "of the physical dangers of railroading that resulted in the

death or maiming of thousands of workers every year." *Consol. Rail Corp. v. Gottshall*, 512 U.S. 532, 542 (1994). It aimed "to put on the railroad industry some of the cost for the legs, eyes, arms, and lives which it consumed in its operations." *Id.* (internal quotation marks omitted).

When FELA was initially enacted, a plaintiff could bring a FELA claim again a common-carrier railroad operating in interstate commerce in any jurisdiction in which the defendant was an "inhabitant." *Balt. & Ohio R.R. Co. v. Kepner*, 314 U.S. 44, 49 (1941). Congress soon determined that the possibility that an employee could be forced to litigate in a distant forum and to incur correspondingly greater expenses was unjust. *Id.* at 49-50. Accordingly, in 1910, Congress amended FELA to provide a broader grant of jurisdiction and venue to courts. As amended, this jurisdiction-granting provision currently provides:

> 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.

45 U.S.C. § 56. Reflecting the importance Congress attached to respecting plaintiffs' choice of forum for FELA claims, Congress has also provided that such claims filed in state court may not be removed to federal district court. 28 U.S.C. § 1445(a).

As this Court has recognized, FELA's broad language with respect to the proper forum for a plaintiff's claim "must have been deliberately chosen to enable the plaintiff, in the words of Senator Borah, who

submitted the report on the bill [to amend the statute], '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.

II. Factual Background and Proceedings Below

BNSF owns and operates rail lines in Montana, is licensed to do business in Montana, and has offices and agents in that state. Pet. App. 13a. BNSF is incorporated in Delaware and has its principal place of business in Texas. *Id.* 48a.

In 2011, Robert Nelson, a North Dakota resident and BNSF employee, filed suit against BNSF in a Montana state court, seeking damages under FELA for injuries during the course of his employment. *Id.* 3a. In 2014, Kelli Tyrrell, a South Dakota resident and the widow of Brent Tyrrell, another BNSF employee, also filed suit in a Montana state court seeking damages under FELA related to the death of her husband, who was injured while working for BNSF. *Id.* 3a, 48a. Neither plaintiff alleged that the injuries occurred in Montana. *Id.* 3a.

BNSF moved to dismiss both suits for lack of personal jurisdiction. *Id.* 3a-4a. The court presiding over Nelson's case granted the motion to dismiss. *Id.* 40a. The court presiding over Tyrrell's case denied the motion but certified its order for appeal. *Id.* 41a-42a, 47a.

The Montana Supreme Court consolidated the two cases on appeal. BNSF argued that neither "the Due Process Clause of the Fourteenth Amendment" nor Montana state law authorized personal jurisdiction over BNSF in the Montana state courts. BNSF's Opening Br. in Mont. S. Ct. 1. Nelson and Tyrrell responded that FELA conferred personal jurisdiction over BNSF in Montana courts and that Montana state law permitted the exercise of that jurisdiction over out-of-state

defendants in FELA suits comparable to those brought by Tyrrell and Nelson. Tyrrell and Nelson also contended that BNSF had consented to jurisdiction in Montana and was "at home" there, thus permitting adjudication of any and all claims against BNSF in Montana courts under this Court's general jurisdiction jurisprudence.

The Montana Supreme Court first held that FELA authorized the state courts to exercise personal jurisdiction over BNSF for adjudication of FELA claims. It emphasized that the U.S. Supreme Court had 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." Pet. App. 8a. It noted, for example, that in *Miles v. Illinois Central Rail Co.*, 315 U.S. 698 (1942), the plaintiff was a Tennessee resident injured while working in Tennessee for an Illinois-based railroad defendant. Nevertheless, *Miles* held that suit in Missouri was proper because FELA permitted "'suits in state courts, despite the incidental burden, where process may be obtained on a defendant . . . actually carrying on railroading by operating trains and maintaining traffic offices within the territory of the court's jurisdiction.'" Pet. App. 9a (quoting *Miles*, 315 U.S. at 702).

