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

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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October 28, 2016

MOTION OF WASHINGTON LEGAL FOUNDATION FOR LEAVE TO FILE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

Pursuant to Rule 37.2, Washington Legal Foundation (WLF) respectfully moves for leave to file the attached brief as *amicus curiae* in support of the petitioner, BNSF Railway Company. Although Counsel for petitioner consented to the filing of WLF's brief, Counsel for respondents stated that, on behalf of their clients, they "must oppose amicus." Accordingly, this motion for leave to file is necessary.

WLF's *amicus* interests are more fully set out in its accompanying brief. In short, WLF is a nonprofit, public-interest law firm and policy center with supporters in all 50 states. WLF devotes a substantial portion of its resources to promoting free enterprise, individual rights, a limited and accountable government, and the rule of law. To that end, WLF has frequently appeared in federal and state courts in cases implicating due-process limitations on a court's authority to exercise personal jurisdiction over an out-of-state defendant. Among the many federal and state court cases in which WLF has appeared to express its views on the proper scope of personal jurisdiction are *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915 (2011), and *Bristol-Myers Squibb Co. v. Superior Court*, 377 P.3d 874 (Cal. 2016).

WLF favors strict adherence to the due-process limitations this Court recognized in *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014) on the judiciary's exercise of personal jurisdiction over out-of-state defendants. WLF fears that the statutory

rationale for personal jurisdiction adopted by the Montana Supreme Court below—if allowed to stand—will erode defendants' due-process rights in cases brought under the Federal Employers' Liability Act. Accordingly, WLF's brief urges the Court to grant the petition to clarify that the Due Process Clause of the Fourteenth Amendment unequivocally bars state courts from exercising general jurisdiction over nonresident defendants in such cases.

WLF believes that the arguments set forth in its brief will assist the Court in evaluating the issues presented by the petition. WLF has no direct interest, financial or otherwise, in the outcome of this litigation. Because of its lack of any direct interest, WLF believes that it can provide the Court with a perspective that is distinct and independent from that of the parties.

For the foregoing reasons, WLF respectfully requests that it be allowed to participate in this case as *amicus curiae* by filing the attached brief.

Respectfully submitted,

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QUESTION PRESENTED

Whether a state court may decline to follow this Court's decision in *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014), which held that the Due Process Clause forbids a state court from exercising general personal jurisdiction over a defendant that is not "at home" in the forum state, in a suit against an American defendant under the Federal Employers' Liability Act.

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INTERESTS OF *AMICUS CURIAE*[1]

Washington Legal Foundation (WLF) is a nonprofit, public-interest law firm and policy center with supporters in all 50 states. WLF devotes a substantial portion of its resources to promoting free enterprise, individual rights, a limited and accountable government, and the rule of law. To that end, WLF has frequently appeared in federal and state courts in cases implicating due-process limitations on a court's authority to exercise personal jurisdiction over an out-of-state defendant. *See, e.g., Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915 (2011); *Bristol-Myers Squibb Co. v. Superior Court*, 377 P.3d 874 (Cal. 2016); *Figueroa v. BNSF Ry. Co.*, No. S063929 (Or. Sup. Ct., dec. pending).

In addition, WLF's Legal Studies Division, the publishing arm of WLF, regularly publishes articles concerning due-process constraints on the judiciary's exercise of personal jurisdiction. *See, e.g.,* Mark Moller, *Contra Plaintiffs' Bar, Registering To Do Business Does Not Create General Jurisdiction*, WLF Legal Opinion Letter (June 10, 2016); Eric L. Alexander, *Plaintiffs Cannot Skirt* Daimler AG v. Bauman *with "Pendent Jurisdiction" Theory*, WLF Legal Opinion Letter (Apr. 1, 2016); James M. Beck,

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[1] Pursuant to Supreme Court Rule 37.6, WLF states that no counsel for any party authored this brief in whole or in part; and that no person or entity, other than WLF and its counsel, made a monetary contribution intended to fund the preparation and submission of this brief. Pursuant to Supreme Court Rule 37.2(a), more than 10 days prior to the due date for this brief, counsel for WLF notified counsel of record for all parties of WLF's intention to file.

