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

REPLY BRIEF FOR PETITIONER

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RULE 29.6 STATEMENT

The corporate disclosure statement contained in the Brief for Petitioner remains accurate.

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REPLY BRIEF FOR PETITIONER

The text and history of the Federal Employers Liability Act leave no doubt about the meaning of Section 56: Congress sought to expand venue in federal courts, and then to confirm the concurrent subject-matter jurisdiction of state courts. *Mondou v. New York, New Haven & Hartford R.R. Co. (Second Employers' Liability Cases)*, 223 U.S. 1, 55–56 (1912). Congress did not include in Section 56 a service-of-process provision, which is how Congress regulates personal jurisdiction in federal courts. *Omni Capital Int'l, Ltd. v. Rudolf Wolff & Co.*, 484 U.S. 97, 104 (1987). And nothing in the text or legislative history suggests that Congress in FELA attempted to alter the personal jurisdiction of *state* courts.

Respondents' defense of the Montana Supreme Court's opinion rests upon statutory analysis that is detached from text, and upon constitutional theories that this Court has decisively rejected. Respondents and their amici do not cite a single statute in the history of the Republic in which Congress purported to alter the personal jurisdiction of state courts. While FELA is one of many statutes where Congress provided for "concurrent" jurisdiction between state and federal courts, Respondents do not identify any statute where that term means personal jurisdiction rather than subject-matter jurisdiction. Respondents also have no case suggesting that Congress even has the power to relieve the Fourteenth Amendment's limitations on state courts' personal jurisdiction. And Respondents certainly have no authority after *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014), holding that "doing business" in a state—even significant business—is sufficient to support a state court's exercise of general "at home" jurisdiction over a foreign defendant.

Respondents' interpretation of FELA would raise serious constitutional questions and create massive uncertainty over whether other special venue statutes also embody undiscovered grants of personal jurisdiction. Moreover, Respondents' view of "at home" jurisdiction would eviscerate the simple and predictable jurisdictional rules of *Daimler*. The judgment of the Montana Supreme Court should be reversed.

I. FELA DID NOT ALTER THE PERSONAL JURISDICTION OF STATE COURTS

Respondents ask this Court to reach an extraordinary conclusion: That Congress in FELA sought to alter the limitations on state courts' personal jurisdiction.

A. Section 56's "Concurrent" Jurisdiction Clause Does Not Affect State Courts' Personal Jurisdiction

Respondents concede, as they must, that the first sentence of Section 56 is explicitly limited to cases "[i]n [f]ederal [c]ourts." Resp. Br. 14. Thus, Respondents' defense of the Montana Supreme Court's holding depends on the concurrent-jurisdiction sentence, which (substantially unchanged since 1910) provides: "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. Respondents contend (at 23) that this clause should be read to "extend[ ] to state courts the authority to exercise personal jurisdiction." But Respondents essentially ignore the *Second Employers' Liability Cases*, where this Court comprehensively analyzed FELA just two years after Section 56 was enacted and held that the concurrent-jurisdiction clause was adopted to correct the mistake of *Hoxie v. New York,*

New Haven & Hartford Railroad Co., 73 A. 754 (Conn. 1909), by confirming that Congress did not withdraw subject-matter jurisdiction over FELA actions from state courts. 223 U.S. at 55–56; *see also id.* at 56 (Section 56 is not an "attempt by Congress to enlarge or regulate the jurisdiction of state courts, or to control or affect their modes of procedure"). The statute's reference to jurisdiction "under this chapter" makes it especially clear that the clause refers to subject-matter jurisdiction, as Respondents concede. Resp. Br. 25.

