No. 16-405

In the Supreme Court of the United States

BNSF RAILWAY CO.,
Petitioner,
v.

KELLI TYRRELL, 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 OF PROFESSOR STEPHEN E. SACHS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICUS CURIAE*

Stephen E. Sachs is a professor at Duke University School of Law. He teaches and writes about civil procedure and conflict of laws, and he has an interest in the sound development of these fields.[1]

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article IV, Section 1 of the Constitution of the United States provides:

> "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof."

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[1] All parties have submitted letters granting blanket consent to *amicus curiae* briefs. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. Duke University School of Law provides financial support for activities related to faculty members' research and scholarship, which helped defray the costs of preparing this brief. (The School is not a signatory to this brief, and the views expressed here are solely those of the *amicus curiae*.) Otherwise, no person or entity other than the *amicus curiae* has made a monetary contribution intended to fund the preparation or submission of this brief.

The Fourteenth Amendment to the Constitution provides in relevant part:

> "[N]or shall any State deprive any person of life, liberty, or property, without due process of law."

The Act of April 5, 1910, ch. 143, § 1, 36 Stat. 291, 291, provides in relevant part:

> "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."

Other relevant provisions are set out in the appendix.

SUMMARY OF ARGUMENT

BNSF Railway Co. should win this case, but on statutory grounds alone. BNSF makes three arguments:

1) That *Daimler AG* v. *Bauman*, 134 S. Ct. 746 (2014), forbids Montana's exercise of general personal jurisdiction here, Pet. Br. 22–27;

2) That Congress has not sought to license the state's exercise of jurisdiction, Pet. Br. 27–48; and

3) That such a license would be void under the Fourteenth Amendment, Pet. Br. 48–54.

BNSF's first two arguments are fully persuasive and decide the case. As a result, the Court should decline to reach the third argument. Not only is it unnecessary to decide, it has the further defect of being wrong.

Respondents' case hinges on whether Congress in 1910 affirmatively licensed state personal jurisdiction over railroads doing business within state lines. Br. in Opp. (BIO) 3, 15–18; see Act of April 5, 1910 (1910 Act), ch. 143, § 1, 36 Stat. 291, 291 (codified as amended at 45 U.S.C. § 56 (2012)). It did not. The 1910 Act specified which federal courts might hear certain actions under the Second Federal Employers' Liability Act (FELA), ch. 149, 35 Stat. 65 (1908) (codified as amended at 45 U.S.C. § 51 *et seq.* (2012)). It did not say which state courts might do so—only *that* state courts might do so. Later discussions of doing-business jurisdiction in fact referred to a preexisting standard for state personal jurisdiction, established well before *International Shoe Co.* v. *Washington*, 326 U.S. 310 (1945). Respondents' theory gets things backwards: Congress did not reshape state personal jurisdiction to fit the statutory rules for federal courts; rather, it shaped the statutory rules for federal courts to fit preexisting rules for state personal jurisdiction.

While Congress in 1910 left state personal jurisdiction as it found it, this Court's modern decisions have not. Respondents do not ask for *Daimler* to be overruled, nor do they deny that *Daimler* requires reversal in the absence of a statutory override. BIO 7–12; cf. this Court's Rule 15.2. This is enough to end the case.

That being so, the Court has no need to reach an important constitutional question. This Court has never squarely decided whether Congress may license the exercise of state personal jurisdiction that might otherwise be invalid. See BIO 17–18; Reply to Br. in Opp. 8. It should not do so in this case. "[N]ormally the Court will not decide a constitutional question if there is some other ground upon which to dispose of the case," *Bond* v. *United States*, 134 S. Ct. 2077, 2087 (2014) (internal quotation marks omitted); see also *Ashwander* v. *TVA*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring), and here there are further reasons for reticence. The United States did not participate before the Montana courts, and limiting Congress's power in this case may have the effect of striking down other federal statutes or may undermine ongoing legislative efforts and treaty negotiations. If the Court is going to restrict the power of Congress, it should wait for a case in which Congress has actually tried to use the power in question, and in which the United States has been available to defend it.

The Court may be tempted to reach the issue regardless, simply because it seems easy—so easy, in fact, as to obviate any need for caution. Congress cannot license what the Constitution forbids, and the Constitution is widely thought to forbid particular types of personal jurisdiction. Yet that widespread belief is actually mistaken. When originally enacted, the Fifth and Fourteenth Amendments did not themselves impose any fixed limits on personal jurisdiction. They required only that a court *have* jurisdiction, over the subject matter as well as the parties—with the substantive doctrines of personal jurisdiction supplied by separate bodies of general and

international law. The Fourteenth Amendment, in particular, was correctly understood by this Court in *Pennoyer* v. *Neff* to create a federal question of what had been merely a matter of general law, outside the scope of Article III appellate review. See 95 U.S. 714, 722, 732–33 (1878); see generally Sachs, Pennoyer *Was Right*, 95 Tex. L. Rev. (forthcoming 2017), http://ssrn.com/id=2832200. Modern doctrine is correct to hold that federal courts can review state judgments for their compliance with jurisdictional standards. But it is wrong to suggest that those standards are supplied by the Constitution itself, and so may not be altered by treaty or by Congress's enumerated power under Article IV.

To be clear: this brief does *not* suggest that the Court conduct its own inquiry as to the original law of due process, or even discuss the issue in any way. The necessary arguments were not briefed at the certiorari stage; they were not raised in the Montana courts; and they have been overlooked by decades of contrary decisions. Yet if the Court now finds itself in a deep hole of incorrect precedent, the least it can do is to stop digging. It should reverse and remand this judgment on statutory grounds, and it should wait for an appropriate case in which to consider the powers of Congress.

ARGUMENT

The Court Should Decline to Consider BNSF's Constitutional Argument.