The state supreme court also relied on *Denver & Rio Grande Western Railroad Co. v. Terte*, 284 U.S. 284 (1932), which addressed the authority of a Missouri court to adjudicate a FELA claim over out-of-state railroads for injuries that occurred out of state. Pet. App. 12a. *Terte* held that one of the railroads "was properly sued" in Missouri where that railroad owned and operated rail lines in the state, was licensed to do business in Missouri,

and had an office and agents there. *Id.* 13a (quoting *Terte*, 284 U.S. at 286).

The state supreme court concluded that it was "undisputed that BNSF owns and operates railroad lines in Montana" and is "licensed to do business and has offices and agents" there. *Id.* Because BNSF was doing business in Montana, FELA permitted Montana courts to exercise personal jurisdiction over it to adjudicate FELA claims. *Id.*

The Montana Supreme Court rejected BNSF's argument that the exercise of personal jurisdiction violated the Due Process Clause of the Fourteenth Amendment. The court recognized that *Daimler* held for Fourteenth Amendment purposes that "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 on 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.

Importantly, the state supreme court recognized that "FELA does not require states to entertain suits arising under it." *Id.* "[R]ather it empowers them to do so where local law permits." *Id.* The court thus examined the scope of Montana's long-arm rule and determined that it permitted the exercise of personal jurisdiction over BNSF here. *Id.* 16a-19a.

Accordingly, the state supreme court reversed the dismissal of Nelson's complaint and affirmed the district

court order denying BNSF's motion to dismiss Tyrrell's complaint. *Id.* 2a-3a.[1]

Justice McKinnon dissented. She would have held that FELA did not confer personal jurisdiction on state courts. *Id.* 29a. She also would have held, regardless of whether FELA could be read to confer personal jurisdiction on state courts, that the exercise of personal jurisdiction over BNSF by Montana courts would violate the Due Process Clause of the Fourteenth Amendment because BNSF, although engaged in "substantial business in Montana," was not at home there. *Id.* at 23a, 32a-33a.

REASONS FOR DENYING THE WRIT

I. The Decision Below Is Consistent with This Court's Precedent on Personal Jurisdiction.

Consistent with the Fourteenth Amendment, a state court may exercise two types of personal jurisdiction over defendants. General jurisdiction—also referred to as "all-purpose" jurisdiction—involves the exercise of "personal jurisdiction over a defendant in a suit not arising out of or related to the defendant's contacts with the forum." *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 n.9 (1984). A court that lacks general jurisdiction over a defendant may exercise specific jurisdiction "in a suit arising out of or related to" such contacts. *Id.* at 414 n.8.

BNSF argues that the decision below conflicts with *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014), which fleshes out the standard for the appropriate exercise of general jurisdiction over corporate entities, and this

[1] In light of its holding, the court had no occasion to address the plaintiffs' argument that BNSF consented to personal jurisdiction. Pet. App. 19a.

Court's other decisions addressing Fourteenth Amendment limitations on state courts' personal jurisdiction. This line of cases is inapposite. To argue otherwise, BNSF fundamentally misconstrues the holding and rationale of the decision below.

A. In *Daimler*, this Court held that, for a court to exercise general jurisdiction over a corporate defendant, the defendant must have its principal place of business in the forum state, be incorporated there, or otherwise have contacts with the forum that are sufficiently "continuous and systematic as to render [the defendant] essentially at home" there. 134 S. Ct. at 760-61 & n.19 (internal quotation marks omitted). Because the defendant in *Daimler* had none of these contacts, this Court held that California's long-arm statute could not be extended to permit general jurisdiction over the company for the adjudication of claims based on state, federal, and Argentine law. *Id.* at 751-52, 762.

BNSF argues that the decision below "created an 11-1 split" of authority on whether *Daimler*'s standard for the exercise of general jurisdiction "applies in purely domestic cases." Pet. 11. It contends that the Montana Supreme Court refused to apply *Daimler* "in part because this case does not involve foreign parties and an overseas injury." *Id.*; *see also id.* 15, 23. BNSF's attempt to manufacture a disagreement among courts on this issue should be rejected.