Keeping the Jurisdictional Toothpaste in the Tube: "General Jurisdiction by Consent" after Daimler AG v. Bauman, WLF Working Paper (Nov. 2015).

This Court's landmark decision in *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014), made clear that state and federal courts lack personal jurisdiction over a corporate defendant unless (1) that defendant's activities within the forum state give rise to the claims being asserted or (2) the corporation is "at home" in the forum state. In sharply curtailing its prior "continuous, substantial, and systematic" rationale for general personal jurisdiction, *Daimler* clarified that a corporation, even one that conducts "continuous, substantial, and systematic" business in all 50 states, can be deemed "at home" in no more than one or two states: its state of incorporation and its principal place of business (or its surrogate principal place of business).

WLF favors strict adherence to *Daimler*'s due-process limitations on the judiciary's exercise of personal jurisdiction over out-of-state defendants. WLF is concerned that the statutory rationale for personal jurisdiction adopted by the Montana Supreme Court—if allowed to stand—will erode the due-process rights of defendants and render *Daimler* a dead letter in all cases brought under the Federal Employers' Liability Act. WLF thus urges the Court to grant certiorari to clarify that the Due Process Clause of the Fourteenth Amendment unequivocally bars state courts from exercising general jurisdiction over nonresident defendants in such cases. Such clarity is needed to provide companies that have a multi-state presence some minimal assurance as to where their conduct will render them liable to suit.

STATEMENT OF THE CASE

BNSF Railway Company (BNSF) is a leading freight railway carrier in the United States. Incorporated in Delaware, BNSF's principal place of business is Ft. Worth, Texas. *See* Pet. App. 3a. Although BNSF operates in 28 states, including Montana, *none* of BNSF's corporate officers or departments is located in Montana. *Id.* at 63a.

Respondents Kelli Tyrrell and Robert Nelson—neither of whom are residents of Montana—brought separate suits against BNSF in Montana state court under the Federal Employers' Liability Act (FELA), 45 U.S.C. §§ 51-60, alleging that BNSF's negligence caused them to sustain injuries while working for BNSF. Pet. App. 1a-4a. Respondents do not allege that they ever lived or worked in Montana; nor do they allege that they suffered any injury in Montana. *Ibid.*

Given respondents' bare jurisdictional allegations, BNSF moved to dismiss each suit on the basis that Montana state courts cannot exercise general jurisdiction over it consistent with the due-process constraints this Court recognized in *Daimler*. The trial court in *Tyrrell* denied BNSF's motion and certified its ruling as final, allowing BNSF to seek discretionary appeal. Pet. App. 41a-46a, 47a-73a. In *Nelson*, the trial court granted BNSF's motion to dismiss, and the plaintiff appealed from that ruling as of right. *Id.* at 36a-40a. The Montana Supreme Court accepted BNSF's appeal in *Tyrrell*, which it then consolidated with *Nelson*. *Id.* at 34a-35a.

A divided Montana Supreme Court "decline[d]" to apply *Daimler*, which it dismissively viewed as "factually and legally distinguishable." Pet. App. 15a. Because *Daimler* was "brought by foreign plaintiffs against a foreign defendant based on events occurring entirely outside the United States," the court deemed it inapplicable here, where "all the parties involved are citizens of the United States." Pet. App. 11a. Most significantly for the court, *Daimler* "did not involve a railroad claim or a railroad defendant." *Ibid*.

Invoking FELA's venue provision, 45 U.S.C. § 56—which establishes venue for FELA cases filed "in a district court of the United States" and provides state courts with "concurrent jurisdiction" over such claims—the Montana Supreme Court cited cases purportedly showing that *this* Court "consistently has interpreted [§] 56 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, 12a-13a. Because *Daimler* "did not overrule decades of consistent U.S. Supreme Court precedent dictating that railroad employees may bring suit under the FELA wherever the railroad is 'doing business,'" *id.* at 12a, the court concluded that the Montana courts' exercise of personal jurisdiction fully "comports with the due process clause." *Id.* at 17a-18a.