A. Congress Has Not Altered the Law of State Personal Jurisdiction Here.

Congress adopted the 1910 Act in light of then-current doctrine allowing states to hear cases against corporations doing business within their borders. The 1910 Act in no way altered this doctrine, even to codify it. Instead, it simply expanded the range of *federal* districts in which railroads could be sued, so as to match the jurisdiction then available in state courts. References to doing-business jurisdiction in the cases relied on by respondents and by the Montana Supreme Court invoke this existing jurisdiction, not some new innovation dating from 1910. Congress has never revisited its decision since 1910; and whatever effect the Act may have in federal courts, it plays no role in determining the personal jurisdiction of state courts.

1. At the time Congress enacted the 1910 Act, states were recognized as having personal jurisdiction over corporations doing business therein. Under the traditional rules applied before *International Shoe*, to exercise personal jurisdiction over a nonconsenting nonresident, a state court typically had to serve process on the defendant within the state's borders. See *Pennoyer*, 95 U.S. at 727, 730–31; *D'Arcy* v. *Ketchum*, 52 U.S. (11 How.) 165, 174–76 (1851). In the strictest sense, a corporation was present—that is, had a legal existence as a juridical person—only within its state of incorporation; it might not be recognized as such within other states, which in the days before general

incorporation statutes might have had very different systems of corporate law. See *Bank of Augusta* v. *Earle*, 38 U.S. (13 Pet.) 519, 586–88 (1839). But a "foreign" corporation might still be permitted in other states to exercise corporate rights (to enter contracts, to appoint agents, to sue and be sued by a common name, etc.), whether by statute or by comity. *Id.* at 588–91. And this permission might be extended only on various conditions, such as a requirement to appoint local agents for service of process. See *Lafayette Ins. Co.* v. *French*, 59 U.S. (18 How.) 404, 407 (1856).

A corporation that went ahead and did business in the state anyway, without appointing agents for service of process, would have done so with constructive knowledge of the law's requirements—with the result that the agents it actually sent to do business in the state, with power to bind the corporation in commercial matters, would be deemed to hold legal authority to accept process on its behalf. *Id*. at 407–09; see *Pennoyer*, 95 U.S. at 735–36; see also *Commercial Mut. Accident Co.* v. *Davis*, 213 U.S. 245, 253–56 (1909); *St. Clair* v. *Cox*, 106 U.S. 350, 356 (1882). Even after the dormant commerce doctrine was thought to limit states' ability to keep corporations out, the agents' authority to receive process remained in place, this time on a more general theory of corporate presence. See *Int'l Harvester Co. of Am.* v. *Kentucky*, 234 U.S. 579, 587–89 (1914); *Tauza* v. *Susquehanna Coal Co.*, 115 N.E. 915, 917–18 (NY 1917) (Cardozo, J.).

Courts sometimes disagreed about the scope of this authority. Some held that it extended only to suits arising from business done in the state, as with modern specific jurisdiction. See *Old Wayne Mut. Life Ass'n of*

Indianapolis v. *McDonough*, 204 U.S. 8, 21–23 (1907). Others reasoned that, like authority by express appointment, the authority conferred by law might extend to any lawsuit at all, resulting in what we now call general jurisdiction. See *Tauza*, 115 N.E. at 918; cf. 4 C. Wright et al., Federal Practice and Procedure § 1066, at 357–58 & n.22 (4th ed. 2015); Juenger, *The American Law of General Jurisdiction*, 2001 U. Chi. Legal F. 141, 149–53; Keasbey, *Jurisdiction over Foreign Corporations*, 12 Harv. L. Rev. 1, 5 (1898). Yet both sides took "doing business" as the crucial test.

The federal courts also recognized the "doing business" test, subject to statutory constraints. The Judiciary Act of 1789 restricted the situs of federal civil litigation in two relevant ways: no one could "be arrested in one district for trial in another," and no U.S. resident could be sued "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." Ch. 20, § 11, 1 Stat. 73, 79. By the end of the nineteenth century, the "found" language had been removed, so that an "inhabitant" could be sued only in his own district—unless the case arose solely under diversity jurisdiction, in which case it could be brought in the plaintiff's home district as well. Act of Aug. 13, 1888, ch. 866, § 1, 25 Stat. 433, 434; see *Macon Grocery Co.* v. *Atl. Coast Line R. Co.*, 215 U.S. 501, 505–10 (1910). Even then, "to obtain jurisdiction there must be service," and the validity of service might rest on "whether the corporation was doing business in that district in such a manner and to such an extent as to warrant the inference that through its agents it was present there." *Green* v. *Chi., Burlington & Quincy Ry. Co.*, 205 U.S. 530, 532 (1907).

By 1910, then, service of process (and thus state personal jurisdiction) might be properly founded on doing business. But a federal lawsuit, including one under FELA, could be brought only where the defendant was also an "inhabitant"—which, for a corporate defendant, was within its state of incorporation. *Macon Grocery*, 215 U.S. at 509–10 (quoting In re *Keasbey & Mattison Co.*, 160 U.S. 221, 229 (1895)).

2. The 1910 Act did not change the states' personal jurisdiction. Instead, it altered the *federal* statutory rule to conform it to existing state practice. In a special message to Congress that January, President Taft had called for amendments that would make the Act "as easy of enforcement as the right of a private person not in the company's employ to sue on an ordinary claim," deeming "process in such suit [to] be sufficiently served if upon the station agent of the company upon whom service is authorized to be made to bind the company in ordinary actions arising under state laws." William Howard Taft, Special Message (Jan. 7, 1910), *in* 16 A Compilation of Messages and Papers of the Presidents (n.s.) 7441, 7449 (N.Y., Bureau of Nat'l Literature, Inc. n.d.).