Respondents say that, because the word "jurisdiction" in Section 56 is not explicitly preceded by "subject-matter," the clause can be read to refer to personal jurisdiction as well. Resp. Br. 24 (citing *Lightfoot v. Cendant Mortg. Corp.*, 137 S. Ct. 553, 562 (2017)). But whereas the statute in *Lightfoot* interpreted the phrase "court of competent jurisdiction," the word "jurisdiction" in Section 56 is modified by the term "concurrent." Usages of "concurrent" jurisdiction appear throughout the United States Code, Pet. Br. 38, yet Respondents do not point to a single statute where that term refers to personal jurisdiction. Instead, since the First Congress, a statute referring to "concurrent" jurisdiction has meant that state and federal courts dually exercise subject-matter jurisdiction over the same claims. Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73, 78 ("[T]he circuit courts shall have original cognizance, concurrent with the courts of the several States, of all suits of a civil nature at common law or in equity" meeting certain criteria). That was plainly the understanding at the time Section 56 was enacted. *See Black's Law Dictionary* 673 (2d. ed. 1910) (defining "concurrent jurisdiction" as "[t]he jurisdiction of several different tribunals, both authorized to deal with the same subject-matter at the choice of the suitor").

The meaning of "concurrent" jurisdiction in Section 56 has been settled by that term's consistent usage across statutes over hundreds of years. *See Indep. Fed'n of Flight Attendants v. Zipes*, 491 U.S. 754, 758 n.2 (1989) ("[S]imilar language" in different statues "is 'a strong indication' that they are to be interpreted alike."). A long line of this Court's precedents confirms that the term refers to subject-matter jurisdiction. *See, e.g.*, *Haywood v. Drown*, 556 U.S. 729, 746 (2009) ("The assumption that state courts would continue to exercise concurrent jurisdiction over federal claims was essential to th[e Madisonian Compromise at the Constitutional Convention]."). FELA's legislative history also confirms that meaning. *See* H.R. Rep. No. 513, 61st Cong., 2d Sess. 10–12 (1910) (Rep. Sterling) (citing *Teal v. Fulton*, 53 U.S. 284, 292 (1851); *The Moses Taylor*, 71 U.S. 411, 428 (1866); *Ex Parte Siebold*, 100 U.S. 371, 392 (1879)).

Respondents assert (at 24) that other statutes referencing concurrent jurisdiction have a different "text and structure" than Section 56. But there is no meaningful difference between providing for, *e.g.*, concurrent jurisdiction "to prevent a violation of … this section," 49 U.S.C. § 11501(c), Resp. Br. 24, and FELA's provision for concurrent jurisdiction "under this chapter," 45 U.S.C. § 56. Moreover, the consistent use of "concurrent" jurisdiction across different statutes with somewhat different structures only reinforces that concurrent jurisdiction means subject-matter jurisdiction.

Respondents' misreading of Section 56 gets no support from the two decisions on which they rely. *Contra* Resp. Br. 24–25. *Claflin v. Houseman*, 93 U.S. 130, 136 (1876), did not interpret a statutory term and

merely observed that, under our system of dual sovereignty, state and federal governments both exercise "concurrent" authority over the same places and people. *Claflin*, in fact, is this Court's seminal case describing the constitutional rule of concurrent *subject-matter* jurisdiction between state and federal courts. *See id.* at 136–37. Respondents' only other authority, *Alabama Great Southern Railroad Co. v. Federal Maritime Commission*, 379 F.2d 100, 102 (D.C. Cir. 1967), stands for the proposition that Congress intended to prevent subject-matter overlap in responsibility between two federal agencies. Nothing in this Court's cases supports Respondents' view that concurrent jurisdiction means personal jurisdiction.[1]

2. Respondents also ask the Court to read this clause in light of Congress's objective to "give plaintiffs an unusually broad right with respect to where to bring suit." Resp. Br. 32. But this Court already held in the *Second Employers' Liability Cases* that, for state courts, Congress's objective was to confirm subject-matter jurisdiction. 223 U.S. at 56. Respondents cite nothing in the legislative history suggesting that Congress gave any thought at all to the personal jurisdiction of state courts. That is not surprising, because prescribing the personal jurisdiction of state courts is a sovereign function of each state. *See Brown v. Gerdes*, 321 U.S. 178, 188–89 (1944) (Frankfurter, J., concurring) ("[T]he States are as free from control by

[1] Since BNSF's opening brief, the Supreme Courts of Oregon and Missouri have each rejected Respondents' interpretation of Section 56. *Barrett v. Union Pac. R.R. Co.*, 361 Or. 115, 128–29 (2017) ("Confirming the state courts' concurrent subject matter jurisdiction over federal claims is not the same thing as conferring personal jurisdiction over out-of-state corporate defendants."); *State ex rel. Norfolk S. Ry. Co. v. Dolan*, No. SC 95514, 2017 WL 770977, at *6–7 (Mo. Feb. 28, 2017).