Justice McKinnon dissented at length. Pet. App. 20a-30a. Criticizing the majority for improperly circumventing this Court's holding in *Daimler*, she pointed out that this Court's FELA precedents relied on by the majority "do not so much as mention the Due Process Clause or general jurisdiction." *Id.* at

27a. She went on to explain that § 56 of FELA "is a venue statute for the federal courts, not a grant of personal jurisdiction to state courts." *Id.* at 29a. Regardless of FELA, Justice McKinnon concluded that "Congress lacks authority to confer personal jurisdiction to state courts where the Due Process Clause of the Fourteenth Amendment would prohibit it." *Id.* at 31a.

SUMMARY OF ARGUMENT

Among the bedrock freedoms protected by the Due Process Clause is the freedom not to be haled into court indiscriminately. This case arises from injuries respondents allegedly sustained outside of Montana while working for BNSF—a railway company incorporated in Delaware and headquartered in Texas. None of the events giving rise to respondents' claims occurred in Montana, and no party in this case is a citizen or resident of Montana. Nonetheless, the Montana Supreme Court held that BNSF can be sued in Montana by nonresident plaintiffs for claims that have no connection whatsoever to Montana.

Contrary to the Montana Supreme Court, FELA's venue provision, 45 U.S.C. § 56, does not provide an independent basis for personal jurisdiction in this case. On its face, the first sentence of § 56 applies only to "court[s] of the United States," not to state courts, and nothing in FELA purports to define the *in personam* jurisdictional reach of *state* courts. FELA also provides for concurrent subject-matter jurisdiction of *claims* for state and federal courts, but FELA does not alter or expand the authority of state courts to

exercise personal jurisdiction over *persons*.

Nor *could* FELA expand the personal jurisdiction of the state courts. Under the Supremacy Clause, FELA cannot supersede the Due Process Clause of the Fourteenth Amendment, nor can it excuse Montana courts from their duty to accord every defendant haled before them with due process of law. Indeed, the Montana Supreme Court's interpretation of FELA as somehow permitting Montana courts to exercise general personal jurisdiction over BNSF in this case cannot be squared with the due-process limitations on personal jurisdiction recognized by this Court in *Daimler AG v. Bauman*. And whatever the extent of Congress's authority to expand the bounds of personal jurisdiction for *federal* courts, it surely cannot alter the jurisdictional reach of *state* courts. Simply put, FELA cannot abrogate the sovereignty of the states, nor can it alter the Constitution's deliberate framework of interstate federalism.

Lastly, if the Montana Supreme Court's erroneous view of *Daimler* is allowed to stand, it will enable FELA plaintiffs, like those here, to shop their claims to forums with no connection to those claims. Such forum shopping distorts the civil justice system by creating inefficiencies when cases are litigated far from the location of the parties, the alleged tortious conduct, and the evidence—all while subjecting defendants to the cost and inconvenience of having to litigate in a distant location. By permitting plaintiffs whose suits have no relationship to Montana to subject a nonresident defendant to suit there, the decision below rewards improper forum shopping and invites further abuse.

REASONS FOR GRANTING THE PETITION

I. REVIEW IS WARRANTED TO CLARIFY THAT FELA DOES NOT SUPPLANT BEDROCK DUE-PROCESS LIMITATIONS ON STATE COURTS' EXERCISE OF PERSONAL JURISDICTION

As the petition ably demonstrates, the Montana Supreme Court's holding exacerbates an existing split among the states' highest courts on whether FELA confers state courts with personal jurisdiction over any defendant "doing business" in the state, obviating the need for a due-process analysis under the Fourteenth Amendment.[2]