As an initial matter, *Daimler* is beside the point because the Montana Supreme Court did *not* hold that Montana state courts could exercise general jurisdiction, as that term is used in this Court's case law, over BNSF. Although the court below did in some passages of its opinion refer to the Montana state courts as having general personal jurisdiction over BNSF, it is clear in

context that the court's ruling extends only to jurisdiction where a FELA claim has been asserted. The court explained, for example, that the question at issue was whether BNSF was "subject to suit *under the FELA* by way of 'doing business' in Montana." Pet. App. 12a (emphasis added); *see also id.* (rejecting argument that *Daimler* "overrule[d] decades of consistent U.S. Supreme Court precedent dictating that railroad employees may bring suit under the FELA wherever the railroad is 'doing business'"). BNSF's contention (at 23) that the decision subjects "every domestic company that does any business in Montana (particularly railroads) . . . to general personal jurisdiction" there is flatly incorrect.

In addition, BNSF is wrong in contending (at 11) that the court below held *Daimler* inapplicable because the defendant in that case was a foreign company and the injury occurred abroad. Rather, the court held that *Daimler* did not apply because it "did not involve a FELA claim or a railroad defendant." Pet. App. 11a. In the course of reaching that holding, the state supreme court observed in passing that, in *Daimler*, this Court could not have addressed the unique issue of personal jurisdiction under FELA because *Daimler* dealt with claims arising abroad and FELA does not apply to "torts that occur in foreign countries, even when all parties involved are citizens of the United States." *Id.*

BNSF's inaccurate portrayal of the decision below as resting on a transnational distinction is further undercut by *Tackett v. Duncan*, 334 P.3d 920 (Mont. 2014), in which the Montana Supreme Court held that a state court lacked personal jurisdiction over a nonresident *domestic* corporation for claims not arising out of its contacts with the forum. *Id.* at 922-23. In that case, which involved a plaintiff, defendants, and events occurring

inside the United States, the court cited *Daimler* and recognized that it sets forth the appropriate standard for exercising general jurisdiction. *Id.* at 925. Not once did the court suggest that *Daimler* was applicable only to transnational cases.

Accordingly, not only is the issue not presented here, but BNSF's purported 11-1 split of authority on whether *Daimler* applies to domestic parties and claims is no split at all.

B. *Daimler* and other Fourteenth Amendment due process cases cited by BNSF do not address the question presented here, which involves whether Congress may authorize, but not require, state courts to exercise personal jurisdiction over domestic defendants for the adjudication of federal claims.

First, a number of the cases cited by BNSF involve a state court's authority to exercise personal jurisdiction over state-law claims asserted against out-of-state or foreign defendants. Both *Helicopteros*, 466 U.S. 408, and *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915 (2011), for example, held that a state court lacked general jurisdiction over out-of-state defendants to adjudicate state-law claims. *J. McIntyre Machinery, Ltd. v. Nicastro*, 564 U.S. 873 (2011) (plurality op.), *World-Wide Volkswagen Corp. v. Woodson*, 444 US. 286 (1980), and *International Shoe Co. v. State of Washington*, 326 U.S. 310 (1945), similarly addressed the question whether a state court had specific jurisdiction over out-of-state defendants in cases asserting state-law claims.

These cases recognize that the "Due Process Clause of the Fourteenth Amendment sets the outer boundaries of a state tribunal's authority to proceed against a defendant." *Goodyear*, 564 U.S. at 923. A defendant must

take some act to "purposefully avail[] itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws," for the exercise of personal jurisdiction to be consistent with the Fourteenth Amendment. *Hanson v. Denckla*, 357 U.S. 235, 253 (1958). Restrictions on personal jurisdiction in this context "are a consequence of territorial limitations on the power of the respective States." *Id.* at 251; *see also J. McIntyre Machinery*, 564 U.S. at 883 (plurality op.) (stating that personal jurisdiction "is in the first instance a question of authority rather than fairness").