That is precisely what the Act did. The initial draft introduced in the House was worded in broader terms, permitting suit in a circuit court "in the district of the residence of either the plaintiff or the defendant, or in which the cause of action arose, or in which the defendant shall be found at the time of commencing such action." H.R. 17263, 61st Cong. § 1 (1910); accord H.R. Rep. No. 513, 61st Cong., 2d Sess., at 2–3 (1910) (House Report). In place of this broader language, both plaintiff- and defendant-friendly witnesses in the

Senate subcommittee hearing were willing to compromise on "doing business," a phrase they thought "has had judicial determination." *Liability of Common Carriers to Employees: Hearing before the Subcomm. of the Comm. on the Judiciary, U.S. Senate, on the Bill H.R. 17263*, 61st Cong. 5 (1910) (statement of Henry Taylor, Jr.); see *id.* at 7–8 (statement of Philip J. Doherty); *id.* at 11–12 (statement of Charles J. Faulkner); see also *id.* at 9 (statement of Edward A. Moseley) ("[Plaintiffs] should be permitted to bring suit as though a United States law was not involved and have the same choice of jurisdiction which is open to parties generally."). The committee reported the bill accordingly, striking "found" and the plaintiff's residence in favor of "doing business." S. Rep. No. 432, 61st Cong., 2d Sess., at 1 (1910) (Senate Report).

As BNSF effectively argues, and as the drafting history supports, these changes had nothing to do with the bill's language on concurrent jurisdiction—which was described as a wholly separate issue, namely of correcting an errant decision by the Connecticut courts denying subject-matter jurisdiction that the states already enjoyed. Pet. Br. 34–40; see also House Report, *supra*, at 7; Senate Report, *supra*, at 5. An amendment on the Senate floor, barring removal from "any state court of competent jurisdiction," made the same assumption that state jurisdiction would be determined by other sources of law. 45 Cong. Rec. 4092–93 (1910). Even without any special deference as legislative history, and considered merely as reflecting the views of contemporary commentators, these materials reaffirm what the text of the statute indicates: that Congress left the jurisdiction of the state courts, both

over the parties and the subject matter, precisely as it found it.

3. That Congress in the 1910 Act presupposed an existing category of state jurisdiction also explains the language in subsequent cases on which respondents have relied. Shortly after the Act's enactment, the Court asked in the *Second Employers' Liability Cases* whether "rights arising under [FELA may] be enforced, as of right, in the courts of the States when their jurisdiction, as fixed by local laws, is adequate to the occasion?" *Mondou* v. *N.Y., New Haven & Hartford R. Co.*, 223 U.S. 1, 46 (1912). The Court rejected an argument that FELA was originally intended to be enforced only in federal courts, relying in part on the 1910 Act's concurrent-jurisdiction language: "The amendment, as appears by its language, instead of granting jurisdiction to the state courts, presupposes that they already possessed it." *Id*. at 56. FELA involved no "attempt by Congress to enlarge or regulate the jurisdiction of state courts or to control or affect their modes of procedure," *id*.; it merely provided a federal cause of action, "susceptible of adjudication according to the prevailing rules of procedure," *id.*, of which a state court would take cognizance "when its ordinary jurisdiction as prescribed by local laws is appropriate to the occasion and is invoked in conformity with those laws," *id*. at 56–57. The 1910 Act did not change the rules of state jurisdiction, but took advantage of whatever jurisdiction had already existed.

In fact, a number of the cases invoked "doing business" in the course of applying a wholly separate doctrine, a dormant-commerce version of *forum non conveniens* that treated an inconvenient forum as a

burden on interstate commerce. See *Mich. Cent. R. Co.* v. *Mix*, 278 U.S. 492, 494–96 (1929) (distinguishing this commerce argument from a Fourteenth Amendment challenge); *Davis* v. *Farmers Coop. Equity Co.*, 262 U.S. 312, 316–18 (1923) (same); Gibson, *The Venue Clause and Transportation of Lawsuits*, 18 Law & Contemp. Probs. 367, 367, 401–06 (1953). For example, in 1932 the Court decided an appeal from a railroad seeking an end to a pending FELA case in the Missouri courts. *Denver & Rio Grande W. R. Co.* v. *Terte*, 284 U.S. 284 (1932). The Court rejected the challenge as to one corporate defendant, which had railroad lines, a business license, "an office[,] and agents in [Missouri]," and would have passed the jurisdictional test with flying colors. *Id*. at 286–87. The other defendant ran no lines in Missouri, but the Court had no need to reach its Fourteenth Amendment challenge (which had been properly raised, see *id.* at 285), resting on a conclusion that the Missouri forum imposed "a serious burden upon interstate commerce," *id.* at 287.

This dormant-commerce doctrine was relaxed somewhat by 1941, when the Court allowed an Ohio plaintiff with an Ohio injury to sue a railroad doing business in the Eastern District of New York. *Balt. & Ohio R. Co.* v. *Kepner*, 314 U.S. 44, 48–49 (1941). The railroad had asked the Ohio courts to enjoin the federal suit. *Id.* Those courts, like this Court, treated the 1910 Act "as decisive of the issue": the Act created a "federal privilege" to sue in various *federal* courts, with which neither the rules of equity nor any "state statute, rule or policy" would interfere. *Id.* at 52–53. And because the railroad was indeed "doing business in New York," as Congress had demanded, the Court saw no need to

ask if the suit "creates an inadmissible burden upon interstate commerce." *Id.* at 51.

This reasoning was soon extended to suits in state court that had obtained personal jurisdiction in the ordinary way. When a Tennessee plaintiff brought suit for a Tennessee injury against an Illinois railroad in the Missouri courts, the Tennessee courts enjoined the suit, but this Court reversed. *Miles* v. *Ill. Cent. R. Co.*, 315 U.S. 698, 699–701 (1942). The Court started by denying any "burden on interstate commerce" when the railroad did extensive business in Missouri. *Id.* at 701. Given that the 1910 Act not only reaffirmed concurrent jurisdiction but even barred removal of FELA cases to federal courts, Congress had "exercised its authority over interstate commerce to the extent of permitting suits in state courts, despite the incidental burden [on commerce], *where process may be obtained on a defendant*, not merely soliciting business but *actually carrying on railroading* by operating trains." *Id.* at 702 (emphasis added). In other words, Congress had anticipated state suits wherever "process may be obtained on a defendant" in the ordinary course—which at the time happened to include, under the doing-business rule, the states in which the corporation was "actually carrying on railroading."