Given this intractable and widening split among the states, only this Court's review can provide a single, national, and uniform interpretation of FELA that is consistent with the Court's understanding of the Due Process Clause's

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[2] *Compare MacKinnon v. St. Louis S.W. Ry. Co.*, 518 So. 2d 89, 93 (1987) (holding that "'actually carrying on railroading' in this state" is "sufficient to invoke [personal] jurisdiction under FELA"), *with Norfolk S. Ry. Co. v. Maynard*, 437 S.E.2d 277, 280-81 (W. Va. 1993) (holding that FELA imposes limitations on where an action may be brought "[i]n addition to the requirements for *in personam* jurisdiction outlined in *International Shoe* and its progeny"), *S. Pac. Transp. Co. v. Fox*, 609 So. 2d 357, 362-63 (Miss. 1992) ("Nothing in [FELA] addresses the matter of personal jurisdiction in the state court."), *and Hayman v. S. Pac. Co.*, 278 S.W.2d 749, 751 (Mo. 1955) (affirming dismissal of plaintiff's action under FELA because, even though the defendant was "doing business" in Missouri, exercising personal jurisdiction over that defendant was inconsistent with due process).

constraints on personal jurisdiction as articulated in *Daimler*. As demonstrated below, review is also warranted because the Montana Supreme Court's holding is contrary to the plain language of FELA and this Court's own precedents interpreting it. And even if Congress desired—under FELA, or otherwise—to expand the general personal jurisdiction of state courts so as to reach defendants who are not "at home" in the forum state, it could not permissibly do so.

A. FELA Does Not Purport to Alter or Expand the Personal Jurisdiction of State Courts

In enacting FELA, Congress clearly did not extend the bounds of state courts' general personal jurisdiction over nonresident defendants. Section 56 of FELA 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. To the extent that § 56 delineates possible venues for a FELA action, that delineation has *nothing* whatsoever to do with personal jurisdiction.

As a preliminary matter, limits on venue should not be mistakenly conflated with constitutional limits on personal jurisdiction. Venue assesses whether litigation in a particular geographic location is appropriate, whereas personal jurisdiction considers whether a particular governmental body's courts can compel the defendant to appear. Accordingly, "the question of whether venue within the state's borders would be burdensome is analytically distinct from the question of which governments can compel a defendant to appear within those borders." Allan Erbsen, *Reorienting Personal Jurisdiction Doctrine Around Horizontal Federalism Rather Than Liberty After* Walden v. Fiore, 19 Lewis & Clark L. Rev. 769, 780 (2015).

For that reason, this Court has explained that "[t]he question of personal jurisdiction, which goes to the court's power to exercise control over the parties, is typically decided in advance of venue, which is primarily a matter of choosing a convenient forum." *Leroy v. Great W. United Corp.*, 443 U.S. 173, 180 (1979); *see also Lisak v. Mercantile Bancorp, Inc.*, 834 F.2d 668, 671 (7th Cir. 1987) ("The question [for personal jurisdiction] is whether the polity, whose power the court wields, possesses a legitimate claim to exercise force over the defendant."). Because proper venue is a necessary but not sufficient condition for a court's exercise of personal jurisdiction, a statute that merely delineates a number of potential venues assumes *nothing* about the existence of personal jurisdiction over any given defendant.

Moreover, under any plausible reading of

FELA, the simple fact that this case is pending in *state* court, rather than *federal* court, is entirely dispositive of the question presented. On its face, § 56's authorization to bring an action wherever a defendant is "doing business" applies only "in a district court of the United States," not any court located *within* the United States. "Because the United States is a distinct sovereign, a defendant may in principle be subject to the jurisdiction of the courts of the United States but not of any particular State." *J. McIntyre Machinery, Ltd. v. Nicastro*, 564 U.S. 873, 884 (2011) (plurality opinion).