Congress in establishing state systems for litigation as is Congress free from state control."). If Congress in passing FELA had sought to legislate for the first time on a matter so squarely within traditional state authority, then it needed to be "'reasonably explicit'" about it. *Bond v. United States*, 134 S. Ct. 2077, 2089 (2014) (quoting Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527, 539–40 (1947)); *cf. Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991) (it is "incumbent upon the federal courts to be certain of Congress's intent before finding that federal law" alters the qualifications for state-court judges) (quotation marks omitted).

There is no way to know for sure what Congress in 1910 might have assumed (or not) about state courts' personal jurisdiction thirty-five years before *International Shoe Co. v. Washington*, 326 U.S. 310 (1945). If Congress had considered the matter, it may well have believed that these Respondents could not sue BNSF on these out-of-state cases in a Montana state court. *See Old Wayne Mut. Life Ass'n of Indianapolis v. McDonough*, 204 U.S. 8, 21–23 (1907) (holding that a state court can serve process on a defendant that is "present" (*i.e.*, doing business) in the court's territory, so long as the cause of action arose from the defendant's business in that state). Regardless, whatever Congress may or may not have assumed, FELA is silent about state courts' personal jurisdiction. And "Congress' silence is just that—silence." *Cmty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 749 (1989) (quotation marks omitted). It is the text of the statue that controls, not a hypothetical statute Congress might have written if it had made different assumptions about other issues at the time of enactment.

Respondents continue to misread *Baltimore & Ohio Railroad Co. v. Kepner*, 314 U.S. 44, 50 (1941), which quoted Senator Borah for the proposition that Congress amended FELA to enable a plaintiff to "find the corporation at any point or place *or State* where it is actually carrying on business, and there lodge his action." Resp. Br. 26, 27, 35. Senator Borah made clear that he referred here to the purpose of the first sentence of Section 56, concerning *federal* courts. 45 Cong. Rec., 61st Cong., 2d Sess. 4034 (1910). Senator Borah then went on to describe separately the purpose of the concurrent-jurisdiction clause, which he said addressed "jurisdiction of the case," *i.e.*, subject-matter jurisdiction. *Id.* at 4035. Senator Borah never mentioned personal jurisdiction in state courts. *See* S. Rep. No. 432, 61st Cong., 2d Sess. 3–4 (1910) (Sen. Borah) (expanding where a FELA plaintiff could sue was the purpose of the first sentence of Section 56, whereas the second sentence addressed *Hoxie*).

Because Section 56's text did not address personal jurisdiction in state courts, the rule today is the same as it was in 1909: FELA plaintiffs may obtain jurisdiction over the defendant in any state court where authorized by state law, subject to the limits of the Fourteenth Amendment.

B. Section 56's Federal-Courts Clause Does Not Affect Personal Jurisdiction

1. Although this Court can reverse the judgment below without addressing the first sentence of 45 U.S.C. § 56, that sentence grants venue, not personal jurisdiction, to "court[s] of the United States." That is what this Court stated repeatedly in *Kepner*, 314 U.S. at 52. By describing where a case "may be brought," FELA used text that is consistent with 200 or so other special federal venue statutes. *See* H.R. Rep. No. 10,

112th Cong., 1st Sess. 18 & n.8 (2011) (when Congress amended the general federal venue statute, it recognized the "special venue rules that govern under particular Federal statutes," citing an American Law Institute report); Am. Law Inst., *Fed. Judicial Code Revision Project*, 253–90 (2004) (identifying special federal venue statutes, including FELA); 14D Charles Alan Wright & Arthur R. Miller, *Fed. Practice & Procedure* §§ 3811–25 (4th ed. 2013) (reviewing special venue statutes).

