No. 16-405

IN THE

Supreme Court of the United States

BNSF RAILWAY COMPANY,

Petitioner,

v.

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

Respondents.

On Writ Of Certiorari To The Supreme Court Of Montana

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Whether, notwithstanding this Court's decision in *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014), a state court can exercise personal jurisdiction over a defendant railroad that is not at home in the state, in a case that does not arise in the state, on the ground that the plaintiff pleads a cause of action under the Federal Employers' Liability Act and the railroad is not incorporated overseas.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The caption contains the names of all the parties to the proceeding below.

Pursuant to this Court's Rule 29.6, Respondent BNSF Railway Company states that its parent company is Burlington Northern Santa Fe, LLC. Burlington Northern Santa Fe, LLC's sole member is National Indemnity Company. The following publicly traded company owns 10% or more of National Indemnity Company: Berkshire Hathaway Inc.

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OPINION BELOW

The opinion of the Supreme Court of Montana (Pet. App. 1a–33a) is reported at 373 P.3d 1.

JURISDICTION

The Supreme Court of Montana entered its judgment on May 31, 2016, accompanied by an opinion deciding the federal question presented in the petition for a writ of certiorari. The court filed a corrected opinion with non-substantive revisions on June 7, 2016. Justice Kennedy extended the time within which to file a petition for a writ of certiorari to and including September 28, 2016, and the petition was filed on that date.

This Court has jurisdiction under 28 U.S.C. § 1257(a). The Montana Supreme Court's "judgment is plainly final on the federal issue" of personal jurisdiction under the Due Process Clause, which "is not subject to further review in the state courts." *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 485 (1975). Petitioner BNSF Railway Company "may prevail at trial on nonfederal grounds," thereby preventing this Court's review of the federal issue, and if the Montana Supreme Court erroneously found personal jurisdiction, then "there should be no trial at all." *Ibid.* In *Shaffer v. Heitner*, 433 U.S. 186, 195 n.12 (1977), this Court held that it has jurisdiction under Section 1257(a) and *Cohn* to review a state court's assertion of personal jurisdiction. This Court also exercised jurisdiction in *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915 (2011), which had a similar posture to one of these cases: a state-court judgment affirming, before trial, the denial of a motion to dismiss for lack of personal jurisdiction.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment of the Constitution of the United States provides, in relevant part:

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

***

The relevant portion of the Federal Employers' Liability Act, 45 U.S.C. § 56, 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.

***

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED (continued)

The relevant portion of Federal Rule of Civil Procedure 4 provides:

> (k) Territorial Limits of Effective Service.
>
> (1) In General. Serving a summons or filing a waiver of service establishes personal jurisdiction over a defendant:
>
> (A) who is subject to the jurisdiction of a court of general jurisdiction in the state where the district court is located;
>
> … or
>
> (C) when authorized by a federal statute.
>
> ***

The relevant portion of the Montana long-arm statute, Montana Rule of Civil Procedure 4(a), (b), provides:

> (a) Definition of Person. As used in this rule, the word "person," whether or not a citizen of this state, or organized under the laws of this state, includes:
>
> …
>
> (3) a corporation;
>
> …
>
> (b) Jurisdiction of Persons.
>
> (1) Subject to Jurisdiction. All persons found within the state of Montana are subject to the jurisdiction of Montana courts …
>
> ***

INTRODUCTION

The Montana Supreme Court has flouted this Court's decision in *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014). This Court in *Daimler* held that, when a plaintiff pleads a cause of action that does not arise in the forum state, the Due Process Clause of the Fourteenth Amendment prohibits a state court from exercising personal jurisdiction unless the defendant is "at home" in the state. *Id.* at 760.

That straightforward constitutional rule resolves these cases. Respondents brought workplace-injury actions against Petitioner BNSF Railway Company in Montana state court under the Federal Employers' Liability Act (FELA), 45 U.S.C. § 51. The cases do not by *any* measure arise in Montana: Respondents are residents of other states (North Dakota and South Dakota) who never worked a day in Montana, were not injured in Montana, and do not allege that BNSF was negligent in Montana. Nor is BNSF at home in Montana under *Daimler*: BNSF is a Delaware corporation whose principal place of business is Texas.

Respondents elected to sue in Montana instead of the states where their cases arose because the Montana Supreme Court has repeatedly subjected railroads to plaintiff-friendly procedural rules and unfavorable substantive FELA standards. Magnet jurisdictions like this one breed cynicism about the civil justice system, and this Court's opinion in *Daimler* aimed to put a stop to this type of flagrant forum shopping. But the Montana Supreme Court has other ideas. Instead of applying *Daimler* and ordering these cases dismissed for lack of personal jurisdiction under the Due Process Clause, the Montana Supreme Court reached the extraordinary conclusions (1) that Congress *conferred* personal jurisdiction on state courts in

FELA Section 56, Pet. App. 13a, and (2) that *Daimler* is "factually … distinguishable," Pet. App. 15a, in light of its transnational facts—a holding that Respondents do not defend in this Court.

The Montana Supreme Court's judgment must be reversed. FELA does not remotely confer personal jurisdiction on state courts. As this Court has held, Section 56 of FELA specifies *venue* for cases filed in *federal* court, *see Baltimore & Ohio R.R. Co. v. Kepner*, 314 U.S. 44, 52 (1941), and then confirms that Congress did not deprive state courts of *subject-matter* jurisdiction over FELA claims, *see Mondou v. N.Y., New Haven & Hartford R.R. Co. (Second Employers' Liability Cases)*, 223 U.S. 1, 55–56 (1912).

The Montana Supreme Court attempted to buttress its decision by badly misreading some of this Court's older precedents as interpreting FELA to confer personal jurisdiction on state courts. But not one of the cases the Montana majority relied on so much as mentioned personal jurisdiction under the Due Process Clause. This Court has never held that Section 56 of FELA has anything to do with personal jurisdiction in state courts. Moreover, even if Congress had attempted through FELA to supersede the Due Process Clause's limits on state courts' personal jurisdiction, the statute would be unconstitutional because "Congress does not have the power to authorize the individual States to violate the [Fourteenth Amendment]." *Graham v. Richardson*, 403 U.S. 365, 382 (1971).

This Court must correct the Montana Supreme Court's departure from the clear teaching in *Daimler*. While FELA plaintiffs plainly have access to state and federal courts, the statute does not subject railroads to personal jurisdiction in the courts of every state

where they do business. The Montana Supreme Court's decision to the contrary violates FELA's plain text and adopts a view of personal jurisdiction that is "unacceptably grasping." *Daimler*, 134 S. Ct. at 761.

STATEMENT

A. The Federal Employers' Liability Act

1. In 1908, "[i]n response to mounting concern about the number and severity of railroad employees' injuries, Congress … enacted FELA to provide a compensation scheme for railroad workplace injuries, preempting state tort remedies." *Norfolk S. Ry. Co. v. Sorrell*, 549 U.S. 158, 165 (2007) (citing *Mondou v. N.Y., New Haven & Hartford R.R. Co. (Second Employers' Liability Cases)*, 223 U.S. 1, 53–55 (1912)). "Unlike a typical workers' compensation scheme, which provides relief without regard to fault, Section 1 of FELA provides a statutory cause of action sounding in negligence." *Ibid.* The statute makes railroads liable "'in damages to any person suffering injury while he is employed by such carrier … for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier.'" *Ibid.* (citing 45 U.S.C. § 51).

2. FELA as originally enacted, *see* Act of April 22, 1908, ch. 149, 35 Stat. 65, soon produced two practical problems. First, the original act contained no venue provision, and thus FELA cases in federal court were controlled by the general venue statute. *See Baltimore & Ohio R.R. Co. v. Kepner*, 314 U.S. 44, 49 (1941); J. C. Gibson, *The Venue Clause and Transportation of Lawsuits*, 18 L. & Contemp. Probs. 367, 368 (1953) (describing the history of FELA). At the time, the general venue statute provided that "no civil suit shall be brought … against any person … in any other district than whereof he is an inhabitant," Act of Aug. 13,

1888, ch. 866, § 1, 25 Stat. 433, 434, which for a corporation meant only the place of incorporation. Gibson, *supra*, at 368; *see also* Marvin J. Sloman, *Forum Non Conveniens in FELA Actions Under the Judicial Code of 1948*, 27 Tex. L. Rev. 698, 701 (1949). Congress perceived an "injustice to an injured employee of compelling him to go to the possibly far distant place of habitation of the defendant carrier, with consequent increased expense for the transportation and maintenance of witnesses, lawyers and parties, away from their homes." *Kepner*, 314 U.S. at 49–50.

The second problem was that the Supreme Court of Errors of Connecticut interpreted FELA in *Hoxie v. New York, New Haven & Hartford Railroad Co.*, 73 A. 754 (Conn. 1909), to bar state courts from exercising subject-matter jurisdiction over FELA claims. *See Second Employers' Liability Cases*, 223 U.S. at 55; Gibson, *supra*, at 369 & n.13, 371 & n.17. That was wrong: Congress never intended to confer exclusive subject-matter jurisdiction on the federal courts in FELA cases. *See Second Employers' Liability Cases*, 223 U.S. at 56.

3. Congress responded in 1910 by amending FELA:

> …
>
> 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 April 5, 1910, ch. 143, § 1, 36 Stat. 291. Today, substantially identical text is codified at 45 U.S.C. § 56, except that FELA's anti-removal provision is now separately codified at 28 U.S.C. § 1445(a).

4. Congress's amendment to FELA removed the limitations of the general venue statute and significantly expanded a FELA plaintiff's options for venue in cases in federal court by providing that venue would be proper in any federal district where the railroad was doing business. *See Kepner*, 314 U.S. at 51–54. In the second sentence of Section 56, Congress abrogated *Hoxie* and confirmed that state courts have "concurrent" jurisdiction—that is, subject-matter jurisdiction—to hear FELA claims. *See Second Employers' Liability Cases*, 223 U.S. at 55–56. Congress also prohibited removal to federal court of FELA actions, so long as the case was filed in a state court of competent jurisdiction. *See Great N. Ry. Co. v. Alexander*, 246 U.S. 276, 280 (1918). The 1910 amendment did not address where defendants could be served with process, and therefore did not alter personal jurisdiction in federal (or state) courts. *See Robertson v. R.R. Labor Bd.*, 268 U.S. 619, 622–23 (1925) (personal jurisdiction depends on the defendant's amenability to service of process); *Omni Capital Int'l, Ltd. v. Rudolf Wolff & Co.*, 484 U.S. 97, 104 (1987) (same).

B. Factual Background

1. BNSF is a rail carrier incorporated in Delaware. JA24. BNSF's principal place of business is Texas. *Ibid.* All of BNSF's corporate headquarters and corporate officers are located in Texas. *Ibid.* None of

BNSF's corporate officers or departments has ever been located in Montana. JA26.

BNSF operates 32,500 miles of rail lines in 28 states and 2 Canadian provinces. JA25. BNSF has more track miles in Texas than in any other state. *Ibid.* The company dispatches its trains and monitors its network from its Network Operations Center in Fort Worth, Texas. JA24. BNSF generates more revenue from Texas than from any other state. JA25. Of BNSF's 43,000 employees, the company employs more people in Texas (approximately 20% of its workforce) than in any other state. *Ibid.*

Montana is one of the 28 states in which BNSF operates. BNSF's revenues from Montana represent only a small fraction—less than 10%—of its nationwide business. JA27. Barely 6% of BNSF's total track mileage is located in Montana, and less than 5% of BNSF's total workforce is located in Montana. JA26.

2. Respondents are two plaintiffs from outside Montana who allege that they were injured while working for BNSF outside Montana. They nevertheless brought suits in Montana state court against BNSF under FELA.

Respondent Robert Nelson is a resident of North Dakota who was employed by BNSF as a fuel truck driver. JA16. In March 2008, while working for BNSF in Washington, Mr. Nelson slipped and fell, injuring his knee. JA16, JA18. He does not allege that he is or was a resident of Montana, that he has ever worked for BNSF in Montana, or that his case is in any way connected to Montana. *See* Pet. App. 3a.

Respondent Kelli Tyrrell was appointed personal representative for the estate of Brent T. Tyrrell, a former employee of BNSF, in South Dakota. JA20. Mr.

Tyrrell allegedly worked for BNSF in South Dakota, Minnesota, and Iowa. *See* Pl.'s Opp. to Def.'s Mot. to Dismiss in Yellowstone Cty. Dist. Ct. 3. The complaint alleges that, during Mr. Tyrrell's employment, he was exposed to "various carcinogenic chemicals" that caused him to develop renal cell carcinoma which resulted in his death in 2011. JA20–JA21. The complaint does not allege that any exposures occurred in Montana or that Mr. Tyrrell ever worked or lived in Montana. Pet. App. 3a–4a.