As this Court has explained recently, federal venue statutes reflect Congress's intent "that venue should always lie in *some federal court* whenever *federal courts* have personal jurisdiction over the defendant." *Atl. Marine Constr. Co. v. U.S. Dist. Court for the W. Dist. of Tex.*, 134 S. Ct. 568, 578 (2013) (second emphasis added). And the fact that "[f]ederal courts ordinarily follow state law in determining the bounds of their jurisdiction over persons," *Daimler*, 134 S. Ct. at 753, further undermines any contention that § 56 provides an independent basis for a Montana court to exercise personal jurisdiction over BNSF in this case. Simply put, nothing in FELA purports to define the *in personam* jurisdictional reach of *state* courts.

Nor does § 56's perfunctory grant of "concurrent jurisdiction" over FELA claims to the "courts of the several States" alter the personal jurisdiction analysis in any way. The concept of "concurrent jurisdiction" extends to *claims*, not *persons*, and has always been understood to refer to subject-matter jurisdiction, *not* personal jurisdiction.

See, e.g., Haywood v. Drown, 556 U.S. 729, 747 (2009) ("[T]he state courts will retain a concurrent jurisdiction in all cases where they had jurisdiction originally *over the subject matter*.") (quoting 1 James Kent, *Commentaries on American Law* 374-75 (1826) (emphasis added)); *Growe v. Emison*, 507 U.S. 25, 32 (1993) (noting that "federal courts and state courts often find themselves exercising concurrent jurisdiction *over the same subject matter*") (emphasis added).

Stated differently, "concurrent jurisdiction" simply grants state courts the "authority" to "adjudicate claims arising under the laws of the United States." *Tafflin v. Levitt*, 493 U.S. 455, 458 (1990). For that reason, courts have interpreted § 56's grant of "concurrent jurisdiction" to the states as a grant of subject-matter jurisdiction over FELA claims, not a grant of personal jurisdiction over out-of-state defendants. *See In re CSX Transp., Inc.*, 151 F.3d 164, 166 (2d Cir. 1998) (explaining that § 56 "confers concurrent federal and state jurisdiction over FELA *claims*") (emphasis added).

This Court has stated explicitly that § 56 is not an "attempt by Congress to enlarge or regulate the [personal] jurisdiction of state courts or to control or affect their modes of procedure." *Second Employers' Liability Cases*, 223 U.S. 1, 56 (1912). Rather, in granting "concurrent jurisdiction" over FELA to the state courts, Congress sought to disabuse any notion that "the enforcement of the rights which [FELA] creates was originally intended to be restricted to the Federal courts." *Ibid*; *See Douglas v. N.Y., N.H. & H.R. Co.*, 279 U.S. 377, 387 (1929) ("As to the grant of jurisdiction in [FELA,]

that statute does not purport to require State Courts to entertain suits arising under it but only to empower them to do so, so far as the authority of the United States is concerned."). Thus, § 56 grants subject-matter jurisdiction over FELA claims to the state courts, but only "when their [personal] jurisdiction, as prescribed by local laws, is adequate to the occasion." *Second Employers*, 223 U.S. at 55.

B. FELA Cannot Be Construed as Expanding the Reach of State Courts' Personal Jurisdiction

The Montana Supreme Court's approach to personal jurisdiction in this case is a relic of the pre-*Daimler* era, in which many state and federal courts permitted large corporations to be sued in any state in which they maintained a significant presence. But *Daimler* leaves no doubt that Montana courts cannot, consistent with due process, subject a nonresident defendant to suit for claims that have no connection whatsoever to Montana. Where, as here, specific jurisdiction over a corporate defendant is lacking, general jurisdiction may be exercised only if the corporation's contacts with Montana are so extensive as to render it "at home" there.

Before any court can assert personal jurisdiction over a defendant in a federal question case, that court must first determine whether the exercise of jurisdiction "comports with the limits imposed by federal due process." *Daimler*, 134 S. Ct. at 753. The Montana Supreme Court's decision thus expands the scope of general personal jurisdiction well beyond its constitutional bounds. By authorizing out-of-state defendants to be sued in a

forum without regard to whether they are "at home" there—even though the plaintiff's claims bear *no* relationship to that forum—the decision below collides with the vital due-process limitations on personal jurisdiction this Court recognized in *Daimler*.