In addition, FELA does not address where service of process can issue, and personal jurisdiction *requires* "authorization for service of summons on the defendant." *Omni Capital*, 484 U.S. at 104. This Court recognized as early as 1838 that, when Congress seeks to expand federal courts' personal jurisdiction, it does so not by legislating where a case "may be brought," but by "authoriz[ing] any civil process to run into any other district." *Toland v. Sprague*, 37 U.S. 300, 327 (1838); *see also ibid.* ("Congress might have authorized civil process from any circuit court, to run into any state of the Union. It has not done so."). Congress exercised that option in legislation both before and shortly after 1910. *See* Credit Mobilier Act of 1873;[2] Clayton Act of 1914.[3] The absence of a similar clause in Section 56 demonstrates that FELA did not, and

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[2] Ch. 226, § 4, 17 Stat. 485, 509 (a "suit may be brought in the circuit court in any circuit," *and* "*writs of subpoena may be issued by said court against any parties defendant, which shall run into any district*") (emphasis added).

[3] Ch. 323, § 12, 38 Stat. 730, 736 (a suit "may be brought not only in the judicial district whereof [a corporation] is an inhabitant, but also in any district wherein it may be found or transacts business; *and all process in such cases may be served in the district of which it is an inhabitant, or wherever it may be found*") (emphasis added).

was not intended to, expand federal courts' personal jurisdiction. *See Robertson v. R.R. Labor Bd.*, 268 U.S. 619, 622–25 (1925) ("It is … obvious that proper venue does not eliminate the requisite of personal jurisdiction over the defendant.").

2. The legislative history shows, and Respondents agree (at 15), that Congress in 1910 was responding to the limitations imposed by the 1888 amendments to the Judiciary Act, which had limited *venue* to places where a corporation was an "inhabitant." Act of Aug. 13, 1888, ch. 866, § 1, 25 Stat. 433, 434. *See Kepner*, 314 U.S. at 49.

Respondents contend, however, that this "inhabitant" provision also limited personal jurisdiction, in order to draw the inference that Congress intended to expand federal personal jurisdiction in Section 56 alongside the expansion of venue. Resp. Br. 16. Respondents are wrong: The 1888 Act's "inhabitant" limitation was a matter of venue only—it "relates to the venue of suits originally begun in [the District Courts]" and "merely confers a personal privilege on the defendant, which he may assert, or waive, at his election[.]" *Lee v. Chesapeake & Ohio Ry. Co.*, 260 U.S. 653, 655 (1923); *see also Green v. Chicago, Burlington & Quincy Ry. Co.*, 205 U.S. 530, 532 (1907) (although the federal court was a proper venue under the 1888 Act, "to obtain jurisdiction there must be service," and so it was necessary to determine the validity of service).

Personal jurisdiction in 1910 was governed by a different clause of the Judiciary Act providing that "no person shall be arrested in one district for trial in another in any civil action before a circuit or district court," 25 Stat. at 434—a clause that, unlike the "inhabitant" venue clause, was the same in 1888 as in the

original Judiciary Act of 1789. *See* 1 Stat. at 79 & note *(b)* (referencing a judicial holding "that the circuit and district courts of the United States cannot … send their process into another district, except where specifically authorized so to do by some act of Congress").[4] This Court interpreted the civil-arrests clause of the Judiciary Act in *Toland* to codify the common-law rule that "the circuit courts can issue no process beyond the limits of their districts." 37 U.S. at 330. Similarly in *Robertson*, the Court explained that, for "jurisdiction over the defendant," (as opposed to "venue"), the Judiciary Act established the "general rule," consistent with "the practice at common law," that a federal court "cannot issue process beyond the limits of the district." 268 U.S. at 622–23 (citing Section 11 of the Judiciary Act of 1789). And since *Robertson*, the Court has reiterated multiple times that changing federal personal jurisdiction requires changing options for service of process. *See Georgia v. Penn. R.R. Co.*, 324 U.S. 439, 467–68 (1945); *Omni Capital*, 484 U.S. at 108–09; Pet. Br. 31–32 (reviewing statutes that expand service of process).

Respondents' reading of the 1888 Act's "inhabitant" clause as a personal-jurisdiction provision would produce bizarre results. The 1888 Act also provided that, in diversity cases, "suit shall be brought only in the district of the residence of either the plaintiff or the defendant." 25 Stat. at 434. But Congress would not attempt to authorize *personal jurisdiction* in a diversity case in the plaintiff's home district—where the defendant may have never visited at all. By contrast,

[4] BNSF's opening brief (at 31) mistakenly quoted the sentence after the civil-arrests clause as controlling federal personal jurisdiction in 1910.

the clause makes perfect sense when understood (properly) as a venue provision.