The "real point of controversy" in *Miles* was not the commerce question, but whether the Court could reject the railroad's alternative ground, namely that the choice of forum was inequitable as a matter of state law. *Id.* As the Court recognized, FELA did not say which state courts could hear its cases: it "recogniz[ed] the jurisdiction of the state courts by providing that the federal jurisdiction should be concurrent," but left

"[t]he venue of state court suits * * * to the practice of the forum." *Id.* at 703. Yet FELA was still "binding on every citizen and every court and enforceable *wherever jurisdiction is adequate for the purpose*." *Id*. at 704 (emphasis added). Because federal law created the cause of action and conferred the right to sue, a state could not prevent its citizens from "exercis[ing] the federal privilege of litigating a federal right in the court of another state": "the right to sue in state courts of proper venue *where their jurisdiction is adequate* is of the same quality as the right to sue in federal courts," which no state could take away. *Id.* (emphasis added). In repeatedly stating that jurisdiction must be adequate, the Court treated this caveat as stemming from a separate source of law: that, and not FELA's concurrent-jurisdiction language, was why "[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. In this respect, at least, the dissent read the statute the same way: "The essence of [the 1910 Act] is merely that the state courts are open to a plaintiff suing under [FELA]," and it "affords no intimation that Congress intended anything more." *Id.* at 710 (Frankfurter, J., dissenting).

Miles rested on a simple logic: Congress had explicitly licensed suit in federal districts where the defendant was doing business; and "[i]f suits in federal district courts at those points do not unduly burden interstate commerce, suits in similarly located state courts cannot be burdensome." *Id*. at 705 (opinion of the Court). This reasoning, and not a claim that the 1910 Act silently expanded state personal jurisdiction, explains the Court's statement a few years later that FELA "establishes petitioner's right to sue in Alabama."

Pope v. *Atl. Coast Line R. Co.*, 345 U.S. 379, 383 (1953). The Court noted that "the *Miles* case dealt with precisely the issue before us," and it followed the same reasoning: if "Congress has deliberately chosen to give petitioner a transitory cause of action," letting the employee "bring his suit wherever the carrier 'shall be doing business,'" and if "admittedly respondent does business in Jefferson County, Alabama," then a state court could not "'enjoin its citizens, *on the ground of oppressiveness* . . . from suing . . . in the state courts of another state . . . .'" *Id*. (omissions in original) (quoting *Miles*, 315 U.S. at 699).

4. If Congress did not alter state personal jurisdiction in the 1910 Act, it has never done so since. The Judicial Code of 1911 did not change the 1910 Act's language, but merely required its reference to circuit courts to "be deemed and held to refer to * * * the district courts." Act of March 3, 1911, ch. 231, § 291, 36 Stat. 1087, 1167.[2] An amendment in 1939 extended FELA's statute of limitations but made no other changes. Act of Aug. 11, 1939, Ch. 685, § 2, 53 Stat. 1404, 1404. And the 1948 recodification of Title 28 separated the bar on removal from the concurrent-

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[2] While the parties have focused on section 56 of Title 45, U.S. Code (per this Court's Rule 34.5), the individual acts of Congress, and not their compilation in Title 45, represent the operative law. Neither the alteration of the word "circuit" to "district" in § 56, nor the alteration of "Act" to "chapter," was ever actually enacted by Congress; nor has Title 45 itself been enacted as positive law. Cf. *U.S. Nat'l Bank of Or.* v. *Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 448 & n.3 (1993); Dorsey, *Some Reflections on Not Reading the Statutes*, 10 Green Bag 2d 283, 284 (2007) ("The result is something like a Cliffs Notes guide to the real law. That is all the Code is, and that is all it is supposed to be.").

jurisdiction language, see Act of June 25, 1948, ch. 646, §§ 1, 18, 62 Stat. 869, 939, 989 (codified in part at 28 U.S.C. § 1445(a) (2012)); but such recodifications do not alter the statute's effect "unless such intention is clearly expressed." *United States* v. *Welden*, 377 U.S. 95, 98–99 n.4 (1964) (internal quotation marks omitted). The Act's effect on state jurisdiction is the same as it was in 1910.

5. Though the 1910 Act may have taken state personal jurisdiction as it found it, that is not how this Court takes the doctrine today. *Miles* and *Pope* may at most be read to show the Court's implicit reliance on the broad view of doing-business jurisdiction: serving process on an agent operating railroads in one state was taken to support jurisdiction over an employee injury that took place in another. This was apparently consistent with *International Shoe*, which treated mere solicitation of business as enough for specific jurisdiction, see 326 U.S. at 314–16, 320, and which suggested that more substantial "continuous corporate operations" might support suits on "dealings entirely distinct from those activities," *id.* at 318 (citing *Tauza*). But it is not consistent with *Daimler*, which rejected the broad approach to doing-business jurisdiction and found the "substantial, continuous, and systematic course of business" test to be "unacceptably grasping." 134 S. Ct. at 761 (internal quotation marks omitted); see also *id.* at 762 n.20.

Respondents do not ask for *Daimler* to be overruled, nor do they seek to limit *Daimler* to transnational cases. BIO 8–10. That is enough to justify reversal. The Court's modern approach to general jurisdiction forbids

Montana's exercise of jurisdiction here, and Congress has never suggested otherwise.

In reaching that conclusion, however, this Court need not decide on the scope of *federal* personal jurisdiction. Cf. BIO 18–20. While the 1910 Act has often been described as a "venue" provision, see, *e.g.*, *Kepner*, 314 U.S. at 49, courts at the turn of the century did not always distinguish "jurisdiction" from other limits as neatly as we do today, see *Steel Co.* v. *Citizens for a Better Environment*, 523 U.S. 83, 90–91 (1998), and the Act's effect on federal personal jurisdiction is unclear. For example, while the 1910 Act was pending in Congress, the Court cited the "inhabitant" limitation to which the Act responded as supporting to a "plea to the jurisdiction"—and as the limitation had not been waived, it found that the circuit court "was without jurisdiction of the persons of the defendants." *Macon Grocery*, 215 U.S. at 503, 508; see also *id.* at 510; *Shaw* v. *Quincy Mining Co.*, 145 U.S. 444, 449 (1892) (stating that the "inhabitant" limitation "restricts the jurisdiction"). This raises the question whether the 1910 Act sounded in what we call personal jurisdiction, and not merely venue; the historical inconsistency in usage cuts both ways.