C. Respondents File Suit In Montana, Which Has Friendly Rules And Standards For FELA Plaintiffs

1. Pursuant to Montana's venue statute, Respondents filed these cases in Yellowstone County, Montana, where BNSF has a registered agent to accept service of process. *See* Mont. Code Ann. § 25-2-122(2)(c) (for a tort action that occurred out-of-state brought by an out-of-state plaintiff against a corporation incorporated out-of-state, venue is "the county in which the corporation's resident agent is located").

2. By filing these cases in Montana state court, Respondents sought the benefit of several litigation advantages that they would not enjoy in other state or federal courts: Once a complaint is timely filed within the applicable statute of limitations, Montana gives plaintiffs up to *three additional years* to serve the complaint on the defendant. Mont. R. Civ. P. 4(t)(1). Montana does not require discovery to be proportional to the needs of the case. *Compare* Mont. R. Civ. P. 26(b), *with* Fed. R. Civ. P. 26(b). The Montana Supreme Court refuses to allow motions to transfer FELA cases based on forum non conveniens. *State ex rel. Burlington N. R.R. Co. v. Dist. Court*, 891 P.2d 493, 499 (Mont.

1995). Montana generally does not follow the standards for expert witnesses in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), except for novel scientific testimony. *See McClue v. Safeco Ins. Co. of Ill.*, 354 P.3d 604, 609 (Mont. 2015). And Montana requires only two-thirds of a jury to agree on a verdict. Mont. R. Civ. P. 48.

3. FELA plaintiffs in Montana enjoy additional litigation advantages under substantive law. The Montana Supreme Court has criticized the reasoning of multiple federal circuit courts and interpreted FELA's statutory three-year statute of limitations to allow plaintiffs to recover for the full amount of their injuries so long as, sometime in the past three years, the defendant's alleged negligence contributed in any way (however slight) to the injury. *See Anderson v. BNSF Ry. Co.*, 354 P.3d 1248, 1260–61 (Mont. 2015), *cert. denied*, 136 S. Ct. 1493 (2016). As a result, not only do railroads face FELA cases in Montana that should be tried elsewhere; railroads face long-stale claims in Montana that should not be tried at all.

Whereas railroad defendants in other courts are entitled to seek have their FELA liability apportioned to account for a plaintiff's preexisting conditions, *see Sauer v. Burlington N. R.R. Co.*, 106 F.3d 1490, 1494 (10th Cir. 1996), the Montana Supreme Court has strongly suggested that railroads cannot make this defense, *see Anderson*, 354 P.3d at 1263–64. The Montana Supreme Court has also held that a violation of a railroad's own internal safety rules will be deemed a violation of federal safety regulations and constitutes negligence per se. *See Woods v. BNSF Ry. Co.*, 104 P.3d 1037, 1039–40 (Mont. 2004).

The Montana Supreme Court also has significantly expanded railroads' potential liability under

state law. Even though this Court has held that Congress intended that FELA would provide the sole method of recovery for injured railroad workers, *see Sorrell*, 549 U.S. at 165, the Montana Supreme Court has approved—and held that FELA does not preempt—novel independent causes of action against railroads for "mismanagement" of an investigation into a worker's injury, *Winslow v. Mont. Rail Link*, 16 P.3d 992, 995–96 (Mont. 2000), and "bad faith" refusal to settle a worker's claim (*i.e.*, offering to settle on terms that are allegedly "unreasonably" low), *Reidelbach v. BNSF Ry. Co.*, 60 P.3d 418, 421–22, 430 (Mont. 2002).

4. The Montana Supreme Court has repeatedly and consistently ruled against railroad defendants in FELA cases. In five recent cases where railroads obtained a defense jury verdict at trial, the Montana Supreme Court reversed every one. *See Anderson*, 354 P.3d 1248; *Martin v. BNSF Ry. Co.*, 352 P.3d 598 (Mont. 2015); *Spotted Horse v. BNSF Ry. Co.*, 350 P.3d 52 (Mont. 2015); *Boude v. Union Pac. R.R. Co.*, 277 P.3d 1221 (Mont. 2012); *Weber v. BNSF Ry. Co.*, 261 P.3d 984 (Mont. 2011). In several other cases, the Montana Supreme Court has reversed lower court decisions dismissing cases or granting summary judgment in favor of railroad defendants. *See Cook v. Soo Line R.R. Co.*, 198 P.3d 310 (Mont. 2008); *Dovey v. BNSF Ry. Co.*, 195 P.3d 1223 (Mont. 2008); *Reidelbach*, 60 P.3d 418. Meanwhile the Montana Supreme Court affirmed rulings in favor of FELA plaintiffs and affirmed or increased FELA plaintiff's verdicts. *See Cheff v. BNSF Ry. Co.*, 243 P.3d 1115 (Mont. 2010); *Bircher v. BNSF Ry. Co.*, 233 P.3d 357 (Mont. 2010) (affirming district court's grant of a new trial after a jury verdict in favor of railroad defendant); *Woods*, 104 P.3d 1037 (overturning jury's finding that the plaintiff

was 50% negligent and reinstating the plaintiff's entire award).

Given this extraordinary combination of plaintiff-friendly procedural rules, legal standards, and case outcomes, it is unsurprising that BNSF has recently faced 36 FELA lawsuits in Montana state court that have no connection whatsoever to Montana.[1]

D. The Montana Supreme Court Holds That *Daimler* Does Not Apply To These Cases

1. BNSF moved separately to dismiss Respondents' cases based on *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014), arguing that the Due Process Clause prevents Montana state courts from exercising personal jurisdiction because these cases do not arise in Montana and BNSF is not at home in Montana. The trial court in *Tyrrell* denied BNSF's motion to dismiss, Pet. App. 47a–73a, but it granted BNSF's motion to certify its ruling as final so that BNSF could appeal, Pet. App. 41a–46a. Meanwhile, the trial court in *Nelson* granted BNSF's motion to dismiss for lack of personal jurisdiction, Pet. App. 36a–40a, and the plaintiff appealed as of right. The Montana Supreme Court then accepted BNSF's appeal in *Tyrrell*, Pet. App. 34a–35a, and consolidated the cases.

2. A divided Montana Supreme Court held that 45 U.S.C. § 56 entitles out-of-state plaintiffs to sue BNSF in Montana on FELA claims arising anywhere on

[1] BNSF's petition for a writ of certiorari (at 25) and reply in support (at 11) identified 33 out-of-state FELA cases in Montana in addition to *Tyrrell* and *Nelson*. Since then, another new case has been served on BNSF in Montana. *Silva v. BNSF Ry. Co.*, No. DV 15-0838. Some cases have been settled or dismissed. BNSF faces similar forum-shopping in Madison County, Illinois, *see* Pet. Reply 11, and in other states.

BNSF's nationwide rail system, that exercising personal jurisdiction over an out-of-state railroad on out-of-state claims does not violate the Due Process Clause, and that *Daimler* does not apply because that case involved transnational facts. Pet. App. 5a–15a.

The Montana Supreme Court first noted that Section 56 was enacted to expand venue for FELA cases, which prior to Section 56 was limited by statute to the "'district of which the defendant was an inhabitant.'" Pet. App. 6a (quoting *Baltimore & Ohio R.R. Co. v. Kepner*, 314 U.S. 44, 49 (1941)). The court stated that the purpose of the amendment was to give an injured plaintiff an expansive choice of venue for bringing a FELA action, and moreover to "permit[] suits in state courts[.]" Pet. App. 6a–7a (quoting *Miles v. Ill. Cent. R.R. Co.*, 315 U.S. 698, 702 (1942)).

The Montana Supreme Court stated that because Section 56 of FELA "does not specify whether the 'concurrent jurisdiction' conferred upon the state and federal courts refers only to subject-matter jurisdiction or personal jurisdiction," and because "the U.S. Supreme Court has never given it such an interpretation," it is "not the province of this Court to insert such a limitation." Pet. App. 14a. The majority thought that reading FELA to confer personal jurisdiction on state courts "is in line with the U.S. Supreme Court's 'liberal construction' of the FELA in favor of injured railroad workers." Pet. App. 14a (quoting *Urie v. Thompson*, 337 U.S. 163, 180 (1949)).

The Montana Supreme Court also stated that *this Court* "consistently has interpreted 45 U.S.C. § 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. The Montana majority quoted this Court's decision in *Pope v. Atlantic Coast Line Railroad Co.*, 345 U.S. 379, 383 (1953), for the proposition that Section 56 "provides that the employee may bring his suit wherever the carrier 'shall be doing business[.]'" Pet. App. 8a; *see also* Pet. App. 8a–9a (quoting *Miles*, 315 U.S. at 702); Pet. App. 12a–13a (quoting *Denver & Rio Grande W. R.R. Co. v. Terte*, 284 U.S. 284, 286 (1932)). The Montana Supreme Court did not say whether any of these cases involved personal jurisdiction under the Due Process Clause.

As to *Daimler*, the Montana majority concluded that the case does not control here because *Daimler* "addressed 'the authority of a court in the United States to entertain a claim brought by foreign plaintiffs against a foreign defendant based on events occurring entirely outside the United States.'" Pet. App. 11a (quoting *Daimler*, 134 S. Ct. at 750). The Montana Supreme Court characterized *Daimler* as "factually … distinguishable," Pet. App. 15a, because *Daimler* "did not involve a FELA claim or a railroad defendant," Pet. App. 11a.

The Montana Supreme Court also stated that it would be unjust if, in the case of a Montana resident who sustained an injury out of state, the plaintiff were unable to sue in Montana courts. Pet. App. 14a. The Montana Supreme Court considered this outcome contrary to FELA's purpose to avoid requiring injured workers to sue in the defendant's place of incorporation. Pet. App. 14a (citing *Kepner*, 314 U.S. at 49–50). Therefore, the Montana Supreme Court reasoned, "if Montana residents may sue BNSF in a Montana state court for injuries that occur outside of Montana, so

may residents of other states," because hearing FELA claims of Montana residents while refusing to hear claims of non-residents would violate the Privileges and Immunities Clause of article IV, section 2. Pet. App. 14a (citing *Miles*, 315 U.S. at 704).

In a separate portion of the opinion, the Montana Supreme Court held that BNSF is subject to general personal jurisdiction in Montana under *state* law. Pet. App. 15a–19a. The Montana Supreme Court has interpreted Montana Rule of Civil Procedure 4(b)(1) to mean that any defendant "that maintains 'substantial' or 'continuous and systematic' contacts with Montana" is "found within" Montana and subject to personal jurisdiction "even if the cause of action is unrelated to the defendant's activities within Montana." Pet. App. 16a (quoting *Tackett v. Duncan*, 334 P.3d 920, 925 (Mont. 2014)).

2. Justice McKinnon dissented. Pet. App. 20a–33a. She criticized the majority for "[d]isregarding the United States Supreme Court's express holdings in *Goodyear* and in *Daimler* … in favor of substantially the same formulation"—a doing-business test—"that the Supreme Court rejected." Pet. App. 20a. Justice McKinnon found "no authority for the proposition that the quality or quantity of process afforded a defendant by the requirement of general jurisdiction depends on the type of cause of action pursued by the plaintiff or the occupation of the defendant." Pet. App. 26a.

Justice McKinnon found it "[r]emarkabl[e]" that the majority "arrive[d] at [its] conclusion *without citing a single* general jurisdiction case." Pet. App. 27a.

The FELA precedents from this Court cited by the majority "hav[e] nothing to do with general jurisdiction under the Due Process Clause," those cases "do not so much as mention the Due Process Clause or general jurisdiction," and they have never been cited by this Court "for any proposition remotely related to general jurisdiction." Pet. App. 27a–28a. Thus, the majority's "claimed 'century' of United States Supreme Court precedent permitting general jurisdiction wherever a nonresident railroad is doing business simply does not exist." Pet. App. 28a.

Justice McKinnon argued further that the majority's interpretation of FELA is deeply flawed because this Court has held that "Section 56 is a venue statute for the federal courts, not a grant of personal jurisdiction to state courts." Pet. App. 29a. Moreover, "[t]he phrase 'concurrent jurisdiction' is a well-known term of art long employed by Congress and courts to refer to subject-matter jurisdiction, not personal jurisdiction." Pet App. 30a. In any event, she concluded, "Congress lacks authority to confer personal jurisdiction to state courts where the Due Process Clause of the Fourteenth Amendment would prohibit it." Pet. App. 31a.