FELA cannot supersede the Due Process Clause of the Fourteenth Amendment, nor can it excuse state courts from their duty to accord defendants appearing before them with due process of law. *See* U.S. Const. amend. XIV, § 1. Even if FELA explicitly provided for personal jurisdiction in this case—and it obviously does not—that would not dispose of the constitutional limits imposed by due process. Like all federal statutes, FELA is "subject to the requirements of * * * the Due Process Clause," *Maresse v. Am. Acad. of Orthopaedic Surgeons*, 470 U.S. 373, 380 (1985), and Congress has "no power to restrict, abrogate, or dilute these guarantees." *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 732 (1982).

Indeed, serious constitutional concerns would arise if this court were to interpret FELA as somehow permitting Montana courts to exercise general personal jurisdiction over BNSF in this case. To avoid any entanglement with those questions, the Court should grant review to interpret FELA as consistent with the bright-line rule announced in *Daimler*: state courts lack general personal jurisdiction over a corporate defendant unless that defendant is "at home" in the state.

1. Whatever the extent of Congress's authority to establish the bounds of personal jurisdiction for *federal* courts, it surely cannot alter the

jurisdictional reach of *state* courts. This distinction is significant because the "first principle" of the Constitution is that it "creates a Federal Government of enumerated powers." *United States v. Lopez*, 514 U.S. 549, 552 (1995) (citing *The Federalist* No. 45 (James Madison)).

As James Madison observed, "[t]he powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite." *Ibid*. The federal government is not granted "an indefinite supremacy over all persons and things," *The Federalist* No. 39 (James Madison), nor does the Constitution "confer upon Congress the ability to require the States to *govern* according to Congress' instructions." *New York v. United States*, 505 U.S. 144, 162 (1992) (emphasis added).

"Few activities of government are more fundamental to sovereignty than the power of a state to resolve disputes through its courts." Geoffrey P. Miller, *In Search of the Most Adequate Forum: State Court Personal Jurisdiction*, 2 Stan. J. Complex Litig. 1, 19 (2014). Indeed, as Justice Frankfurter explained:

> Congress may avail itself of state courts for the enforcement of federal rights, but it must take the state courts as it finds them, subject to all the conditions for litigation in the state courts that [apply] for every other litigant who seeks access to its courts.

* * * * *

> The federal law in any field within which Congress is empowered to legislate is the supreme law of the land in the sense that it may supplant legislation in that field, but *not* in the sense that it may supplant the existing rules of litigation in state courts. Congress has full power to provide its own courts for litigating federal rights. The state courts belong to the States. They are not subject to the control of Congress.

Brown v. Gerdes, 321 U.S. 178, 190, 193 (1944) (Frankfurter, J., concurring) (emphasis added).

Although the Constitution imposes only due-process limitations on the exercise of personal jurisdiction by *federal* courts, it imposes both due-process *and* territorial limitations on the exercise of personal jurisdiction by *state* courts. *See, e.g.,* Austen L. Parrish, *Sovereignty, Not Due Process: Personal Jurisdiction Over Nonresident Alien Defendants*, 41 Wake Forest L. Rev. 1, 16 (2006) ("Despite the due process focus, the U.S. Supreme Court has never wholly discarded taking sovereignty concerns into account in its personal jurisdiction analysis."); Robert C. Casad, *Personal Jurisdiction in Federal Question Cases*, 70 Tex. L. Rev. 1589, 1591 (1992) ("It is now reasonably clear that the source [of constitutional limitations on state court jurisdiction] is not just the Due Process Clause.").

Indeed, this Court has made clear that the Constitution imposes unique *territorial* constraints on the exercise of personal jurisdiction by state

courts and that such constraints do more than simply ensure fairness to an out-of-state defendant. Personal jurisdiction also "acts to ensure that the States through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292-93 (1980) ("[W]e have never accepted the proposition that state lines are irrelevant for jurisdictional purposes, nor could we, and remain faithful to the principles of interstate federalism embodied in the Constitution.").