BNSF correctly notes that Congress did not phrase the 1910 Act in terms of service of process, like other personal-jurisdiction statutes. Pet. Br. 31–33. But that is because it did not need to. If a railroad did business within a district in 1910, the agent it had sent to do that business could be validly served within the district, and the 1910 Act provided that the action "may be brought" in the relevant federal circuit court. There

would have been no point in providing that the circuit court's process could also be served somewhere else.

Since 1910, Congress and the Court have gradually severed the connection between jurisdiction and service—allowing process to be served around the globe, while treating service as establishing jurisdiction only in certain cases, such as when it is available "in the state where the district court is located" or "when authorized by a federal statute." Compare Fed. R. Civ. P. 4(e), (f), (h), with *id.* 4(k)(1)(A), (C); see also *id.* 4(f) (1938), 308 U.S. 667 (allowing process to run throughout "the state in which the district court is held," or outside the state by federal statute); *id.* 4(e)–(f), (i) (1963), 374 U.S. 876–78 (allowing out-of-state service via state-law procedures); *id.* 4(k) (1993), 507 U.S. 1109 (establishing the Rule in essentially its current form); Advisory Committee's Notes, 28 U.S.C. app. at 93–94, 94–95, 104–06 (2012).

What effect these changes have had on the 1910 Act is a murky issue this Court can well avoid. If the Act spoke only to venue, then personal jurisdiction in federal FELA cases might have to be established under Rule 4(k)(1)(A), and the range of judicial districts in which a FELA case may *actually* be brought has shrunk along with the reach of state personal jurisdiction. On the other hand, if "may be brought" means that federal personal jurisdiction has been "authorized by a federal statute"—as courts in 1910 might well have understood the Act to do—then this suit could have been brought in the U.S. District Court for the District of Montana under Rule 4(k)(1)(C). That question is not presented on these facts, and this Court need not decide it. Whether or not the Act authorizes personal jurisdiction

in federal courts, it certainly does not do so in state courts, which means that respondents lose.

B. Congress Not Having Acted, the Court Should Not Address Its Power to Act.

Because BNSF is right about the statute, and because reversing on statutory grounds would afford BNSF complete relief, this Court need not decide who is right about congressional power. Not only is it the Court's standard practice to avoid unnecessary questions, but this practice has special force when a statutory inquiry might foreclose a constitutional one. See *Bond*, 134 S. Ct. at 2087; *Ashwander*, 297 U.S. at 347 (Brandeis, J., concurring).

As noted above, the judgment under review was rendered without the benefit of participation by the United States. That may not be uncommon for state-court litigation; but this Court's role as one "of final review and not first view" counsels postponing the question if possible. *Dep't of Transp.* v. *Ass'n of Am. Rs.*, 135 S. Ct. 1225, 1234 (2015) (internal quotation marks omitted). Moreover, to the extent that BNSF draws into question the constitutionality of an Act of Congress, its petition did not recite the potential applicability of 28 U.S.C. § 2403(a). See this Court's Rules 14.1(e)(v), 29.4(b).

The case for a narrow decision is even stronger when the constitutional question is significant. Statutes not discussed by the parties may turn out to be invalid if BNSF's position is correct. For example, the Parental Kidnaping Prevention Act of 1980, 28 U.S.C. § 1738A (2012), prevents interstate conflict in child custody cases by assigning exclusive jurisdiction to a

single state—which may not always be the same state that this Court's state-court due process jurisprudence might otherwise choose. If a third party asserts paternity rights as against a husband and wife, as in *Michael H.* v. *Gerald D.*, 491 U.S. 110 (1989), that third party may be a "contestant" statutorily entitled to sue in his home state, even after the couple and child have moved away and are no longer domiciled there. See § 1738A(b)(2), (4), (c)(2)(A), (d). Whether to uphold Congress's selection in such instances is surely not on the table here.

The same goes for legislative or treaty proposals involving the recognition of foreign judgments. This Court has never squarely held whether it violates due process, in its own right, to enforce according to federal statutes or treaties the judgments of foreign courts that fail to meet American jurisdictional standards. See Restatement (First) of Judgments § 13 & cmt.*c* (1942) (suggesting that it does); cf. *Richards* v. *Jefferson County*, 517 U.S. 793, 797 n.4 (1996) (insisting on the judgment of a "court of competent jurisdiction" (internal quotation marks omitted), and citing *Scott* v. *McNeal*, 154 U.S. 34, 46 (1894)); accord *Underwriters Nat'l Assur. Co.* v. *N.C. Life & Accident & Health Ins. Guar. Co.*, 455 U.S. 691, 704–05 n.10 (1982) (discussing sister-state judgments). At the same time, the American Law Institute has produced a model statute on judgment recognition which may require some of these judgments to be enforced—for example, a judgment from the United Kingdom binding a contactless codefendant in France. Am. Law Inst., Foreign Judgments Recognition & Enforcement Act § 6(a)(v) & cmt. *c*, reporter's note 3 (2005). Likewise, draft text for an international convention on judgments

would enforce certain contractual judgments "unless the defendant's activities in relation to the transaction *clearly* did not constitute a purposeful and substantial connection to that State"—which may succeed in reproducing the requirements of American due process doctrine, but which also might not. Hague Conference on Private International Law, Report of the Fifth Meeting of the Working Group on the Judgments Project, annex art. 5(1)(e), at iii (Nov. 2015), https://goo.gl/zmcGTz (emphasis added).

It is plainly an important question whether U.S. legislators or treaty negotiators have latitude to depart from current doctrine when compromising on a uniform jurisdictional standard for the nation or the globe. The Court should not decide such questions prematurely, in a case that has nothing to do with them. To decide this case, there is no need to speculate on congressional powers that Congress has not attempted to exercise here.