SUMMARY OF ARGUMENT

I. The Due Process Clause prohibits Montana state courts from exercising personal jurisdiction over BNSF in these cases.

A. This Court has held that when a case does not arise in the forum state, a state court may not exercise personal jurisdiction unless the defendant is at home in the forum. *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011). In *Daimler AG v. Bauman*, 134 S. Ct. 746, 760 (2014), this Court held

that a corporate defendant is at home only where it is incorporated or has its principal place of business, save an exceptional case where a corporation has created a surrogate principal place of business somewhere else.

Those simple jurisdictional rules resolve these cases. The cases do not arise in Montana. BNSF is not at home in Montana. This is not an exceptional case.

B. The Montana Supreme Court's distinctions of *Daimler* are wrong. The constitutional protections of due process do not change based on the cause of action asserted or the nature of the defendant's business. Nor was this Court's holding in *Daimler* confined to transnational fact patterns. The Montana Supreme Court also misunderstood the Privileges and Immunities Clause, which is not implicated when state courts decline to exercise personal jurisdiction in order to comply with the Due Process Clause.

The Montana Supreme Court believed it was necessary to create special rules of personal jurisdiction so that injured workers would not be forced to travel to a railroad's state of incorporation to bring suit. That was error. Under *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), these cases can be brought *wherever* they arise (or, at Respondents' option, in BNSF's place of incorporation or principal place of business). But these cases cannot be brought in Montana, which has no connection to the litigation.

II. The Federal Employers' Liability Act does not confer personal jurisdiction on state courts.

A. The text of the statute does not support the Montana Supreme Court's interpretation.

1. The first sentence of Section 56 explicitly refers to where cases may be brought "in a district court of the United States." This Court and others have consistently interpreted that sentence to refer only to cases in federal court. *Baltimore & Ohio R.R. Co. v. Kepner*, 314 U.S. 44, 52 (1941). Moreover, the statute affects only venue, *see ibid.*, not personal jurisdiction, which in federal courts is controlled by where a defendant is amenable to service of process, *see Omni Capital Int'l, Ltd. v. Rudolf Wolff & Co.*, 484 U.S. 97, 104–05 (1987). Nothing in Section 56 addresses service of process.

The history of Section 56 similarly confirms that Congress intended to provide an expansive choice of *venue*, because the general federal venue statute at the time limited venue in cases against corporations to the defendant's place of incorporation. *See Kepner*, 314 U.S. at 49–50.

2. The statute's provision for "concurrent" jurisdiction between state and federal courts also does not confer personal jurisdiction. This Court has recognized that Congress intended to overturn a mistaken interpretation of FELA as conferring exclusive *subject-matter* jurisdiction on federal courts. *See Mondou v. N.Y., New Haven & Hartford R.R. Co. (Second Employers' Liability Cases)*, 223 U.S. 1, 55–56 (1912). Other cases and statutes confirm that "concurrent" jurisdiction *always* refers only to subject-matter jurisdiction, never personal jurisdiction. *See, e.g.*, *Growe v. Emison*, 507 U.S. 25, 32 (1993).

B. Contrary to the Montana Supreme Court's opinion, this Court has never interpreted FELA to confer personal jurisdiction on state courts. The cases cited by the Montana majority instead involved

whether a FELA case in a state court would impermissibly burden interstate commerce, *see Denver & Rio Grande W. R.R. Co. v. Terte*, 284 U.S. 284, 286 (1932), or whether FELA preempted the traditional equitable power of state courts to enjoin their residents against pursuing vexatious litigation in other courts, *see Kepner*, 314 U.S. at 47; *Miles v. Ill. Cent. R.R. Co.*, 315 U.S. 698, 699 (1942); *Pope v. Atl. Coast Line R.R. Co.*, 345 U.S. 379, 381 (1953).

Not one of the cases cited by the Montana Supreme Court so much as mentioned personal jurisdiction under the Due Process Clause. Respondents cannot draw support from any "drive by" jurisdictional rulings, *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 91 (1998), especially for a waivable right like limited personal jurisdiction, *Ins. Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 703 (1982). Even if the cited precedents had addressed personal jurisdiction, all but one was decided before *International Shoe*, and those cases should not attract heavy reliance today. *See Daimler*, 134 S. Ct. at 761 n.18.

C. Snippets of floor statements in FELA's legislative history are no basis for ignoring FELA's plain text. In any event, the legislative history here does not support the Montana Supreme Court's holding. Nor can the Montana Supreme Court justify its misinterpretation of the statute by resort to "liberal construction." The statutory text is not ambiguous. *See Norfolk S. Ry. Co. v. Sorrell*, 549 U.S. 158, 171 (2007).

III. This Court should not construe FELA to confer personal jurisdiction in state courts because that interpretation would raise grave constitutional questions.

A. This Court has repeatedly held that Congress may not authorize the states to violate the Fourteenth Amendment. *See, e.g.*, *Shapiro v. Thompson*, 394 U.S. 618, 641 (1969); *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 732–33 (1982).

B. Respondents badly err in suggesting that a plurality of this Court concluded in *J. McIntyre Machinery, Ltd. v. Nicastro*, 564 U.S. 873, 885 (2011) (plurality op.), that Congress could authorize personal jurisdiction in state courts. The *Nicastro* plurality suggested the very opposite when it stated that personal jurisdiction must be determined on a sovereign-by-sovereign basis. *See id.* at 884.

The fact that this Court has never determined the extent of the *Fifth Amendment's* limits on Congress's power to confer personal jurisdiction is not relevant here, because Congress may not authorize *states* to violate the Fourteenth Amendment, even when Congress is not similarly constrained. *See Graham v. Richardson*, 403 U.S. 365, 382 (1971).

Finally, Respondents' position is not saved by noting that, under the Dormant Commerce Clause, states may impose otherwise-impermissible burdens on interstate commerce with the consent of Congress. The Fourteenth Amendment, unlike other clauses in the Constitution, denies powers to the states *regardless* of whether Congress consents. For blanket constitutional prohibitions like those in the Due Process Clause, this Court has long held that the states may not act even with congressional permission. *See, e.g.*, *White v. Hart*, 80 U.S. 646, 649 (1871).

ARGUMENT

This Court should reverse the judgment of the Montana Supreme Court.

I. THE DUE PROCESS CLAUSE PROHIBITS MONTANA STATE COURTS FROM EXERCISING PERSONAL JURISDICTION OVER BNSF IN THESE CASES

The Due Process Clause of the Fourteenth Amendment "sets the outer boundaries of a state tribunal's authority" to exercise personal jurisdiction over a defendant. *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 923 (2011). This Court's seminal opinion in *International Shoe Co. v. Washington* held that due process requires "minimum contacts" between the defendant, the forum, *and* the litigation such that the suit "does not offend traditional notions of fair play and substantial justice." 326 U.S. 310, 316 (1945) (quotation marks omitted).

A. These Cases Do Not Arise In Montana And BNSF Is Not At Home In Montana

1. Ever since *International Shoe*, this Court has interpreted the Constitution's minimum-contacts test to authorize two distinct categories of personal jurisdiction. *Goodyear*, 564 U.S. at 919. The "dominant" mode is *specific* personal jurisdiction, *Daimler AG v. Bauman*, 134 S. Ct. 746, 758 (2014), which allows a state court to hear a suit that "arises out of or relates to the defendant's contacts with the forum," *Goodyear*, 564 U.S. at 923–24 (quoting *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 n.8 (1984)). By contrast, when the cause of action does not arise out of the defendant's contacts with the forum state, a state court can exercise *general* personal jurisdiction, but only if the defendant's "affiliations with the State

are so 'continuous and systematic' as to render [it] essentially at home in the forum state." *Id.* at 919 (quoting *International Shoe*, 326 U.S. at 317).

This Court in *Daimler* explained that, since *International Shoe*, it is "specific jurisdiction [that] has become the centerpiece of modern jurisdiction theory, while general jurisdiction has played a reduced role." 134 S. Ct. at 755 (quotation marks omitted). In other words, cases usually must be brought where they arise. General jurisdiction exists only "as an imperfect safety valve that sometimes allows plaintiffs access to a reasonable forum in cases when specific jurisdiction would deny it." *Id.* at 758 n.9 (citation omitted). For that reason, "only a limited set of affiliations with a forum will render a defendant amenable" to personal jurisdiction on claims that do not arise in the forum. *Id.* at 760.

With respect to "foreign (sister-state or foreign-country) corporations," the defendant is at home in its "place of incorporation and principal place of business." *Daimler*, 134 S. Ct. at 754, 760. Only in a case with "exceptional" facts, such as where the defendant has relocated to a "surrogate" head office in a time of war, *cf. Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437 (1952), can the defendant be at home in any other state. *Daimler*, 134 S. Ct. at 756 n.8.

The Constitution embraces these straightforward principles because "'simple jurisdictional rules … promote greater predictability,'" which in turn facilitates the orderly administration of the laws that forms the core of due process. *Daimler*, 134 S. Ct. at 760 (quoting *Hertz Corp. v. Friend*, 559 U.S. 77, 94 (2010)). *Daimler* rejected as "unacceptably grasping" the contention that a corporate defendant can be subject to general

jurisdiction in every state where it "engages in a substantial, continuous, and systematic course of business." 134 S. Ct. at 761. That is because general jurisdiction "does not focus solely on the magnitude of the defendant's in-state contacts," but "instead calls for an appraisal of a corporation's activities in their entirety, nationwide and worldwide." *Id.* at 762 n.20 (quotation marks omitted).

2. A straightforward application of *Daimler* shows that the Montana state courts lack personal jurisdiction in these cases. These cases do not arise in Montana. They were brought by non-residents who never worked in Montana, were not injured in Montana, and do not allege any negligence in Montana. BNSF is not at home in Montana under the test for general jurisdiction in *Daimler*. BNSF is not incorporated in Montana and does not have its principal place of business there, and BNSF does not have a surrogate principal place of business in Montana that could make this an exceptional case.

Under *Daimler*, these cases must be dismissed for lack of personal jurisdiction.

B. The Montana Supreme Court's Distinctions Of *Daimler* Are Not Persuasive

1. The Montana Supreme Court declined to apply *Daimler* on the ground that *Daimler* "did not involve a FELA claim or a railroad defendant." Pet. App. 11a. Respondents likewise contend that "*Daimler* is beside the point" because the Montana court's opinion was limited to FELA claims and so is not about general personal jurisdiction "as that term is used in this Court's case law." Br. in Opp. 8–9. These assertions only highlight the Montana Supreme Court's confu-

sion about this Court's personal-jurisdiction jurisprudence, which is grounded in the Due Process Clause. The constitutional right to due process does not ebb and flow based on the particular cause of action asserted or the nature of the defendant's business.

2. Equally troubling is the Montana Supreme Court's contention that *Daimler*'s holding is limited to cases with similar facts, namely claims "'brought by foreign plaintiffs against a foreign defendant based on events occurring entirely outside the United States.'" Pet. App. 11a (quoting *Daimler*, 134 S. Ct. at 750). Respondents do not defend that reasoning in this Court. *See* Br. in Opp. 8–9. That is wise, as every other state court of last resort and federal circuit court to decide the matter has held that *Daimler* is not limited to transnational cases. *See, e.g.*, *Magill v. Ford Motor Co.*, 379 P.3d 1033, 1038 (Colo. 2016); *Brown v. Lockheed Martin Corp.*, 814 F.3d 619, 630 (2d Cir. 2016); Pet. 12–13. This Court should debunk the myth once and for all because a few courts still express doubt about whether *Daimler* applies in domestic cases. *See, e.g.*, *State ex rel. Ford Motor Co. v. McGraw*, 788 S.E.2d 319, 329, 333 (W. Va. 2016).[2]

3. The Montana Supreme Court reasoned further that "if Montana residents may sue BNSF in a Montana state court for injuries that occur outside of Montana, so may residents of other states," per the Privileges and Immunities Clause of article IV, section 2.

[2] Respondents contend that the Montana Supreme Court did not really distinguish *Daimler* based on transnational context. Br. in Opp. 9. That is incorrect. Respondents' brief to the Montana Supreme Court asked for that very distinction. *See* Pet. Reply 2 (quoting Pls.' Consolidated Answer Br. in Mont. S. Ct. 34, 36). And the Montana Supreme Court's reasoning that *Daimler* is "factually … distinguishable," Pet. App. 15a, speaks for itself. *See* Pet. App. 11a.