Other cases cited by BNSF involve challenges by out-of-state or foreign defendants to a *federal* court's personal jurisdiction as governed by Federal Rule of Civil Procedure 4. Rule 4 provides in relevant part that, absent a statute permitting nationwide service of process, serving a summons "establishes personal jurisdiction over a defendant . . . who is subject to the jurisdiction of a court of general jurisdiction in the state where the district court is located," that is, a defendant who could be reached by the state's long-arm statute. Fed. R. Civ. P. 4(k)(1). Because many states' long-arm statutes extend to the boundaries of what the Constitution permits, these cases often hinge on the Fourteenth Amendment's restrictions.

Daimler, for example, addressed the authority of a federal court in California to exercise general jurisdiction over a foreign defendant based on claims under state, federal, and Argentine law. Recognizing that Rule 4(k)(1) controlled the federal court's authority to exercise personal jurisdiction over the defendant, this Court looked to California's long-arm statute, which permits state courts to exercise jurisdiction "'on any

basis not inconsistent with the Constitution of this state or of the United States.'" 134 S. Ct. at 753 (quoting Cal. Civ. Proc. Code Ann. § 410.10). Solely for that reason, this Court inquired whether the exercise of personal jurisdiction over the defendant was consistent with the limits imposed by the Fourteenth Amendment. *Id.*

Similarly, in *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985), this Court held that a federal court in Florida could adjudicate a state-law claim against an out-of-state defendant because the Florida long-arm statute provided state courts with specific jurisdiction over the claim and such jurisdiction did not violate the Due Process Clause of the Fourteenth Amendment. *Id.* at 487; *see also Walden v. Fiore*, 134 S. Ct. 1115, 1120-21 (2014) (Nevada federal court could not adjudicate a *Bivens* claim against an out-of-state defendant because applying the Nevada long-arm statute to permit personal jurisdiction would violate the Due Process Clause of the Fourteenth Amendment).

The problem for BNSF is that none of these cases, in either category, holds that the Fourteenth Amendment precludes *Congress* from conferring on state courts the power to exercise personal jurisdiction over a U.S.-based defendant to adjudicate a specific federal claim. Nor does BNSF contend that there is a split of authority among lower courts on this issue—which is the only one presented by the case.

II. No Split of Authority Exists on the Question Whether FELA Authorizes State Courts to Exercise Personal Jurisdiction in These Circumstances.

BNSF's petition for certiorari asserts that there is a split in authority among courts addressing whether "the Due Process Clause, as interpreted by *International*

Shoe and *Daimler*, controls in FELA cases filed in state court, or instead whether it is sufficient for personal jurisdiction that the defendant is doing business in the forum." Pet. 18. BNSF's assertion is wrong.

BNSF claims that three state-court decisions are inconsistent with the decision below. Each is easily reconcilable. In *Southern Pacific Transportation Co. v. Fox*, 609 So.2d 357 (Miss. 1992), the Supreme Court of Mississippi held that the state's long-arm statute did not permit a Mississippi court to exercise jurisdiction over an out-of-state FELA defendant doing business in the state. At the time, Mississippi's long-arm statute provided that defendants "doing business" in the state could only be subject to personal jurisdiction on that basis where "[t]he cause of action . . . ar[o]se from, or [was] connected with such act or transaction," and in *Fox*, the cause of action had not arisen there. *Id.* at 360. The court's holding that no jurisdiction existed was "wholly independent of constitutional due process concerns . . . flowing from *International Shoe*" and its progeny. *Id.* at 359; *see also id.* at 361 ("The question is not whether Mississippi *could* constitutionally subject Southern Pacific to personal jurisdiction, but whether it *has*, by statute or otherwise.").

Fox is fully consistent with the decision below. The Montana Supreme Court—like the court in *Fox*—recognized that "[t]he FELA does not require states to entertain suits arising under it; rather it empowers them to do so *where local law permits*." Pet. App. 15a (citing, e.g., *Mondou v. N.Y., New Haven & Hartford R.R. Co.* (*Second Employers' Liability Cases*), 223 U.S. 1 (1912)) (emphasis added). That Mississippi's law more narrowly limited the cases that could be brought in that state than

Montana's law is an ordinary product of state prerogative.