C. Congress Would Have Power to Recognize the Expanded Exercise of State Personal Jurisdiction.

A further reason not to adopt BNSF's view of congressional power is that it is wrong. BNSF argues that Congress cannot license what the Fourteenth Amendment's Due Process Clause forbids. Pet. Br. 48–54. But notwithstanding contrary language in various decisions of this Court, the Due Process Clause does not itself set out the grounds on which state courts may exercise jurisdiction. The Fourteenth Amendment requires only that state courts *have* jurisdiction, obtained from some appropriate source of law; it does not specify what those sources could be.

The limits applied by *Pennoyer* and its progeny were in fact imposed by rules of general and international law, which American courts had applied since the Founding (and before). Subsequent case law mistakenly attributed these limits to the Constitution itself, suggesting that they are beyond the power of Congress to alter or amend. But as the Supremacy Clause provides, such rules are subject to abrogation, whether by treaty or by statute pursuant to Congress's enumerated powers. U.S. Const. art. VI, cl. 2.

Because Congress indeed has such enumerated power under Article IV, it might have exercised that power here. Because it did not in fact do so, however, the Court need not, and should not, address the issue.

1. The Constitution of 1788 imposed no limits on personal jurisdiction, state or federal. Nor was the Fifth Amendment's Due Process Clause, ratified in 1791, seen to impose any territorial restrictions on personal jurisdiction. A federal court's process might ordinarily run within its district, but Congress might choose to send it "into every state in the Union"; and if Congress ordered that "a subject of England, or France, or Russia, * * * be summoned from the other end of the globe to obey our process," a court "would certainly be bound to follow it, and proceed upon the law." *Picquet* v. *Swan*, 19 F. Cas. 609, 611, 613, 615 (CCD Mass 1828) (No. 11,134) (Story, Circuit Justice); accord *Toland* v. *Sprague*, 37 U.S. (12 Pet.) 300, 328 (1838) (attributing "great force" to *Picquet*'s reasoning). Similar due process clauses in state constitutions were not taken as limiting the state's personal jurisdiction for many decades after the Founding, until the time of

the Civil War. See, *e.g.*, *Beard* v. *Beard*, 21 Ind. 321, 324 (1863).

Yet the absence of *constitutional* limits on personal jurisdiction did not mean there were *no* limits. Instead, these limits were supplied by doctrines of general and international law, which addressed the sovereign authority of separate states. A foreign court exercising an exorbitant jurisdiction, issuing judgments against nonresidents or property outside its own borders, would find those judgments ignored by other nations' courts when presented for recognition or enforcement; no court could "exercise[] a jurisdiction which, according to the law of nations, its sovereign could not confer." *Rose* v. *Himely*, 8 U.S. (4 Cranch) 241, 276 (1808) (Marshall, C.J.); accord *Buchanan* v. *Rucker*, 9 East. 192, 103 Eng. Rep. 546 (K.B. 1808). Such a judgment, rendered without jurisdiction, was traditionally viewed as *coram non judice* and void, see *The Marshalsea*, 10 Co. Rep. 68b, 76a–b, 77 Eng. Rep. 1027, 1038–39 (K.B. 1613); it was a mere "nullity," *Kempe's Lessee* v. *Kennedy*, 9 U.S. (5 Cranch) 173, 184 (1809) (Marshall, C.J.) (summarizing argument of counsel), or a piece of "waste paper," *Voorhees* v. *Jackson*, 35 U.S. (10 Pet.) 449, 475 (1836), of no legal force or effect. See generally J. Story, Commentaries on the Conflict of Laws § 586, at 492 (Boston, Hilliard, Gray & Co. 1834).

The same was true of the judgments of sister states. A state statute announcing an exorbitant jurisdiction might be given effect in the state's own courts, in preference to general or international rules; but the judgment would be recognized in other courts only if *those* courts saw the defendant as lawfully

"*commanded* * * * to appear and answer." *Hart* v. *Granger*, 1 Conn. 154, 168–69 (1814); see also *Bartlet* v. *Knight*, 1 Mass. 401, 410 (1805) (opinion of Sedgwick, J.); *Kilburn* v. *Woodworth*, 5 Johns. 37, 41 (NY 1809) (per curiam); Nelson, *Sovereign Immunity as a Doctrine of Personal Jurisdiction*, 115 Harv. L. Rev. 1559, 1573–74 (2002).

Whether that command was lawful would be assessed under the same international rules of jurisdiction that state courts had applied under the Articles of Confederation. See, *e.g.*, *Jenkins* v. *Putnam*, 1 S.C.L. (1 Bay) 8, 9–10 (SC Ct. Com. Pl. & Gen. Sess. 1784); accord *Kibbe* v. *Kibbe*, 1 Kirby 119, 126 (Conn. Super. Ct. 1786); *Phelps* v. *Holker*, 1 U.S. (1 Dall.) 261, 264 (Pa 1788) (opinion of McKean, C.J.). These international rules remained in place under the Constitution's Full Faith and Credit Clause, U.S. Const. art. IV, § 1, and its implementing statute, Act of May 26, 1790, ch. 11, 1 Stat. 122. State judges sometimes disagreed on the meaning of the Clause and the statute, but they agreed that neither required recognition for invalid judgments that failed to respect prevailing rules on judicial authority. Compare, *e.g.*, *Rogers* v. *Coleman*, 3 Ky. (1 Hard.) 413, 424–25 (1808), with *Bissell* v. *Briggs*, 9 Mass. 462, 469 (1813) (opinion of Parsons, C.J.).