Pet. App. 14a (citing *Miles v. Ill. Cent. R.R. Co.*, 315 U.S. 698, 704 (1942)). That explanation is wrong for two reasons. First, the Montana majority's premise is incorrect: This Court has repeatedly held that personal jurisdiction does not turn on the residence of the plaintiff, even for purposes of specific personal jurisdiction. *See, e.g.*, *Walden v. Fiore*, 134 S. Ct. 1115, 1125 (2014) ("mere injury to a forum resident is not a sufficient connection to the forum"). As a result, it is not true that a Montana resident would automatically be entitled to sue BNSF in Montana for an injury that arose out-of-state. *See Goodyear*, 564 U.S. at 929 n.5 ("[G]eneral jurisdiction to adjudicate has in United States practice never been based on the plaintiff's relationship to the forum.") (quotation marks omitted).

Second, the Montana Supreme Court misunderstood the Privileges and Immunities Clause. This Court in *Miles* recognized that a state might violate the Constitution by flatly prohibiting out-of-state residents from bringing claims in the state's courts *whose* "*jurisdiction is adequate*." 315 U.S. at 704 (emphasis added). But it is the Due Process Clause that prohibits state courts from exercising the "exorbitant" personal jurisdiction that Respondents seek here. *Daimler*, 134 S. Ct. at 751. No precedent supports the Montana Supreme Court's bizarre suggestion that a state court could violate the Privileges and Immunities Clause by conforming its exercise of personal jurisdiction to the requirements of due process.

4. The Montana Supreme Court's last reason for setting aside *Daimler* was the "injustice" that would occur if injured railroad workers were required "to go to the possibly far distant place of habitation of the defendant carrier, with consequent increased expense for the transportation and maintenance of witnesses,

lawyers and parties, away from their homes." Pet. App. 6a (quoting *Baltimore & Ohio R.R. Co. v. Kepner*, 314 U.S. 44, 50 (1941)). But that problem was a relic of a bygone era when venue was narrowly confined to a corporation's place of incorporation. *Kepner*, 314 U.S. at 49. That era passed with the statutory expansion of venue and *International Shoe*'s recognition of specific (or case-linked) personal jurisdiction, which authorizes jurisdiction in any forum with minimum contacts between the defendant, the forum, and the litigation.

Respondents here faced no injustice: They left their homes and the locations of all the witnesses and parties in the hope of gaining an advantageous forum in Montana's courts. Under *International Shoe* and *Daimler*, Respondents were not required to go to BNSF's place of habitation to litigate. Respondents were entitled to bring these cases wherever they arose (or, at Respondents' option, in Delaware or Texas). But the Due Process Clause does not allow Respondents to bring these cases in the state courts of Montana, which lacks any connection whatsoever to the litigation. *Daimler*'s straightforward holding is directly applicable here and resolves these cases.

II. THE FEDERAL EMPLOYERS' LIABILITY ACT DOES NOT CONFER PERSONAL JURISDICTION ON STATE COURTS

Given *Daimler*'s unmistakable instruction, the remaining question is whether FELA somehow expands the personal jurisdiction of the Montana state courts beyond what the Due Process Clause permits. To state the question is effectively to answer it. The Montana Supreme Court egregiously misread older FELA decisions of this Court as if they created a novel rule of personal jurisdiction for FELA cases only.

A. The Text Of The Statute Does Not Refer To Personal Jurisdiction In State Courts

The Montana Supreme Court's holding that Montana state courts "have general personal jurisdiction" over railroads doing business in the state "under the FELA," Pet. App. 15a, is refuted by the text of the statute itself and this Court's cases interpreting that text. The relevant section 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.

1. Section 56 Provides For Venue In A Federal Court

a. The statute's first sentence, by its explicit terms, is limited to cases "in a district court of the United States," and is thus entirely irrelevant to cases (like these) filed in a state court. This Court recognized in *Kepner* that Section 56 "established venue for an action *in the federal courts*." 314 U.S. at 52 (emphasis added); *see also Pope v. Atl. Coast Line R.R. Co.*, 345 U.S. 379, 385 (1953) (Section 56 provides a "right to establish venue in the federal court").

Multiple state courts over the decades have similarly recognized that "Section 56 speaks to venue of actions in federal courts, not personal jurisdiction in

state courts," and that "[n]othing in the act addresses the matter of personal jurisdiction in the state court." *S. Pac. Transp. Co. v. Fox*, 609 So. 2d 357, 362–63 (Miss. 1992); *see also, e.g.*, *Law v. Atl. Coast Line R.R. Co.*, 79 A.2d 252, 253 (Pa. 1951) ("It is well settled that whether a state court has jurisdiction of an action brought therein under the Federal Employers' Liability Act is to be determined by the state or local law and not by federal laws."); *Hayman v. S. Pac. Co.*, 278 S.W.2d 749, 751 (Mo. 1955) (Section 56 "refers to suits in the United States District Courts and is not applicable" to cases in state court); *but see MacKinnon v. St. Louis S.W. Ry. Co.*, 518 So. 2d 89, 93 (Ala. 1987) (suggesting that Section 56 grants personal jurisdiction to state courts).

b. In fact, this Court has explained that Section 56 does not confer personal jurisdiction *at all*, even in a federal court. Rather, the statute "established *venue*" in federal cases. *Kepner*, 314 U.S. at 52 (emphasis added); *see also Pope*, 345 U.S. at 385.

Personal jurisdiction is a distinct requirement from venue (and both are distinct from subject-matter jurisdiction). *See Robertson v. R.R. Labor Bd.*, 268 U.S. 619, 623 (1925) ("It is obvious that jurisdiction, in the sense of personal service within a district where suit has been brought, does not dispense with the necessity of proper venue. It is equally obvious that proper venue does not eliminate the requisite of personal jurisdiction over the defendant."). "The 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). "This basic difference between the court's power and the litigant's

convenience is historic in the federal courts." *Neirbo Co. v. Bethlehem Shipbuilding Corp.*, 308 U.S. 165, 168 (1939). Once the plaintiff has identified the federal district courts with personal jurisdiction over the defendant, limitations on venue *further* restrict the choice of forum in order "to protect the defendant against the risk that a plaintiff will select an unfair or inconvenient place of trial." *Leroy*, 443 U.S. at 184; *see also Lindahl v. Office of Pers. Mgmt.*, 470 U.S. 768, 793 n.30 (1985) ("Venue provisions come into play only after jurisdiction has been established[.]").

In federal courts, venue is determined by the general venue statute (today codified at 28 U.S.C. § 1391) unless, as in FELA, another statute provides for venue more specifically. *See Atl. Marine Constr. Co. v. U.S. Dist. Ct. for W. Dist. of Tex.*, 134 S. Ct. 568, 577 & n.2 (2013). The personal jurisdiction of federal courts, by contrast, is governed by the defendant's amenability to service of process. *See Robertson*, 268 U.S. at 622–23 ("In a civil suit in personam, jurisdiction over the defendant, as distinguished from venue, implies, among other things, either voluntary appearance by him or service of process upon him at a place where the officer serving it has authority to execute a writ of summons.").

Today, federal service is governed by Federal Rule of Civil Procedure 4(k). *See Omni Capital Int'l, Ltd. v. Rudolf Wolff & Co.*, 484 U.S. 97, 104 (1987).[3] Before enactment of the Federal Rules of Civil Procedure, and

[3] The default rule of Federal Rule of Civil Procedure 4(k)(1)(A) allows service if the defendant would be "subject to the jurisdiction of a court of general jurisdiction in the state where the district court is located." *See Daimler*, 134 S. Ct. at 753 ("Federal courts ordinarily follow state law in determining the bounds of their jurisdictions over persons.").

at the time Congress amended FELA in 1910, federal law provided that "no civil suit shall be brought [in a federal court] against an inhabitant of the United States, by any original process in any other district than whereof he is an inhabitant, or in which he shall be found at the time of serving the writ." Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73, 79; *see also Robertson*, 268 U.S. at 623 ("ever since" the Judiciary Act of 1789, "a defendant in a civil suit can be subjected to [a federal district court's] jurisdiction in personam only by service within the district").

Both before and after adoption of the Federal Rules of Civil Procedure, when Congress intended to expand the personal jurisdiction of federal courts, it did so by providing for expanded *service of process*, as in the Clayton Act of 1914. *See Robertson*, 268 U.S. at 623–24 (noting that the original Clayton Act authorized a defendant to be "summoned although they reside in some other district"); *see also ibid*. (describing other statutes where Congress specially allowed the plaintiff "to serve the process upon a defendant in any district"); *Omni Capital*, 484 U.S. at 106 (citing more recent statutes where Congress expressly provided for nationwide service of process). Today, Federal Rule of Civil Procedure 4(k)(1)(C) allows service in a federal court "when authorized by a federal statute," and the modern Clayton Act implements that option by providing that "all process in [cases under this statute] may be served in the district of which [the defendant] is an inhabitant, or wherever it may be found." 15 U.S.C. § 22.

There are many federal statutes that expand the plaintiff's options for service (and thus the federal courts' personal jurisdiction). *See, e.g.*, 15 U.S.C. § 78aa (Securities Exchange Act); 18 U.S.C. § 1965

(RICO); 18 U.S.C. § 2334 (Antiterrorism Act); 29 U.S.C. § 1132(e)(2) (ERISA); 31 U.S.C. § 3732(a) (False Claims Act). Every one of these statutes explicitly refers to the plaintiff's options for service of process—unlike Section 56 of FELA. Appellate courts uniformly recognize, moreover, that these statutes do not confer personal jurisdiction in a *state* court. *See Hoffman v. Chandler*, 431 So. 2d 499, 501 (Ala. 1983) ("[t]he propriety of [personal] jurisdiction [in an ERISA case] is premised upon the mandate that Defendants have sufficient 'minimum contacts' within this State, so that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice'"); *Haught v. Agric. Prod. Credit Ass'n*, 39 S.W.3d 252, 258 (Tex. App. 2000) ("the trial court erred when it concluded that 'the court has personal jurisdiction over [defendants] under the federal civil RICO statute, 18 U.S.C. § 1965 (1999),'" because that provision applies only to cases in federal court).

Statutes that expand service of process sometimes also modify the default venue rule by either expanding or contracting federal venue. *See, e.g.*, 29 U.S.C. § 1132(e)(2) (ERISA) ("Where an action under this subchapter is brought in a district court of the United States, it may be brought in the district where the plan is administered, where the breach took place, or where a defendant resides or may be found, and process may be served in any other district where a defendant resides or may be found.").

Other statutes are like Section 56: They contain an expansive venue provision but *do not* also include a service-of-process provision. *See, e.g.*, 28 U.S.C. § 1400(a) (Copyright Act); 28 U.S.C. § 1400(b) (Patent Act); 33 U.S.C. § 918 (Longshore and Harbor Workers' Compensation Act). For those statutes, this Court has

long recognized that conferring venue is distinct from conferring personal jurisdiction. In *Robertson*, for example, this Court confronted a statute that authorized the Railroad Labor Board to subpoena a party by "invok[ing] the aid of any United States district court." 268 U.S. at 620. This Court held that although that statute modified the general rules of venue, *id.* at 623–24, the statute did not alter the courts' personal jurisdiction, *id.* at 627.

The courts of appeals likewise agree that statutes expanding venue without expanding options for service of process do not affect personal jurisdiction, even in federal courts. *See, e.g.*, *Cable/Home Comm. Corp. v. Network Prods., Inc.*, 902 F.2d 829, 856 (11th Cir. 1990) (because there is no special service-of-process provision for the Copyright Act, the federal court's personal jurisdiction is determined by the forum state's long-arm statute); *Inamed Corp. v. Kuzmak*, 249 F.3d 1356, 1359–60 (Fed. Cir. 2001) (personal jurisdiction in patent cases is determined by the forum state's long-arm statute); *cf. Omni Capital*, 484 U.S. at 106 (in holding that the statute at issue did confer personal jurisdiction, it was "significant" that the statute was silent as to service of process).

In short, Section 56 is not a personal-jurisdiction provision because "Congress knows how to authorize [expansive] service of process when it wants to provide for it. That Congress failed to do so here argues forcefully that such authorization was not its intention." *Omni Capital*, 484 U.S. at 106.[4]

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[4] This Court has not resolved the extent of the Fifth Amendment's limits on Congress's power to confer personal jurisdiction on federal courts. *See Omni Capital*, 484 U.S. at 104. That question is not presented here.

c. The history of Section 56 confirms that the first sentence addresses only cases in federal court, and only the matter of venue. As this Court observed in *Kepner*, the statute addressed the fact that under FELA as originally enacted, the general federal venue statute confined venue to a corporate defendant's place of incorporation. 314 U.S. at 49–50. The 1910 amendment was enacted to solve this problem with "reference to the venue" of FELA actions, by "enabling the plaintiff to bring his action where the cause of action arose or where the defendant may be doing business." 45 Cong. Rec., 61st Cong., 2d Sess. 4034 (1910) (Sen. Borah); *see also Kepner*, 314 U.S. at 50.