BNSF similarly relies on *Hayman v. Southern Pacific Co.*, 278 S.W.2d 749 (Mo. 1955), a FELA case in which a state court held that it lacked personal jurisdiction over an out-of-state defendant. Again, the court's holding rested on its interpretation of the state long-arm statute, not federal law: The court could not "hold that [state] jurisdiction was acquired" in the case. *Id.* at 751; *see also Jennings v. McCall Corp.*, 320 F.2d 64, 72 (8th Cir. 1963) (citing *Hayman* for the proposition that "the Missouri courts require something more than minimum compliance with federal due process to constitute doing business such as will make a foreign corporation amenable to state jurisdiction"); *cf. Besse v. Mo. Pac. R.R. Co.*, 721 S.W.2d 740, 741 (Mo. 1986) (stating that FELA "[s]uit may be brought in any federal court of the district in which the defendant does business, or in any state court where state venue statutes permit").

Norfolk Southern Railway Co. v. Maynard, 437 S.E.2d 277 (W. Va. 1993), the third case cited by BNSF, is even further afield. In that FELA case, the Supreme Court of West Virginia considered whether a railroad defendant was subject to personal jurisdiction in state court. *Id.* at 283-84. The trial-court record was inadequate to enable the court to determine whether the activities of the defendant's subsidiary were "sufficient to hold the parent, Norfolk Southern Railway, to be doing business" in the state, as required to satisfy FELA's "doing business" prong. *Id.* at 284. The supreme court ordered that the railroad was entitled on remand to a hearing on that question. It discussed *International Shoe* and its progeny in dicta to describe the scope of the

state's long-arm statute, and it recognized that whether suit was permitted under its long-arm statute was an issue distinct from the question whether the defendant was "doing business" in West Virginia, as FELA uses that term. *Id.* at 280-81 (citing *Hodge v. Sands Mfg. Co.*, 150 S.E.2d 793 (W. Va. 1966)). That discussion aligns with Montana's determination here that FELA confers personal jurisdiction on state courts but does not require states to exercise it where prohibited by state law.

Not only are the three state-court decisions on which BNSF relies consistent with the Montana Supreme Court's decision here, but *MacKinnon v. St. Louis Southwestern Railway Co.*, 518 So.2d 89 (Ala. 1987), is not—as BNSF contends—at odds with those decisions. BNSF describes *MacKinnon* as holding that "in a FELA case, it is sufficient for personal jurisdiction that the defendant is doing business in the forum state." Pet. 18. In fact, however, the plaintiff in *MacKinnon* acknowledged that FELA plaintiffs attempting to enforce their rights in a state court based on the fact that the defendant was doing business in the state could do so only "in the absence of a [state] statute precluding jurisdiction." 518 So.2d at 93. There is no indication in the opinion that the defendant railroad asserted that state law forbade bringing the suit.[2]

III. The Montana Supreme Court's Decision Is Correct.

A. As the Montana Supreme Court recognized, this Court has on numerous occasions reviewed FELA claims brought in state and federal court that—like this case—

---

[2] *Imm v. Union Railroad Co.*, 289 F.2d 858 (3d Cir. 1961), on which a BNSF amicus relies (Nat'l Ass'n of Mfrs. Br. 16), is inapplicable for the more basic reason that it addressed subject-matter jurisdiction, not personal jurisdiction.

involved out-of-state plaintiffs, defendants, and events. This Court has never questioned that the courts had personal jurisdiction over the defendants. In *Denver & Rio Grande Western Railroad Co. v. Terte*, 284 U.S. 284 (1932), for example, two railroads argued that the adjudication of FELA claims against them in Missouri state court, where the plaintiff lived, would violate the Fourteenth Amendment. *Id.* at 285. This Court held that, although one of the railroads was not properly sued in Missouri because it was not running trains in the state, the other railroad—which owned and operated railroad lines in Missouri and was licensed to do business there—was properly sued in the state. *Id.* at 287; *see also McKnett v. St. Louis & S.F. Ry. Co.*, 292 U.S. 230, 233-34 (1934) (holding that an Alabama state court could not refuse to adjudicate a FELA claim between a Tennessee plaintiff and a foreign defendant involving an injury that occurred in Tennessee).