Federal courts took the same view. See, *e.g.*, *M'Elmoyle* ex rel. *Bailey* v. *Cohen*, 38 U.S. (13 Pet.) 312, 326–27 (1839); *Elliott* v. *Lessee of Peirsol*, 26 U.S. (1 Pet.) 328, 340–41 (1828); *Banks* v. *Greenleaf*, 2 F. Cas. 756, 759 (CCD Va 1799) (No. 959) (Washington, Circuit Justice). State statutes purporting to expand jurisdiction might well be "rules of decision * * * in

cases where they apply," overriding contrary rules of general law. Judiciary Act of 1789 § 34, 1 Stat. at 92 (codified as amended at 28 U.S.C. § 1652 (2012)). But in the era before *Erie R. Co.* v. *Tompkins*, 304 U.S. 64 (1938), and *Klaxon Co.* v. *Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941), the federal courts were free to consult general conflicts principles before determining which states' statutes actually applied. They could therefore disregard, as exceeding the state's legislative competence, statutes attempting to project jurisdiction beyond the state's own borders. See, *e.g.*, *Flower* v. *Parker*, 9 F. Cas. 323, 324–25 (CCD Mass 1823) (No. 4891) (Story, Circuit Justice). Accordingly, this Court held in 1851 that there was no obligation, either in a state or a federal court, to recognize or enforce a state-court judgment that violated the "well-established rules of international law, regulating governments foreign to each other," as to the extent of state personal jurisdiction. *D'Arcy*, 52 U.S. at 174.

2. The Fourteenth Amendment altered this picture, not by silently imposing new rules of personal jurisdiction, but by creating a new avenue for appellate review. The principles of conflict of laws and the international law of jurisdiction were not federal law, but general law, on which state and federal courts could disagree. See, *e.g.*, *Swift* v. *Tyson*, 41 U.S. (16 Pet.) 1 (1842). And before the Fourteenth Amendment, an exorbitant judgment in a state's own courts could not always be appealed to this Court, because issues of general law did not support arising-under jurisdiction under Article III. See *N.Y. Life Ins. Co.* v. *Hendren*, 92 U.S. 286, 286–87 (1876). As *Pennoyer* recognized, "there was no mode of directly reviewing such judgment or impeaching its validity within the State

where rendered; and * * * it could be called in question only when its enforcement was elsewhere attempted." 95 U.S. at 732.

This is what the Fourteenth Amendment changed. With the Amendment in place, *Pennoyer* explained, "the validity of such judgments may be directly questioned, and their enforcement in the State resisted, on the ground that proceedings in a court of justice to determine the personal rights and obligations of parties *over whom that court has no jurisdiction* do not constitute due process of law." *Id.* at 733 (emphasis added). In other words, a judgment rendered without jurisdiction was still a "nullity" or a piece of "waste paper"; and depriving someone of liberty or property, based only on a piece of "waste paper," was a deprivation without due process of law. That is why, for example, *Pennoyer* put the same weight on the state court's jurisdiction over "the subject-matter of the suit" as over the parties. *Id.* The Fourteenth Amendment's Due Process Clause surely does not specify, say, which state courts have subject-matter jurisdiction over small-claims cases. Rather than setting out detailed rules for jurisdiction, it requires only that the state court *have* some, as determined by other sources of law. See Perdue, *What's "Sovereignty" Got to Do with It? Due Process, Personal Jurisdiction, and the Supreme Court*, 63 S.C. L. Rev. 729, 732 (2012). Without other rules to apply, *Pennoyer*, like *D'Arcy*, drew on general principles of international law (which it called "principles of public law") to determine that the state judgment at issue was void. 95 U.S. at 722; see also *id.* at 730 (quoting *D'Arcy* on international law).

In recognizing judgments without jurisdiction as posing due process concerns, *Pennoyer* did not require federal review of every garden-variety claim that a state court might lack jurisdiction. Ordinarily the subject-matter jurisdiction of state courts is a matter solely of state law—on which federal courts defer to state ones, absent evidence of malfeasance. *Broad River Power Co.* v. *South Carolina* ex rel. *Daniel*, 281 U.S. 537, 540 (1930), *aff'd*, 282 U.S. 187 (1930) (per curiam); *Elmendorf* v. *Taylor*, 23 U.S. (10 Wheat.) 152, 159 (1825). But when a state asserts subject-matter jurisdiction outside its legislative competence, as understood by the federal courts, its judgments may indeed be reviewed and set aside. See, *e.g.*, *Baker* v. *Gen. Motors Corp.*, 522 U.S. 222 (1998); *Fall* v. *Eastin*, 215 U.S. 1 (1909). And the same is true when a state purports to exercise a jurisdiction that traditional rules of personal jurisdiction forbid. No state is thought competent, from the perspective of a federal court, simply to declare its own jurisdiction over nonresidents or property outside its own borders. And to the extent that state and federal courts disagree on the general rules of jurisdiction, the availability of federal appellate review means that the federal view of these rules will control. That is precisely how some contemporary state courts understood *Pennoyer*: the limits on their jurisdiction were imposed, not by the Due Process Clause, but by the fact that the Clause had enabled routine review of a general-law issue in federal court. See, *e.g.*, *Belcher* v. *Chambers*, 53 Cal. 635, 643 (1879); accord *Conn. Mut. Life Ins. Co.* v. *Spratley*, 172 U.S. 602, 609 (1899) (describing the relevant federal question as "whether the [state] court obtained jurisdiction to render judgment in the case against the [defendant] so that to enforce it would not be taking the

property of the [defendant] without due process of law"). See generally Sachs, Pennoyer *Was Right*, *supra* (manuscript at 61–63, 68–78).

It is not hard to understand how this jury-rigged doctrine—that jurisdiction is ordinarily a matter of general law, the federal courts' view of which will control in light of the availability of appellate review under the Due Process Clause—would be simplified over time. The Court soon began speaking in shorthand, asking merely whether the state law or state judgment "contravenes the due process clause." *Hess* v. *Pawloski*, 274 U.S. 352, 355 (1927); see Perdue, *supra*, at 733. But it was error for the courts to treat this shorthand as if it were substance—particularly on issues, such as congressional power, where the distinction makes a difference. The modern doctrine that the Due Process Clause directly establishes territorial limits unalterable by Congress, as suggested by *International Shoe* and its progeny, is the product of confusion and mistake rather than of the Fourteenth Amendment.