Today, FELA's grant of expansive federal venue is less important than it once was, because of two developments: First, since *International Shoe*, specific jurisdiction has become the "centerpiece of modern jurisdictional theory," so venue provisions are now relevant to a smaller number of potential forums. *See Daimler*, 134 S. Ct. at 762 n. 20 (*International Shoe* replaced a "doing business" test for personal jurisdiction with specific personal jurisdiction). Second, Congress since 1910 has significantly *expanded* the general federal venue statute. *See* 28 U.S.C. § 1391(b)(1), (c)(2) (in a suit against a corporate defendant, venue is proper "in any judicial district in which such defendant is subject to the court's personal jurisdiction with respect to the civil action in question"). Nevertheless, the purpose and effect of Section 56 is clear—to address venue in federal courts, not personal jurisdiction in state courts.

2. Section 56 Confirms The Subject-Matter Jurisdiction Of State Courts

a. The second sentence of 45 U.S.C. § 56 provides that "[t]he jurisdiction of the courts of the United

States under this chapter shall be concurrent with that of the courts of the several States." The Montana Supreme Court stated that Section 56 "does not specify whether the 'concurrent jurisdiction' conferred upon the state and federal courts refers only to subject-matter jurisdiction or personal jurisdiction, [and] the U.S. Supreme Court has never given it such an interpretation." Pet. App. 14a. That is plainly wrong.

Every decision of this Court interpreting this clause has described it not in terms of state courts' personal jurisdiction, but of subject-matter jurisdiction—that is, "[t]he character of the controversies over which … judicial authority may extend." *Ins. Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 701 (1982). *See Mondou v. N.Y., New Haven & Hartford R.R. Co. (Second Employers' Liability Cases)*, 223 U.S. 1, 59 (1912) (Section 56 means "that rights arising under [FELA] may be enforced, as of right, in the courts of the states when their jurisdiction, as prescribed by local laws, is adequate to the occasion."); *Douglas v. N.Y., New Haven & Hartford R.R. Co.*, 279 U.S. 377, 387 (1929) (FELA "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"); *Miles*, 315 U.S. at 703 (Section 56 concerns "[t]he opportunity to present causes of action arising under the [FELA] in the state courts"). In *Missouri ex rel. Southern Railway Co. v. Mayfield*, 340 U.S. 1, 3 (1950), this Court treated it as a given that a FELA case may be brought only where "the State has acquired jurisdiction over the defendant."

b. This Court explained more than a century ago—and just two years after Section 56 was added to

FELA—that this clause was added to correct the mistaken holding of the Supreme Court of Errors of Connecticut (in *Hoxie v. New York, New Haven & Hartford Railroad Co.*, 73 A. 754 (Conn. 1909)) that Congress had meant for the original version of FELA to withdraw *subject-matter* jurisdiction over FELA claims from state courts. *Second Employers' Liability Cases*, 223 U.S. at 55 (*Hoxie* held "that the congressional act impliedly restricts the enforcement of the rights which it creates to the Federal courts."). That was error, *see id.* at 56, and Congress sought to correct it one year later "by an express declaration that there is no intent on the part of Congress to confine remedial actions brought under the [FELA] to the courts of the United States," J. C. Gibson, *The Venue Clause and Transportation of Lawsuits*, 18 L. & Contemp. Probs. 367, 371 n.17 (1953) (quoting H.R. Rep. No. 513, at 7, 61st Cong., 2d Sess. Febr. 22, 1910 (Rep. Sterling)); *see also* W. W. Thornton, *Federal Employers' Liability Act*, 215–16 (2d ed. 1912) ("This amendment was made to confer jurisdiction upon state courts, because of the decision of the Supreme Court of Connecticut, which was severely criticized and declared to be erroneous."). Congress thus enacted the second sentence of Section 56 as it exists today, which was universally understood to confirm the subject-matter jurisdiction of state courts over FELA cases. Thornton, *supra*, at 215–216; *see also* Jacob Aronson, *Federal Employers' Liability Act*, 2 Brook. L. Rev. 37, 37 (1933) (Section 56 provides that state courts "have been invested with jurisdiction to try actions instituted pursuant to the Act").

c. This Court in the *Second Employers' Liability Cases* noted that the second sentence of Section 56, "instead of granting jurisdiction to the state courts, presupposes that they already possessed it." 223 U.S.

at 56. That is because the Constitution's default rule is that "state courts have inherent authority, and are thus presumptively competent, to adjudicate claims arising under the laws of the United States." *Tafflin v. Levitt*, 493 U.S. 455, 458 (1990); *see also* The Federalist No. 82, p. 555 (J. Cooke ed. 1961) (A. Hamilton) (the Constitution establishes that "the state courts would have a concurrent jurisdiction in all cases arising under the laws of the union, where it was not expressly prohibited").

This Court has contrasted this default rule of "concurrent jurisdiction" over a subject matter with "exclusive jurisdiction" over that subject, which Congress may confine to the federal courts. *Charles Dowd Box Co. v. Courtney*, 368 U.S. 502, 507–08 (1962); *see also Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 478 (1981) (the Court "begins with the presumption that state courts enjoy concurrent jurisdiction," but Congress "may confine jurisdiction to the federal courts either explicitly or implicitly"); *Claflin v. Houseman*, 93 U.S. 130, 136 (1898). Neither "concurrent jurisdiction" nor "exclusive jurisdiction" refers to a court's power over the *person* of the defendant.

In fact, "concurrent" jurisdiction as used in Section 56 has *always* been understood to refer to subject-matter jurisdiction, not personal jurisdiction. *See, e.g.*, *Growe v. Emison*, 507 U.S. 25, 32 (1993) ("federal courts and state courts often find themselves exercising concurrent jurisdiction over the same subject matter"); *Plaquemines Tropical Fruit Co. v. Henderson*, 170 U.S. 511, 517–18 (1898) ("the concurrent jurisdiction of the state tribunals depends altogether upon the pleasure of congress, and may be revoked and extinguished whenever they think proper, in every case in which the subject matter can constitutionally be made

cognizable in the federal courts; and … without an express provision to the contrary, the state courts will retain a concurrent jurisdiction in all cases where they had jurisdiction originally over the subject-matter" (quoting 1 J. Kent, *Commentaries on Am. Law* 374–75 (1826))).

Many federal statutes refer to "concurrent" jurisdiction between state and federal courts. *See, e.g.*, 11 U.S.C. § 526(c)(4) (providing for concurrent jurisdiction over claims under certain debt-collection laws); 15 U.S.C. § 3007(c) (Interstate Horseracing Act); 16 U.S.C. § 403c-1(g) (providing for concurrent jurisdiction over civil actions arising within Shenandoah National Park); 22 U.S.C. § 9003(a) (International Child Abduction Remedies Act); 28 U.S.C. § 1352 (providing for concurrent jurisdiction over claims related to federal bonds); 29 U.S.C. §§ 1132(e)(1), 1451(c) (ERISA); 42 U.S.C. § 13981(e)(3) (Violence Against Women Act); 49 U.S.C. § 11501(c) (Railroad Revitalization and Regulatory Reform Act); 49 U.S.C. § 14502(c)(1) (providing for concurrent jurisdiction over claims to prevent various actions deemed to burden and discriminate against interstate commerce). These statutes have always been understood to confirm state court's subject-matter jurisdiction, never to confer personal jurisdiction. *See, e.g.*, *Am. Airlines, Inc. v. Cty. of San Mateo*, 912 P.2d 1198, 1207 (Cal. 1996) (observing that 49 U.S.C. § 11501(c) "accord[s] federal district and state courts concurrent *jurisdiction over claims* within their purview") (emphasis added); *Hoffman*, 431 So. at 501–504 (even though 29 U.S.C. § 1132(e)(1) confers "concurrent" jurisdiction, a state court's personal jurisdiction in an ERISA case is determined by its long-arm statute and *International Shoe*).

d. This Court has never suggested that Congress even has the power to affect the personal jurisdiction of state courts. Even as the Court has held that "a state court *of competent jurisdiction*" may not discriminate against federal law by refusing to hear federal causes of action, *Howlett v. Rose*, 496 U.S. 356, 369–72 (1990) (emphasis added), the Court has affirmed that states "have great latitude to establish the structure and jurisdiction of their own courts," *id.* at 372. Section 56 of FELA is an example of this rule: The statute is not an "attempt by Congress to enlarge or regulate the jurisdiction of state courts or to control or affect their modes of procedure." *Second Employers' Liability Cases*, 223 U.S. at 56. Instead, FELA creates an obligation on a state court only "when its ordinary jurisdiction as prescribed by local laws is appropriate to the occasion and is invoked in conformity with those laws, to take cognizance of an action to enforce a right of civil recovery arising under [FELA] and susceptible of adjudication according to the prevailing rules of procedure." *Id.* at 56–57. In other words, Section 56 makes clear that FELA "may be enforced, as of right, in the courts of the States when their jurisdiction, as prescribed by local laws, is adequate to the occasion." *Id.* at 59.

e. In another clause of the same 1910 amendment to FELA, Congress provided a different form of protection for the plaintiff's choice of forum by prohibiting removal to federal court of FELA actions filed in state court *of competent jurisdiction*. *See Great N. Ry. Co. v. Alexander*, 246 U.S. 276, 280 (1918). A court "of competent jurisdiction" traditionally refers to a court that has both subject-matter jurisdiction *and* personal jurisdiction. *See Lightfoot v. Cendant Mortg. Corp.*, 137 S. Ct. 553, 562 (2017) (citing cases). The fact that Congress barred removal from state courts "of competent

jurisdiction" in FELA Section 56 is further proof that Congress recognized the plaintiff's choice of forum was not absolute.

The Montana Supreme Court's opinion missed the fundamental difference between state courts' subject-matter jurisdiction, which can be granted or withdrawn by Congress, and state courts' personal jurisdiction, which is not "adequate to the occasion" in these cases, *Second Employers' Liability Cases*, 223 U.S. at 59, because of the constraints of the Due Process Clause.

B. The Montana Supreme Court Misread This Court's Older Cases, Which Did Not Interpret FELA To Confer Personal Jurisdiction On State Courts

The Montana Supreme Court stated that "decades of consistent U.S. Supreme Court precedent dictat[e] that railroad employees may bring suit under the FELA wherever the railroad is 'doing business.'" Pet. App. 12a. That is profoundly wrong. As the dissenting justice below pointed out, not one of these cases so much as mentioned personal jurisdiction under the Due Process Clause. *See* Pet. App. 27a–28a.

1. In *Denver & Rio Grande Western Railroad Co. v. Terte*, 284 U.S. 284, 285–86 (1932), a plaintiff injured in Colorado sued two railroads (the Rio Grande and the Santa Fe) under FELA in Missouri state court. The trial court denied the railroads' motion to quash the attachment and summonses. *Ibid.* The railroads then unsuccessfully petitioned the Supreme Court of Missouri for a writ of prohibition to enjoin the trial judge against continuing to exercise jurisdiction, arguing that "if the case proceeded to trial an undue burden on interstate commerce would result; also the commerce clause of the Federal Constitution and the

Fourteenth Amendment would be violated." *Id.* at 285.

This Court held that the Santa Fe railroad, which operated rail lines in Missouri (among other states), was "properly sued" in Missouri "[a]ccording to the doctrine approved in *Hoffman v. State of Missouri ex rel. Foraker*, 274 U.S. 21 [(1927)]." *Terte*, 284 U.S. at 287. *Foraker*, decided five years earlier, was not a case about personal jurisdiction. The Court in *Foraker* held that a suit against a railroad in Missouri for an injury arising outside the state did not impermissibly "burden interstate commerce" because the railroad was incorporated in Missouri, operated its railroad there, and was sued in a county where it had an agent and a usual place of business. 274 U.S. at 22–23.

This Court's opinion in *Terte* relied exclusively on *Foraker* and the Dormant Commerce Clause; the Court never discussed the Due Process Clause or the meaning of Section 56.