These principles of interstate federalism "are more than a guarantee of immunity from inconvenient or distant litigation. They are a consequence of territorial limitations on the power of the respective States." *Hanson v. Denckla*, 357 U.S. 235, 251 (1958). So "when it comes to federal *legislative* power concerning *state judicial* power, state boundaries have constitutional significance." Joan Steinman, *Reverse Removal*, 78 Iowa L. Rev. 1029, 1119 (1993).

While due process constrains the authority of both federal and state courts to reach across geographic borders to exercise personal jurisdiction over defendants and controversies arising outside their borders, the geographic boundaries of the United States are vastly larger than those of any one state. *See Nicastro*, 564 U.S. at 884 (plurality opinion) ("For [general] jurisdiction, a litigant may have the requisite relationship with the United States Government but not with the government of any individual state."). "Regardless of who is doing the legislating, the relevant boundaries are those of

the sovereign that has created the court." Steinman, *supra*, at 1119.

So even if Congress wanted to expand the general personal jurisdiction of state courts so as to reach FELA defendants who are not "at home" in the forum state, it could not do so. Simply put, FELA cannot abrogate the sovereignty of the states, nor can it alter the Constitution's deliberate framework of interstate federalism. As Justice Kennedy has cautioned, allowing the wrong state to exercise jurisdiction over the citizens of another state "would upset the federal balance, which posits that each State has a sovereignty that is not subject to unlawful intrusion by other States." *Nicastro*, 564 U.S. at 884 (plurality opinion).

2. Authorizing a state court to exercise general jurisdiction over every railway company "doing business" in the state would not only violate the Due Process Clause and disregard the sovereignty of the states, it would also destroy the very predictability that *Daimler* sought to provide by ensuring that companies are able to structure their affairs with some confidence of not being haled into court unexpectedly.

Among other things, due-process limitations on personal jurisdiction confer "a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985). Such "[p]redictability is valuable to corporations making business and investment

decisions." *Hertz Corp. v. Friend*, 559 U.S. 77, 94 (2010).

A corporation's place of incorporation and principal place of business—the two jurisdictions where a corporation is always "at home" under *Daimler*—"have the virtue of being unique." *Daimler*, 134 S. Ct. at 760. That is, "each ordinarily indicates only one place"—a forum that is "easily ascertainable." *Ibid.* This Court's bright-line rule in *Daimler* thus provides corporations with the predictable assurance that they will be subject to general jurisdiction in only one or two well-defined jurisdictions.

In contrast, most railway companies are "doing business" in any number of states. Permitting those activities to suffice for general jurisdiction would allow those companies to be sued in Montana by *any* plaintiff on *any* FELA claim arising *anywhere*. Railway carriers would be completely unable to predict where any particular claim might be brought. Such unprecedented expansion of states' personal jurisdiction over nonresident defendants would "scarcely permit out-of-state defendants 'to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit.'" *Daimler*, 134 S. Ct. at 762 (quoting *Burger King Corp.*, 471 U.S. at 472).

* * *

In sum, because § 56 of FELA does not authorize state courts to exercise general jurisdiction over nonresident defendants—nor could it—the petition for certiorari should be granted.

II. REVIEW IS WARRANTED TO ENSURE THAT THE DECISION BELOW DOES NOT INCENTIVIZE FURTHER FORUM SHOPPING

No matter their reasons, if the nonresident plaintiffs in this case both found it advantageous to bring their FELA claims in Montana courts, other plaintiffs contemplating FELA suits in other states will too. Indeed, "[t]here are currently 32 cases against BNSF pending in Montana state courts brought by FELA plaintiffs who are not Montana residents, who were not injured in Montana, and who do not allege *any* Montana-related acts or omissions." Pet. at 24. Permitting the Montana Supreme Court's elastic approach to general jurisdiction to stand would doubtlessly invite and encourage even more plaintiffs from across the country to come to Montana to pursue the same harmful forum-shopping strategy. But *Daimler* has significantly cabined the exercise of general jurisdiction over nonresident defendants, and this Court should look askance at state courts that invite forum shopping by haling nonresident defendants into forums unrelated to the plaintiff's claims.