Moreover, this Court has repeatedly concluded that the inconvenience and cost to defendants of defending FELA suits in any state where they do business was contemplated by Congress and is permissible. In *Baltimore & Ohio Railroad Co. v. Kepner*, 314 U.S. 44 (1941), this Court considered whether a "state court may validly exercise its equitable jurisdiction to enjoin a resident of the state from prosecuting" a FELA claim in a federal court of New York. *Id.* at 47. The plaintiff in that case lived in Ohio, the accident giving rise to the FELA claim occurred there, and the defendant was doing business there. This Court held that the state court could not enjoin the federal-court action on the ground that the federal-court action would result in "inequity based on cost, inconvenience or harassment." *Id.* at 54. "A privilege of venue granted by the legislative body

which created this right of action cannot be frustrated for reasons of convenience or expense." *Id.*

The following year, this Court held in *Miles v. Illinois Central Railroad Co.*, 315 U.S. 698 (1942), that a Tennessee state court could not enjoin a Missouri state court from adjudicating a FELA claim on grounds of inequity or harassment, even though the claim was brought by a Tennessee resident for injuries sustained in Tennessee. The Court held that the "specific declaration" in FELA "that the United States courts should have concurrent jurisdiction with those of the several states and the prohibition against removal point clearly to the conclusion that Congress has exercised its authority over interstate commerce to the extent of permitting suits in state courts, despite the incidental burden, where process may be obtained on a defendant" that is doing business in the forum state. *Id.* at 702; *see also*, *e.g.*, *Pope v. Atl. Coast R. Co.*, 345 U.S. 379, 383, 387 (1953) (holding that a Georgia state court could not enjoin on grounds of oppressiveness or inequity an Alabama state court from adjudicating a FELA claim that arose in Georgia and that was asserted by a Georgia resident).

BNSF dismisses these cases, contending that they do not use the term "personal jurisdiction" and, in some cases, pre-date *International Shoe*. Pet. 19-20. But just recently, in *J. McIntyre Machinery*, a plurality of the 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. *J. McIntyre Machinery* held that a state court lacked specific jurisdiction over a foreign corporation to adjudicate a state products liability suit. 564 U.S. at 877 (plurality op.). As the plurality opinion explained, however, it might "be that, assuming it were otherwise

empowered to legislate on the subject, the Congress could authorize the exercise of jurisdiction in appropriate courts" for such claims. *Id.* at 885. The plurality's acknowledgment is consistent with the view that Fourteenth Amendment limits on state court personal jurisdiction rest in the first instance on the territorial limits of state authority, and Congress's authority is not limited by state boundaries. And this Court in other contexts has acknowledged that Congress may authorize states to take action that, in the absence of such authorization, would be unconstitutional. *See*, *e.g.*, *Hillside Dairy Inc. v. Lyons*, 539 U.S. 59, 66 (2003) (stating that "Congress certainly has the power to authorize state regulations that burden or discriminate against interstate commerce").

BNSF also contends (at 21) that the decision below is inconsistent with *Mondou* (*Second Employers' Liability Cases*), 223 U.S. 1, which stated that in crafting FELA, Congress did not attempt "to enlarge or regulate the jurisdiction of state courts." *Id.* at 56. The Montana Supreme Court, however, recognized that FELA permits—but does not require—state courts to exercise jurisdiction over FELA claims, so long as the state jurisdictional provision does not single out FELA claims for discrimination. The decision below is thus consistent with *Mondou*.

B. If BNSF were correct that 45 U.S.C. § 56 addressed only proper venue, not personal jurisdiction, the FELA claims in this case could not be brought in either the Montana state court or a Montana federal court, even if the plaintiffs here had been Montana residents.