2. Even further afield is *Kepner*, 314 U.S. 44, which considered "whether a state court may validly exercise its equitable jurisdiction to enjoin a resident of the state from prosecuting a cause of action arising under the Federal Employers' Liability Act in a federal court of another state where the Act gave venue, on the ground that the prosecution in the federal court is inequitable, vexatious and harassing to the carrier." *Id.* at 47. The case arose from an injury in Ohio to a railroad employee who was a resident of Ohio, but who sued the railroad in federal court in New York, which was one state where the railroad did business. *Id.* at 48. The railroad then sued in Ohio state court to enjoin the New York proceeding, arguing "that the continued prosecution of the federal court action would be

an undue burden on interstate commerce and an unreasonable, improper and inequitable burden upon [the railroad] itself." *Ibid*. The Ohio courts refused to enjoin the New York suit.

This Court's opinion in *Kepner* first rejected the railroad's argument claiming an impermissible burden on interstate commerce, citing *Terte* and *Foraker*. *See* 314 U.S. at 51. The Court then addressed the argument that the Ohio court should have enjoined the New York case as vexatious and inequitable. *Ibid.* This Court affirmed that a state court has the traditional power to enjoin its residents from carrying on vexatious litigation in other courts. *Id.* at 52 (citing, *e.g.*, *Cole v. Cunningham*, 133 U.S. 107, 118–20 (1890)). Nevertheless, this Court held that Section 56 of FELA preempted that power, because the statute was intended to grant plaintiffs a wide choice of federal venue. *Id.* at 53–54. The Court held that "[a] privilege of venue, granted by the legislative body which created this right of action, cannot be frustrated for reasons of convenience or expense." *Id.* at 54.

Kepner by its own terms had nothing at all to do with the personal jurisdiction of state courts or with the Due Process Clause. Contrary to the conclusion of the Montana Supreme Court, the case does not remotely stand for the proposition that a state court can exercise personal jurisdiction in a FELA case so long as the defendant is doing business in the forum.

3. This Court's decision in *Miles*, 315 U.S. 698, was very similar to *Kepner* (and decided only one year later), except it concerned "the power of a state court to enjoin its citizens, on the ground of oppressiveness and inequity to the defendant carrier, from suing on a [FELA] claim in the *state courts* of another state." *Id.* at 699 (emphasis added).

This Court again held that a state court cannot enjoin out-of-state litigation as a burden on interstate commerce where the railroad does business in the forum, because "despite the incidental burden on commerce," Congress "has exercised its authority over interstate commerce to the extent of permitting suits in state courts … *where process may be obtained on a defendant* … actually carrying on railroading." *Miles*, 315 U.S. at 701–02 (emphasis added).

Moreover, just as in *Kepner*, the Court again held that FELA preempted the equitable power of state courts to enjoin litigation in other state courts of adequate jurisdiction. *Miles*, 315 U.S. at 703–04. Because Congress intended to allow state courts to exercise subject-matter jurisdiction over FELA cases, that opportunity was "no more subject to interference by state action than was the federal venue in the *Kepner* case." *Id.* at 704. And "[s]ince the existence of the cause of action and the privilege of vindicating rights under the [FELA] in state courts spring from federal law, 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." *Ibid.* (emphasis added). *Miles*, like *Kepner*, never mentioned state courts' personal jurisdiction or the Due Process Clause.

4. The Montana Supreme Court's last claim to precedent was *Pope*, 345 U.S. 379. *Pope* was "indistinguishable" from *Miles* and presented exactly the same issue; the only question was whether Congress had since abrogated *Miles* by enacting 28 U.S.C. § 1404(a), which allowed a federal court to transfer venue to another federal district where the case might have been brought "'[f]or the convenience of parties and witnesses, in the interest of justice.'" 345 U.S. at 383.

This Court held that although Section 1404(a) allowed federal courts to transfer venue, the statute said nothing about the power of state courts to enjoin vexatious litigation, and *Miles* therefore still prevented state courts from exercising that equitable authority in FELA cases. *Pope*, 345 U.S. at 384–87. *Pope*, unsurprisingly, did not mention state courts' personal jurisdiction or the Due Process Clause.

5. Respondents attempt to draw support from the fact that some state courts in these cases apparently exercised jurisdiction over out-of-state defendants that were merely doing business in the forum. Br. in Opp. 2, 15–16. But that reasoning is impermissible, because "drive-by jurisdictional rulings of this sort … have no precedential effect." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 91 (1998). The rule is particularly forceful in the context of a waivable right like limited personal jurisdiction. *See Insurance Corp. of Ireland*, 456 U.S. at 703.

Moreover, even if these cases had concerned personal jurisdiction, every one save *Pope* was decided before *International Shoe*, in the era when companies were routinely subjected to personal jurisdiction "based on the presence of a local office, which signaled that the corporation was 'doing business' in the forum." *Daimler*, 134 S. Ct. at 761 n.18. *International Shoe* abrogated the jurisdictional approach of this prior era, *see id.* at 753–54, and personal-jurisdiction cases pre-dating *International Shoe* "should not attract heavy reliance today," *id.* at 761 n.18.

C. Respondents Cannot Overcome Statutory Text And Precedent By Legislative History Or "Liberal Construction"

1. Respondents contend that Section 56 "confers personal jurisdiction on federal courts" in every district where the railroad does business, and so it "likewise" authorizes personal jurisdiction on state courts. Br. in Opp. 19–20. As shown above, *supra* Part II.A.1.b., the premise of Respondents' argument is wrong: FELA does not confer personal jurisdiction even in federal courts. Regardless, Respondents' conclusion also does not follow. "Personal jurisdiction requires a forum-by-forum, or sovereign-by-sovereign, analysis." *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873, 884 (2011) (plurality op.); *see also Second Employers' Liability Cases*, 223 U.S. at 58 ("the sovereignties are distinct, and neither can interfere with the proper jurisdiction of the other"). "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." *Nicastro*, 564 U.S. at 884. No matter where BNSF might be suable in federal court, nothing in Section 56 purports to make BNSF subject to personal jurisdiction in state courts.

2. The Montana Supreme Court attempted to get around this fatal defect in Respondents' argument by invoking a statement by Senator Borah, "who submitted the report on the bill" adding Section 56, to the effect that the amendment was meant to enable the plaintiff "to find the corporation at any point or place or State where it is actually carrying on business, and there lodge his action, if he chooses to do so." Pet. App. 6a–7a (quoting *Kepner*, 314 U.S. at 50) (quotation marks omitted). Even if Senator Borah's remarks

were helpful to Respondents, one sentence of a floor statement by one Senator cannot overcome clear statutory text, the context of the provision, and a consistent body of interpretative precedent from this Court. "Given the straightforward statutory command, there is no reason to resort to legislative history." *United States v. Gonzales*, 520 U.S. 1, 6 (1997).

In any event, Senator Borah notably did *not* claim that Section 56 conferred personal jurisdiction on a state court. His quoted statement describing where a plaintiff may lodge his FELA action was an explanation for the *first* sentence of Section 56, which he said "has reference to the venue" of FELA cases. 45 Cong. Rec. at 4034 (Sen. Borah). Senator Borah also understood that the reference to "concurrent jurisdiction" in the second Sentence of 56 refers to "jurisdiction *of the case*"—that is, subject-matter jurisdiction. *Id.* at 4035.

3. The Montana Supreme Court also fell back to arguing that this Court has given FELA a "liberal construction to accomplish its humanitarian and remedial purposes." Pet. App. 18a. But "[i]t does not follow … that this remedial purpose requires [this Court] to interpret every uncertainty in the Act in favor of employees." *Norfolk S. Ry. Co. v. Sorrell*, 549 U.S. 158, 171 (2007). Words matter in statutes. "FELA's text does not support the proposition that" the statute confers personal jurisdiction on state courts, "and the statute's remedial purpose cannot compensate for the lack of a statutory basis." *Ibid.*

* * *

Under the Montana Supreme Court's interpretation of Section 56, railroads might conceivably be sued in any county in any state where they operate, even if the railroad does no business in that county. *See Bur-*

lington N. R.R. Co. v. Ford, 504 U.S. 648 (1992) (holding that when a state has acquired personal jurisdiction over a defendant, the state may allow that defendant to be sued in any county). Montana has 56 counties, and hundreds more exist in the 27 other states where BNSF operates. Under the Montana Supreme Court's theory, a railroad could be subject to jurisdiction in any one of those counties if a state long-arm statute allowed it.

The Montana Supreme Court's interpretation of Section 56 violates quintessential principles of due process by subjecting railroads to "the burdens of litigating in a distant or inconvenient forum," *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980), and by depriving railroads of "'some minimum assurance'" as to where they will and will not be "'liable to suit.'" *Daimler*, 134 S. Ct. at 761–62 (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985)). The decision below also allows Montana's courts to "reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system," *World-Wide Volkswagen*, 444 U.S. at 292, and pass judgment on cases over which they have no lawful sovereign authority because the cases have no connection to Montana. *See Nicastro*, 564 U.S. at 884 (plurality op.) ("due process protects the individual's right to be subject only to lawful power," but "whether a judicial judgment is lawful depends on whether the sovereign has authority to render it"); *Burger King*, 471 U.S. at 471–72 (due process "protects an individual's liberty interest in not being subject to the binding judgments of a forum with which he has established no meaningful 'contacts, ties, or relations'" (quoting *International Shoe*, 326 U.S. at 319)).

In sum, this Court need not do any more than confirm what FELA's text plainly says: The statute does not confer personal jurisdiction on state courts.

III. CONGRESS COULD NOT CONFER ON STATE COURTS PERSONAL JURISDICTION THAT THE DUE PROCESS CLAUSE FORBIDS

The statutory text resolves these cases. To the extent that any ambiguity persists, this Court should not read FELA to attempt to confer personal jurisdiction that the Due Process Clause forbids, which would cast the statute into grave constitutional doubt. *See, e.g.*, Antonin Scalia & Bryan A. Garner, *Reading Law* 247–51 (2012) ("A statute should be interpreted in a way that avoids placing its constitutionality in doubt.").

Congress does not have the power to authorize state courts to exercise personal jurisdiction beyond the limitations of the Due Process Clause. If FELA really did attempt to confer personal jurisdiction in the courts of every state where a railroad operates, then the statute is unconstitutional.

A. Congress Does Not Have The Power To Enable States To Act Contrary To The Fourteenth Amendment

This Court has repeatedly held that Congress does not have the power to authorize states to violate the Fourteenth Amendment. In *Shapiro v. Thompson*, 394 U.S. 618, 622 (1969), this Court considered state statutes that denied welfare assistance to persons who had not resided within the state for at least one year. The Court struck down the restrictions as a violation of the Equal Protection Clause. *Id.* at 638. The states responded that Congress had expressly approved the imposition of the residency requirements

in federal law. *Ibid.* But this Court held that the federal statute, "insofar as it permits the one-year waiting-period requirement, would be unconstitutional." *Id.* at 641. For "Congress may not authorize the States to violate the Equal Protection Clause." *Ibid.*

Similarly, in *Mississippi University for Women v. Hogan*, 458 U.S. 718, 719 (1982), this Court struck down a statute excluding males from enrolling in a state-supported professional nursing school, holding that the restriction was sex discrimination in violation of the Equal Protection Clause. *Id.* at 731. The Court rejected the defendant's contention that the policy had been authorized by federal statute: "Although [the Court] give[s] deference to congressional decisions and classifications, neither Congress nor a State can validate a law that denies the rights guaranteed by the Fourteenth Amendment." *Id.* at 732–33.

It makes no difference that these cases concerned violations of the Equal Protection Clause, whereas here the Montana Supreme Court held that FELA supersedes the limitations of the Fourteenth Amendment's Due Process Clause. This Court has held that the Due Process Clause is the source of essential guarantees to civil defendants including the right to "notice" of the proceeding, *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950), a "hearing appropriate to the nature of the case," *ibid.*, and a judge without a conflict of interest, *e.g.*, *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 887 (2009). *Cf.* Henry J. Friendly, *"Some Kind of Hearing,"* 123 U. Pa. L. Rev. 1267, 1279–95 (1975) (describing the components of a fundamentally fair hearing for all civil and criminal proceedings). The Clause also protects civil defendants against "grossly excessive" punitive damages. *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 568 (1996)

(quotation marks omitted). Nothing in our constitutional tradition supports Respondents' position that Congress could withdraw these fundamental protections for liberty and property by statute. *See* 1 Laurence Tribe, *American Constitutional Law* 1238 (3d ed. 2000) ("Congress cannot authorize a state to violate a constitutional command designed to protect private rights against government action (such as the commands of § 1 of the Fourteenth Amendment).").