3. The original law of personal jurisdiction and due process has clear implications for the powers of Congress. The substantive limits on state personal jurisdiction stem from general and international law, and not from the Constitution; they are merely "part of our law," *The Paquete Habana*, 175 U.S. 677, 700 (1900), and not "supreme Law of the Land," U.S. Const. art. VI, cl. 2. As such, they may be abrogated by a properly adopted treaty, or by a statute made pursuant to Congress's enumerated powers. See *id*.

As it turns out, Congress does have such enumerated power. In addition to requiring "Full Faith

and Credit" to the "public Acts, Records, and judicial Proceedings" of each state, Article IV empowers Congress "by general Laws" to "prescribe * * * the Effect" that "such Acts, Records and Proceedings" shall have. U.S. Const. art. IV, § 1. This allows Congress to adopt a national compromise regarding the territorial scope of each state's judicial power. Early Congresses repeatedly proposed such compromises, including by recognizing and giving some effect to judgments that might otherwise have lacked personal jurisdiction according to general law; the main objections to those proposals were made on substantive rather than constitutional grounds. See, *e.g.*, H.R. 46, 9th Cong., 1st Sess., § 1 (1806); H.R. 45, 13th Cong., 2d Sess., § 3 (1814); H.R. 17, 15th Cong., 1st Sess., § 1 (1817); see also Sachs, *Full Faith and Credit in the Early Congress*, 95 Va. L. Rev. 1201, 1251–78 (2009); *id*. at 1264–65 n.278.

Were Congress to prescribe the effect of some category of state judgments, that statute could override any general rules of personal jurisdiction that might otherwise bar a judgment's recognition in state or federal court, including on direct review in this Court. Congress did not enact such an override in 1790, see *D'Arcy*, 52 U.S. at 176, but that does not mean it can no longer do so today. If it did, then both state and federal courts would "proceed upon the law," *Picquet*, 19 F. Cas. at 615, in accepting the state judgment as valid and in giving it full effect "in every court within the United States." 28 U.S.C. § 1738 (2012). The judgment being valid according to law, there would be no argument that the deprivation of liberty or property it ordered had been done "without due process of law." Cf. Perdue, *Personal Jurisdiction and the Beetle in the Box*,

32 B.C. L. Rev. 529, 564–67 (1991); Sachs, Pennoyer *Was Right*, *supra* (manuscript at 38–40, 42–48, 53–55, 72–74, 78–79, 86–88).

4. The fact that Congress has such power does not mean that the 1910 Act used it. As a result, this brief does *not* suggest that the Court, in the course of deciding this case, undertake a frolic and detour into the original law of personal jurisdiction and due process. The necessary historical arguments have not been briefed by the parties, whether at the certiorari stage or before the Montana courts. And they require the reexamination of decades of previous decisions, which—however erroneous they may be—neither party has yet seen fit to challenge.

Instead, the importance of the history in this case is merely to counsel caution. No matter how easy the constitutional issue may appear, under these circumstances the Court should not act without full consideration—especially in ways that might foreclose future efforts by the United States, by statute or treaty, to recognize the expanded exercise of jurisdiction by state courts. Should the United States choose to make such efforts, there will be plenty of time to consider the historical questions then, under the appropriate standards of *stare decisis* (including whether the prior cases were "badly reasoned," *Payne* v. *Tennessee*, 501 U.S. 808, 827 (1991)). In the meantime, the Court should avoid carrying potentially erroneous decisions into new fields, and it should resolve this case on statutory grounds alone.

CONCLUSION

The judgment of the Supreme Court of Montana should be reversed and the case remanded for further proceedings.

Respectfully submitted,

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March 6, 2017

APPENDIX

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Act of April 22, 1908

Second Federal Employer's Liability Act, ch. 149, § 6, 35 Stat. 65, 66:

SEC. 6. That no action shall be maintained under this Act unless commenced within two years from the day the cause of action accrued.

Act of April 5, 1910

Ch. 143, § 1, 36 Stat. 291, 291:

Be it enacted by the Senate and the House of Representatives of the United States of America in Congress assembled, That an Act entitled "An Act relating to the liability of common carriers by railroad to their employees in certain cases," approved April twenty-second, nineteen hundred and eight, be amended in section six so that said section shall read:

"SEC. 6. That no action shall be maintained under this Act unless commenced within two years from the day the cause of action accrued.

"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 March 3, 1911

Judicial Code of 1911, ch. 231, § 291, 36 Stat. 1087, 1167:

SEC. 291. Wherever, in any law not embraced within this Act, any reference is made to, or any power or duty is conferred or imposed upon, the circuit courts, such reference shall, upon the taking effect of this Act, be deemed and held to refer to, and to confer such power and impose such duty upon, the district courts.

Act of Aug. 11, 1939

Ch. 685, § 2, 53 Stat. 1404, 1404:

SEC. 2. That the first sentence of section 6, of the Act entitled "An Act relating to the liability of common carriers by railroad to their employees in certain cases," approved April 22, 1908 (35 Stat. 65; U.S.C., title 45, sec. 56), be, and it is hereby, amended to read as follows:

"SEC. 6. That no action shall be maintained under this Act unless commenced within three years from the day the cause of action accrued."

Act of June 25, 1948

Revision of the Judicial Code, ch. 646, §§ 1, 18, 62 Stat. 869, 939, 989:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That title 28 of the United States Code, entitled "Judicial Code and Judiciary" is hereby revised, codified, and enacted into law, and may be cited as "Title 28, United States Code, section —", as follows:

* * *

§ 1445. Carriers; non-removable actions

(a) A civil action in any State court against a railroad or its receivers or trustees, arising under sections 51–60 of Title 45, may not be removed to any district court of the United States.

* * *

SEC. 18. The second sentence of the second paragraph of the Act approved April 22, 1908 (chapter 149, 35 Stat. 65, 66; 45 U.S.C., section 56) as added by the Act approved April 5, 1910 (chapter 143, section 1, 36 Stat. 291), is amended to read as follows:

"The jurisdiction of the courts of the United States under this Act shall be concurrent with that of the courts of the several States."