As discussed above, Federal Rule of Civil Procedure 4 governs the federal courts' personal jurisdiction over

defendants. Under BNSF's theory, a FELA plaintiff residing in Montana but injured elsewhere could not sue in the U.S. District Court for the District of Montana and rely on Rule 4(k)(1)(A), which provides that a summons may establish personal jurisdiction when the defendant is within reach of the forum state's long-arm authority. That plaintiff also could not rely on Rule 4(k)(1)(C), which permits the exercise of personal jurisdiction when "authorized by a federal statute." *See also* 1993 Advisory Committee Note, Fed. R. Civ. P. 4 (explaining that federal legislation "may provide for nationwide or even world-wide service of process in cases arising under particular federal laws").[3]

That outcome—in which an injured employee cannot sue a railroad in either state or federal court in a state where the railroad is doing business—would render illusory an employee's 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 (internal quotation marks omitted). That BNSF's theory would support such an outcome underscores that it cannot be correct.

Indeed, it appears that even BNSF disagrees with the implications of its theory for federal-court actions: BNSF told the Montana Supreme Court that FELA gives a plaintiff "the right to sue in any *federal* court where BNSF does business." BNSF Reply in Mont. S. Ct. 17. That statement is true only if 45 U.S.C. § 56

[3] As this Court recognized in *Omni Capital Int'l, Ltd. v. Rudolf Wolff & Co.*, 484 U.S. 97, 102 n.5 (1987), it has not directly addressed whether and to what extent the Fifth Amendment to the U.S. Constitution may limit Congress's power to confer on a federal court personal jurisdiction over a defendant who lacks contacts with the state in which the federal court sits. BNSF has not, in any event, raised an argument based on the Fifth Amendment.

confers personal jurisdiction on federal courts. We agree with BNSF that it does. And if that is correct, the state court likewise may exercise jurisdiction in this case.

C. BNSF contends that state courts will be flooded with suits asserting FELA and other claims against defendants with no connection to the state other than ongoing business unrelated to the claims. As discussed above, however, the Montana Supreme Court did not hold that its courts could adjudicate any and all claims against a defendant on the ground that it is doing business in the state. Rather, courts may adjudicate only FELA claims against common-carrier railroads engaged in interstate commerce in such circumstances, and even then, only so long as state law permits the claims to be brought there. *See*, *e.g.*, *State of Missouri ex rel. S. Ry. Co. v. Mayfield*, 340 U.S. 1, 4 (1950) (holding that a state may deny access in its courts to individuals bringing FELA claims "if in similar cases the State for reasons of local policy denies resort to its courts and enforces its policy impartially").

BNSF also contends that under the decision below, it and other railroads will "be forced to defend cases in Montana when, as here, the site of the injury, the relevant evidence, and the witnesses are all located hundreds of miles away." Pet. 24; *see also id.* 25 (warning that railroads "will face hundreds more out-of-state FELA lawsuits"). To the extent BNSF claims unfairness that it can be sued on FELA claims wherever it does business, that argument is best addressed to Congress. Congress considered the wisdom of more narrowly limiting employees' choice of forum and, indeed, did so in FELA's early years. It later determined that such limitations were inappropriate. By permitting FELA claims in a state court in any jurisdiction where a

defendant is doing business, and by making those claims non-removable, Congress intentionally gave employees broad discretion in choosing where to bring their claims. *See* 45 U.S.C. § 56; 28 U.S.C. § 1445(a).

In any event, concerns that individual workers asserting FELA claims will seek out distant fora for their suits is overblown. As a general matter, litigating in distant states would burden workers much more than railroads. The cases here—in which both plaintiffs live in states adjoining Montana, where they filed suit—demonstrate that BNSF's portrayal of injured workers engaging in nationwide forum-shopping is off the mark.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

FREDRIC A. BREMSETH
BREMSETH LAW FIRM, P.C.
601 Carlson Parkway
Suite 995
Minnetonka, MN 55305

ROBERT S. FAIN, JR.
2060 Overland Avenue
Suite D
P.O. Box 80886
Billings, MT 59108

JULIE A. MURRAY
Counsel of Record
SCOTT L. NELSON
PUBLIC CITIZEN
LITIGATION GROUP
1600 20th Street NW
Washington, DC 20009
(202) 588-1000
jmurray@citizen.org

Counsel for Respondents

November 2016