The matter is not hypothetical. This Court has held that the Due Process Clause of the Fourteenth Amendment prohibits the states from denying marriage to same-sex couples. *See Obergefell v. Hodges*, 135 S. Ct. 2584 (2015). Yet Section 2 of the Defense of Marriage Act, 28 U.S.C. § 1738C, which was not at issue in *United States v. Windsor*, 133 S. Ct. 2675, 2682–83 (2013), purports to authorize states to refuse to recognize same-sex marriages performed under the laws of other states. *Ibid.* Respondents' argument would allow this Court's constitutional holding in *Obergefell* to be undone by federal statute. *But see Obergefell v. Wymyslo*, 962 F. Supp. 2d 968, 981 n.9 (S.D. Ohio 2013) (holding that DOMA Section 2 "does not provide a legitimate basis for otherwise constitutionally invalidated state laws" restricting marriage).

B. Respondents Offer No Persuasive Theory That Congress Can Supersede The Fourteenth Amendment By Statute

1. The Montana Supreme Court offered no defense at all, and did not cite a single case, for its conclusion that Congress can supersede the Fourteenth Amendment by statute. Respondents, for their part, attempt to supply a rationale first by contending that a plurality of this Court suggested in *Nicastro*, 564 U.S. at 885,

that "Congress could exercise its power to confer personal jurisdiction on state courts." Br. in Opp. 17. That is spectacularly wrong. Just two sentences after the passage that Respondents quote, the *Nicastro* plurality was clear that it referred to a hypothetical statute "authoriz[ing] jurisdiction in a *federal court* in New Jersey." 564 U.S. at 885–86 (emphasis added).

In fact, the *Nicastro* plurality opinion stands strongly for the *opposite* of the Montana Supreme Court's holding here by stating that "personal jurisdiction requires a forum-by-forum, or sovereign-by-sovereign analysis," and recognizing that "the United States is a distinct sovereign." 564 U.S. at 884. The plurality's analysis in *Nicastro* confirms that only state legislatures—not Congress—have the sovereign power to alter their state courts' personal jurisdiction. And the legislatures may act only subject to the constraints of the Due Process Clause. *See* U.S. Const. amend. XIV.

2. Respondents further contend that "Congress's authority," unlike that of the states, "is not limited by state boundaries," Br. in Opp. 18, and this Court has "not directly addressed whether and to what extent" the Fifth Amendment's Due Process Clause limits Congress's power to confer personal jurisdiction on federal courts. Br. in Opp. 19 n.3 (citing *Omni Capital*, 484 U.S. at 102 n.5). This Court has strongly suggested that the Due Process Clause imposes *some* limit on federal courts' personal jurisdiction. *See Omni Capital*, 484 U.S. at 104. Regardless, these points do not help Respondents here. Even if the Constitution does not limit Congress's power to confer expansive personal jurisdiction in federal courts, this Court's cases establish that Congress does not have

the power to supersede the limitations on state authority in the Due Process Clause.

When the Fourteenth Amendment imposes a prohibition on the states, Congress cannot authorize the states to take the forbidden action even if Congress *could* itself enact the same policy as a matter of federal law. In *Graham v. Richardson*, 403 U.S. 365, 376 (1971), for example, this Court struck down under the Equal Protection Clause a state statute that restricted welfare benefits to United States citizens or aliens that had lived in the state for a specified number of years, notwithstanding the state's argument that the restriction was authorized by federal law, *id.* at 380. This Court has elsewhere held that Congress, unlike the states, *can* constitutionally condition aliens' eligibility for federal benefits on the nature and duration of their residency in the United States, pursuant to Congress's power in the Naturalization Clause. *See Mathews v. Diaz*, 426 U.S. 67, 82–83 (1976). But this Court in *Graham* nevertheless categorically determined that, "[a]lthough the Federal Government admittedly has broad constitutional power" in this area, "Congress does not have the power to authorize the individual states to violate the Equal Protection Clause." 403 U.S. at 382.

3. Finally, Respondents note that Congress has the power to "authorize state regulations that burden or discriminate against interstate commerce," even though those regulations would, absent congressional authorization, be unconstitutional. Br. in Opp. 18 (citing *Hillside Dairy Inc. v. Lyons*, 539 U.S. 59, 66 (2003)). But that gets Respondents nowhere, because the Dormant Commerce Clause has a materially different structure in the Constitution than does the Due Process Clause. This Court has interpreted Congress's

power to regulate interstate commerce in article I, section 8 to mean that Congress has the *exclusive* power to regulate interstate commerce, including by authorizing state laws that burden interstate commerce. *See Comptroller of Treasury of Md. v. Wynne*, 135 S. Ct. 1787, 1794 (2015). That is, the Court has interpreted the regulation of interstate commerce to be similar to other governmental powers that the Constitution withholds from the states "without the Consent of Congress," such as "keep[ing] Troops, or Ships of War in time of Peace," or "enter[ing] into any Agreement or Compact with another State, or with a foreign Power." U.S. Const. art. I, § 10, cl. 3.

By contrast, other clauses in the Constitution unequivocally deny powers to the states *without* making allowance for congressional consent. *See, e.g.*, U.S. Const. art. I, § 10, cl. 1 ("No State shall enter into any Treaty[;] … coin Money; … pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts"). This Court has interpreted those clauses to mean that the states may *never* exercise those powers, even with congressional approval. *See, e.g.*, *Holmes v. Jennison*, 39 U.S. 540, 571 (1840) ("the words 'agreement' and 'compact[ ]' cannot be … held to mean the same thing with the word 'treaty' in the preceding clause, into which the states are positively and unconditionally forbidden to enter; and which even the consent of Congress could not authorize").

Importantly, the states may not exercise these powers by congressional authorization even when Congress is not similarly constrained. The Contracts Clause, for example, does not restrict the federal government as it does the states. *See Pension Benefit Guar. Corp. v. R.A. Gray*, 467 U.S. 717, 732–33 & n.9

(1984). But the states are nevertheless absolutely prohibited from impairing the obligation of contracts: Even "if Congress had expressly dictated and expressly approved the [state] proviso in question [impairing preexisting contracts], such dictation and approval would be without effect. *Congress has no power to supersede the National Constitution*." *White v. Hart*, 80 U.S. 646, 649 (1871) (emphasis added).

The Due Process Clause of the Fourteenth Amendment has the same structure as the Contracts Clause and the Equal Protection Clause: It unequivocally prohibits the states from depriving a person of property without due process of law, without any exception for congressional approval. Congress has no power to authorize states to violate the Due Process Clause.

* * *

The judgment below depends on the Montana Supreme Court's erroneous contention that *Daimler*'s constitutional rule does not apply to domestic railroads doing business in Montana. But "[t]here can be no serious doubt that it does." *Am. Tradition P'ship, Inc. v. Bullock*, 132 S. Ct. 2490, 2491 (2012) (per curiam) (citing U.S. Const. art. VI, cl. 2). Nor can the Montana Supreme Court evade *Daimler*'s reach by grafting onto FELA a grant of personal jurisdiction to state courts that by text is not there—and under the Constitution could not be.

CONCLUSION

The judgment of the Montana Supreme Court should be reversed.

Respectfully submitted.

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APPENDIX

APPENDIX

U.S. Constitution, Amendment 14, Section 1

No State shall … deprive any person of life, liberty, or property, without due process of law …

***

45 U.S.C. § 51. Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence; employee defined

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter.

***

45 U.S.C. § 56. Actions; limitation; concurrent jurisdiction of courts

No action shall be maintained under this chapter unless commenced within three years from the day the cause of action accrued.

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

***

Federal Rule of Civil Procedure 4. Summons

…

(c) Service.

(1) In General. A summons must be served with a copy of the complaint. The plaintiff is responsible for having the summons and complaint served within the time allowed by Rule

4(m) and must furnish the necessary copies to the person who makes service.

(2) By Whom. Any person who is at least 18 years old and not a party may serve a summons and complaint.

(3) By a Marshal or Someone Specially Appointed. At the plaintiff's request, the court may order that service be made by a United States marshal or deputy marshal or by a person specially appointed by the court. The court must so order if the plaintiff is authorized to proceed in forma pauperis under 28 U.S.C. §1915 or as a seaman under 28 U.S.C. §1916.

(d) Waiving Service.

(1) Requesting a Waiver. An individual, corporation, or association that is subject to service under Rule 4(e), (f), or (h) has a duty to avoid unnecessary expenses of serving the summons. The plaintiff may notify such a defendant that an action has been commenced and request that the defendant waive service of a summons. The notice and request must:

(A) be in writing and be addressed:

(i) to the individual defendant; or

(ii) for a defendant subject to service under Rule 4(h), to an officer, a managing or general agent, or any other agent authorized by appointment or by law to receive service of process;

(B) name the court where the complaint was filed;

(C) be accompanied by a copy of the complaint, 2 copies of the waiver form appended to this Rule 4, and a prepaid means for returning the form;

(D) inform the defendant, using the form appended to this Rule 4, of the consequences of waiving and not waiving service;

(E) state the date when the request is sent;

(F) give the defendant a reasonable time of at least 30 days after the request was sent—or at least 60 days if sent to the defendant outside any judicial district of the United States—to return the waiver; and

(G) be sent by first-class mail or other reliable means.

(2) Failure to Waive. If a defendant located within the United States fails, without good cause, to sign and return a waiver requested by a plaintiff located within the United States, the court must impose on the defendant:

(A) the expenses later incurred in making service; and

(B) the reasonable expenses, including attorney's fees, of any motion required to collect those service expenses.

(3) Time to Answer After a Waiver. A defendant who, before being served with process, timely returns a waiver need not serve an answer to the complaint until 60 days after the request was sent—or until 90 days after it was sent to the defendant outside any judicial district of the United States.

(4) Results of Filing a Waiver. When the plaintiff files a waiver, proof of service is not required and these rules apply as if a summons and complaint had been served at the time of filing the waiver.

(5) Jurisdiction and Venue Not Waived. Waiving service of a summons does not waive any objection to personal jurisdiction or to venue.

…

(h) Serving a Corporation, Partnership, or Association. Unless federal law provides otherwise or the defendant's waiver has been filed, a domestic or foreign corporation, or a partnership or other unincorporated association that is subject to suit under a common name, must be served:

(1) in a judicial district of the United States:

(A) in the manner prescribed by Rule 4(e)(1) for serving an individual; or

(B) by delivering a copy of the summons and of the complaint to an officer, a managing or general agent, or any other agent authorized by appointment or by law to receive service of process and—if

the agent is one authorized by statute and the statute so requires—by also mailing a copy of each to the defendant; or

(2) at a place not within any judicial district of the United States, in any manner prescribed by Rule 4(f) for serving an individual, except personal delivery under (f)(2)(C)(i).

…

(k) Territorial Limits of Effective Service.

(1) In General. Serving a summons or filing a waiver of service establishes personal jurisdiction over a defendant:

(A) who is subject to the jurisdiction of a court of general jurisdiction in the state where the district court is located;

(B) who is a party joined under Rule 14 or 19 and is served within a judicial district of the United States and not more than 100 miles from where the summons was issued; or

(C) when authorized by a federal statute.

(2) Federal Claim Outside State-Court Jurisdiction. For a claim that arises under federal law, serving a summons or filing a waiver of service establishes personal jurisdiction over a defendant if:

(A) the defendant is not subject to jurisdiction in any state's courts of general jurisdiction; and

(B) exercising jurisdiction is consistent with the United States Constitution and laws.

…

(m) Time Limit for Service. If a defendant is not served within 90 days after the complaint is filed, the court—on motion or on its own after notice to the plaintiff—must dismiss the action without prejudice against that defendant or order that service be made within a specified time. But if the plaintiff shows good cause for the failure, the court must extend the time for service for an appropriate period. This subdivision (m) does not apply to service in a foreign country under Rule 4(f), 4(h)(2), or 4(j)(1).

***

Montana Rule of Civil Procedure 4. Persons Subject to Jurisdiction; Process; Service.

(a) Definition of Person. As used in this rule, the word "person," whether or not a citizen of this state, a resident of this state, or organized under the laws of this state, includes:

(1) an individual, whether operating in the individual's own name or under a trade name;

(2) an individual's agent or personal representative;

(3) a corporation;

(4) a limited liability company;

(5) a business trust;

(6) an estate;

(7) a trust;

(8) a partnership;

(9) an unincorporated association;

(10) any two or more persons having a joint or common interest or any other legal or commercial entity; and

(11) any other organization given legal status as such under the laws of this state.

(b) Jurisdiction of Persons.