As this Court has explained, "[d]ue process limits on the State's adjudicative authority principally protect the liberty of the nonresident defendant—*not* the convenience of plaintiffs or third parties." *Walden v. Fiore*, 134 S. Ct. 1115, 1122 (2014) (emphasis added). Yet permitting a nonresident plaintiff whose claims have no relationship to the forum state to compel an out-of-state defendant to defend a lawsuit in that state rewards improper forum shopping and invites further abuse. Given the forum-shopping

implications of the Montana Supreme Court's holding, it is all the more urgent that this Court grants review to ensure that the decision below does not incentivize similar behavior by future plaintiffs.

Such forum shopping serves no useful purpose and is deeply unfair to litigants. This Court has long recognized that "it would be unfair for the character or result of a litigation materially to differ because the suit had been brought in" a particular court. *Hanna v. Plumer*, 380 U.S. 460, 466 (1965). And empirical research confirms that forum shopping can affect the outcome of cases because the forum in which a case proceeds very often impacts the result. *See* Kevin M. Clermont & Theodore Eisenberg, *Exorcising the Evil of Forum-Shopping*, 80 Cornell L. Rev. 1507, 1507 (1995) (analyzing three million cases terminated over 13 years and finding that "plaintiffs' rate of winning drops from 58% in cases in which there is no transfer [of venue] to 29% in transferred cases"—an effect that "prevails over the range of substantively different types of cases").

Forum shopping also damages the integrity of the civil justice system itself. "Forum shopping can be harmful to the legal system by distorting the substantive law, by showcasing the inequities of granting plaintiffs an often outcome-determinative choice among many district courts, and by causing numerous economic inefficiencies, including inconveniences to the parties." Jeanne C. Fromer, *Patentography*, 85 N.Y.U. L. Rev. 1444, 1445 (2010). Allowing plaintiffs to have their suits tried and decided in more favorable but far-flung forums can often result in "magnet jurisdictions." Such jurisdictions impose unwelcome administrative

burdens on the courts and undermine localized interests in procuring justice. As this Court has noted:

> Administrative difficulties follow for courts when litigation is piled up in congested centers instead of being handled at its origin. Jury duty is a burden that ought not to be imposed upon the people of a community which has no relation to the litigation. In cases which touch the affairs of many persons, there is reason for holding the trial in their view and reach rather than in remote parts of the country where they can learn of it by report only. There is a local interest in having localized controversies decided at home.

Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508-09 (1947).

Although the Montana Supreme Court concluded that "FELA is to be given a liberal construction in favor of injured railroad employees so that it may accomplish humanitarian and remedial purposes," Pet. App. 5a, refusing to sanction forum shopping does not work an injustice against railroad employees. While applying the rule announced in *Daimler* may limit the number of state forums in which FELA plaintiffs may bring their claims, it does nothing to undermine the "humanitarian and remedial purposes" of FELA. Even under *Daimler*, for example, the plaintiffs in this case would still have at least three viable forums within which to bring their claims: the state where they allegedly

sustained their injury, Delaware, and Texas.

If plaintiffs have unfettered discretion to sue corporations in any state in the country where the defendant is "doing business," then plaintiffs will be free to shop claims to any forum their counsel views as more plaintiff-friendly. The forum-shopping incentives implicated here provide yet another reason for the Court to grant review and reject the Montana Supreme Court's sweeping theory of personal jurisdiction.

CONCLUSION

For the foregoing reasons, *amicus curiae* Washington Legal Foundation respectfully requests that the Court grant the petition.

Respectfully submitted,

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