(1) Subject to Jurisdiction. All persons found within the state of Montana are subject to the jurisdiction of Montana courts. Additionally, any person is subject to the jurisdiction of Montana courts as to any claim for relief arising from the doing personally, or through an employee or agent, of any of the following acts:

(A) the transaction of any business within Montana;

(B) the commission of any act resulting in accrual within Montana of a tort action;

(C) the ownership, use, or possession of any property, or of any interest therein, situated within Montana;

(D) contracting to insure any person, property, or risk located within Montana at the time of contracting;

(E) entering into a contract for services to be rendered or for materials to be furnished in Montana by such person;

(F) acting as director, manager, trustee, or other officer of a corporation organized under the laws of, or having its principal place of business within, Montana; or

(G) acting as personal representative of any estate within Montana.

(2) Acquisition of Jurisdiction. Jurisdiction may be acquired by Montana courts over any person:

(A) through service of process as herein provided; or

(B) by the voluntary appearance in an action by any person either personally or through an attorney, authorized officer, agent, or employee.

…

(d) Service.

(1) In General. The summons and complaint must be served together. The plaintiff must furnish the necessary copies to the person who makes service.

(2) In Person. Service of all process may be made in the county where the party to be served is found by a sheriff, deputy sheriff, constable, or any other person over the age of 18 not a party to the action.

(3) (A) By Mail. A summons and complaint may also be served by mailing via first class mail, postage prepaid, the following to the person to be served:

(i) a copy of the summons and complaint;

(ii) two copies of a notice and acknowledgment conforming substantially to form 18-A; and

(iii) a return envelope, postage prepaid, addressed to the sender.

(B) A summons and complaint may not be served by mail to the following:

(i) A minor;

(ii) An incompetent person; or

(iii) A corporation, partnership, or other unincorporated association, whether domestic or foreign.

(C) If no acknowledgment of service by mail is received by the sender within 21 days after the date of mailing, service of the summons and complaint must be made in person.

(D) If a person served by mail does not complete and return the notice and acknowledgment within 21 days, the court must order that person to pay the costs of personal service unless good cause is shown for not doing so.

(E) The notice and acknowledgment must be signed and dated by the de-

fendant, and service of summons and complaint will be deemed complete on the date shown.

…

(i) Serving a Business or Nonprofit Entity.

(1) For the purposes of this Rule, a business or nonprofit entity includes the following:

(A) a corporation;

(B) a limited liability company;

(C) a partnership;

(D) any other unincorporated association; and

(E) any business entity that has filed with the office of the secretary of state.

(2) Service is available under this rule for a domestic business or nonprofit entity, as well as a foreign business or nonprofit entity that either:

(A) has a place of business in Montana;

(B) does business in Montana permanently or temporarily; or

(C) was doing business in Montana permanently or temporarily at the time the claim for relief accrued.

(3) A business or nonprofit entity must be served by either:

(A) delivering a copy of the summons and complaint to:

(i) an officer;

(ii) a director;

(iii) a manager;

(iv) a member of a member-managed limited liability company;

(v) a superintendent;

(vi) a managing agent;

(vii) a general agent; or

(viii) a partner;

(B) leaving copies of the summons and complaint at the office or place of business within Montana with the person in charge of such office;

(C) delivering a copy of the summons and complaint to the registered agent named on the records of the secretary of state;

(D) delivering a copy of the summons and complaint to any other agent or attorney in fact authorized by appointment or by statute to receive or accept service on behalf of the business or nonprofit entity, provided that if the agent or attorney in fact is designated by statute to receive service, further notice as required by the statute must also be given; or

(E) if the suit is against a business or nonprofit entity whose charter or right to do business in Montana has expired or been forfeited, by delivering a copy of the summons and complaint to its trustees or stockholders or members.

(j) Serving a Corporation or Limited Liability Company When Persons Designated Under Rule 4(i) Cannot Be Found Within Montana.

(1) This Rule applies when none of the persons designated in Rule 4(i) can be found within Montana with the exercise of due diligence, and a claim for relief is pending in any Montana court against the following:

(A) a corporation or limited liability company that has filed a copy of its charter in the office of the Montana secretary of state and is qualified to do business in Montana;

(B) a corporation or limited liability company which is subject to the jurisdiction of Montana courts under Rule 4(b), even though it has never qualified to do business in Montana; or

(C) a national banking corporation which, through insolvency or lapse of charter, has ceased to do business in Montana.

(2) The party causing summons to be issued shall exercise reasonable diligence to ascertain the last known address of any person designated under Rule 4(i).

(3) If, after exercising reasonable diligence, the party causing summons to be issued is unable to accomplish service, the following must be filed with the clerk of the court in which the claim for relief is pending:

(A) an affidavit reciting that none of the persons designated in Rule 4(i) can be found within Montana, as well as a recitation of either:

(i) the last known address of any person designated under Rule 4(i); or

(ii) a statement that no address for any person designated under Rule 4(i) could be found after the exercise of reasonable diligence; and

(B) $10 deposited with the clerk to be paid to the secretary of state as a fee for each defendant for whom the secretary of state is to receive service. When service is requested at more than one address, an additional $10 must be paid for each party to be served at each additional address.

(4) An affidavit filed pursuant to Rule 4(j)(3)(A) reciting that diligent inquiry was made is sufficient evidence of the diligence of inquiry. The affidavit need not detail the facts constituting such inquiry. The affidavit may also be combined in the same instrument with the affidavit required under Rules 4(o)(3)(A)(ii) and 4(p), should an affidavit under these Rules be required.

(5) Upon receiving the necessary affidavit and fees as required under Rule 4(j)(3), the clerk of court must:

(A) issue an order directing process to be served upon the Montana secretary of state or, in the secretary of state's absence, upon the Montana deputy secretary of state; and

(B) mail to the secretary of state at the office of the secretary of state:

(i) the original summons;

(ii) one copy of the summons and affidavit for the files of the secretary of state;

(iii) one copy of the summons attached to a copy of the complaint for each of the defendants to be served by service upon the secretary of state; and

(iv) the fee for service.

(6) (A) Upon receiving the materials required under Rule 4(j)(5)(B), the secretary of state must mail a copy of the summons and complaint by certified mail, return receipt requested, either:

(i) to the last known address of any of the persons designated in Rule 4(i); or

(ii) if the corporation or liability company is not organized in

Montana and no address for a person designated under Rule 4(i) is known, to the secretary of state of the state in which the corporation or limited liability company was originally incorporated, if known.

(B) The secretary of state must also make a return as provided in Rule 4(p).

(7) Service made in accordance with this Rule is deemed personal service on the corporation or limited liability company and the secretary of state, or a deputy in the absence of the secretary of state, is thereby appointed agent of the corporation or limited liability company for service of process.

(8) (A) If a person designated in Rule 4(i) is located and served personally as provided by this Rule, service is deemed complete upon the corporation or limited liability company regardless of the receipt of any return receipt or advice by the postal authority of refusal of the addressee to receive the process mailed.

(B) If a person designated in Rule 4(i) is not located or served personally as provided by this Rule, service by publication must also be made as provided in Rules 4(c)(2)(D) and 4(o)(4). Such publication must first be made within 60 days from the date the original summons is mailed to the secretary of state. If such first publication is not made, the action shall be deemed dismissed as to any corporation or limited liability company intended to be served by

such publication. Service by publication in accordance with this Rule is complete upon the date of the last publication of summons.

(9) When service of process is made in accordance with this Rule, and there is no appearance thereafter made by any attorney for such corporation or limited liability company, service of all other notices required by law to be served in such action may be served upon the secretary of state.

…

(n) Personal Service outside Montana.

(1) When a person cannot, with due diligence, be served personally within Montana, service may be made outside Montana in the manner provided for service within Montana. Such service has the same force and effect as though it had been made within Montana.

(2) Where service by publication is permitted, personal service of the summons and complaint upon the defendant outside Montana is equivalent to and dispenses with the procedures, publication, and mailing provided for in Rules 4(o)(3), 4(o)(4), and 4(o)(5).

(o) Service by Publication.

(1) When Permitted. A defendant who has not been served under the foregoing sections of Rule 4 can only be served by publication in the following situations:

(A) when the subject of the action is real or personal property in Montana in

which the defendant has or claims an actual or contingent lien or interest, or the relief demanded consists wholly or partially in excluding the defendant from any interest therein;

(B) when the action is to foreclose, redeem from, or satisfy a mortgage, claim, or lien upon real or personal property within Montana;

(C) when the action is for dissolution, legal separation or a declaration of invalidity of a marriage of a Montana resident, or for modification of a decree of dissolution or order on custody, visitation, support, or a parenting plan granted by a Montana court; or

(D) when the defendant has property within Montana which has been attached or has a debtor within Montana who has been garnished. Jurisdiction under this subsection may be independent of or supplementary to jurisdiction acquired under Rules 4(o)(1)(A), 4(o)(1)(B), or 4(o)(1)(C).

(2) Effect of Service by Publication. When a defendant has been served by publication as provided in this Rule, any Montana court having jurisdiction may render a decree adjudicating any interest of such defendant in the status, property, or thing acted upon. Such a decree does not bind the defendant personally to the personal jurisdiction of the court unless some ground for the exercise of personal jurisdiction exists.

(3) Filing of Pleading and Affidavit for Service by Publication; Order for Publication.

(A) Before service of the summons by publication is authorized, the following must be filed with the clerk of the district court of the county in which the action is commenced:

(i) a pleading setting forth a claim in favor of the plaintiff and against the defendant in one of the situations defined in Rule 4(o)(1); and

(ii) a) in situations defined in Rules 4(o)(1)(A), 4(o)(1)(B), and 4(o)(1)(C), upon return of the summons showing the failure to find any defendant designated in the complaint, an affidavit stating that either:

1. such defendant resides out of Montana;

2. such defendant has departed from Montana;

3. such defendant cannot, after due diligence, be found within Montana;

4. such defendant conceals the defendant's person to avoid the service of summons;

5. the defendant is a business or nonprofit entity as defined in Rule 4(i)(1) of which none of the persons in Rule 4(i) can, after due diligence, be found within Montana; or

6. the defendant is an unknown claimant and the affiant has made diligent search and inquiry for all persons who claim or might claim any present or contingent right, title, estate, interest in, lien, or encumbrance upon such property or any part thereof, adverse to plaintiff's ownership, or any cloud upon plaintiff's title thereto, including any right of inchoate or accrued dower, and that the affiant has specifically named as defendants in such action all such persons whose names can be ascertained.

b) Such affidavit is sufficient evidence of the diligence of any inquiry made by the affiant if it recites the fact that diligent inquiry was made. The facts constituting such inquiry need not be detailed.

c) Such affidavit may be with the affidavit required under Rules 4(j)(3)(A) and 4(p), should an affidavit under these Rules be required.

(iii) In the situation defined in Rule 4(o)(1)(D), proof that a valid attachment or garnishment has been effected must first be presented to the court.

(B) Upon complying herewith, the plaintiff must obtain an order, issued either by the judge or clerk of court, for the service of summons to be made upon the defendants by publication.

(4) Number of Publications. Service by publication must be made by publishing the summons once a week for three successive weeks in a newspaper published in the county in which the action is pending or, if no newspaper is published in such county, then in a newspaper published in an adjoining county that has a general circulation therein.

(5) Mailing Summons and Complaint. A copy of the summons and complaint, at any time after the filing of the affidavit for publication but not later than 14 days after the first publication of the summons, must be mailed, postage prepaid, to the defendant at defendant's place of residence, unless the affidavit for publication states that the residence of the defendant is unknown. If the defendant is a business or nonprofit

entity as defined in Rule 4(i)(1), and personal service cannot with due diligence be effected within Montana on any of the persons designated in Rule 4(i), then the secretary of state must be served pursuant to Rule 4(j).

(6) Time When First Publication or Service outside Montana Must Be Made. The first publication of summons or personal service of the summons and complaint upon the defendant out of Montana must be made within 60 days after the filing of the affidavit for publication. If not, the action must be dismissed as to any party intended to be served by such publication.

(7) When Service by Publication or Outside Montana Complete. Service by publication is complete on the date of the last publication of the summons or, in case of personal service of the summons and complaint upon the defendant out of Montana, on the date of such service.

…

(t) Time Limit for Issuance and Service of Process.

(1) A plaintiff must accomplish service within three years after filing a complaint. Absent an appearance by defendant(s), the court, upon motion or on its own initiative, must dismiss an action without prejudice if the plaintiff fails to do so.

(2) A plaintiff who names a fictitious defendant in the complaint pursuant to section 25-5-103 may, within three years of filing the

original complaint, amend the complaint to substitute a real defendant for the fictitious defendant. The three-year time period set forth in Rule 4(t)(1) begins to run as to the newly identified defendant from the date of the filing of the original complaint.

* * *