3. Respondents have marshaled no authorities or provisions of FELA's legislative history to suggest that Congress was concerned about personal jurisdiction in 1910. Respondents' two citations to cases applying the general venue statute and referring to courts' "jurisdiction" or "plea[s] to the jurisdiction," Resp. Br. 16, are unreliable evidence. A "plea to the jurisdiction" was merely a type of special pleading, before the Federal Rules of Civil Procedure, whereby a defendant could challenge personal jurisdiction, venue, the amount in controversy, the plaintiff's capacity, standing, or other deficiencies. *See* 1 C.J.S. Abatement & Revival §§ 1–18 (2017). These cases do not imply, as Respondents assert, that venue and service of process were fused together in FELA in 1910.[5]

Respondents also cite (at 22) three decisions from the D.C. Circuit that, after *Omni Capital*, inferred service-of-process provisions from federal statutes. Those cases involved statutes establishing enforcement power in federal agencies, and the court of appeals concluded that an implication of expansive service was the only way to give those powers any meaningful effect. Section 56, by contrast, solved the particular problem that Congress was concerned about—

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[5] Similarly unhelpful is an unenacted proposed amendment to FELA in 1947. *Contra* Resp. Br. 32. While Congress declined to narrow venue, it also declined to expand venue to include the plaintiff's residence. *See* Br. of United States 17. The proposed amendment cuts both ways. Moreover, "failed legislative proposals are a particularly dangerous ground on which to rest an interpretation of a prior statute." *Cent. Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164, 187 (1994) (quotation marks omitted).

the Judiciary Act's limitation of venue to a corporation's "inhabitan[ce]." This Court has never inferred a service-of-process provision in a federal statute, and Respondents have not asked this Court to do so here.

Section 56's federal-courts clause is not a grant of personal jurisdiction because the text cannot bear that interpretation. "Congress knows how to authorize nationwide service of process when it wants to provide for it." *Omni Capital*, 484 U.S. at 106.

* * *

Because neither sentence of Section 56 can support the Montana Supreme Court's holding, Respondents fall back to asking for a "liberal[ ] constru[ction]" that would treat the two clauses "as a package" expanding state courts' personal jurisdiction. Resp. Br. 25–26. But Section 56 is not greater than the sum of its parts. Congress was explicit about its particular intent for each piece of the 1910 amendments to FELA: Congress sought to expand the venue of federal courts, to prevent state courts from refusing to hear FELA cases for lack of subject-matter jurisdiction, and to prevent removal of FELA cases from state court. *Second Employers' Liability Cases*, 223 U.S. at 55–56; *Kepner*, 314 U.S. at 52; S. Rep. No. 432, *supra*, at 3 ("The proposed amendments to [FELA] may be considered under [several] heads: First, as to the venue of such an action; second, as to the concurrent jurisdiction of the courts of the several states[.]"). That is it. There is no ambiguity about the meaning of Section 56, and no role for liberal construction. *See Norfolk S. Ry. Co. v. Sorrell*, 549 U.S. 158, 171 (2007) ("the statute's remedial purpose cannot compensate for the lack of a statutory basis").

C. Respondents Continue To Misread FELA Precedents

1. It is telling that Respondents cannot cite a single case in the more than 100 years since 1910 stating that Section 56 confers personal jurisdiction on state courts. As BNSF has already shown (at 41–44), not one of this Court's precedents interpreted FELA to confer personal jurisdiction; the cases cited by Respondents involved different issues altogether. Contrary to Respondents' brief (at 28), there is no "established practice" allowing state courts to exercise personal jurisdiction based on FELA.

At most, the Court in some cases may have made unstated assumptions about the *constitutional* limits on personal jurisdiction, which were very different in the era before *International Shoe*. *See Daimler*, 134 S. Ct. at 761 n.18. But the Court did not *interpret FELA* to confer personal jurisdiction. *See* Br. of United States 23 ("It may well be that the Court in those cases believed that a state court hearing a FELA case could exercise personal jurisdiction over a defendant railroad doing business in the State. But that does not mean that the Court was of the view that Section 56, as opposed to state law, made the defendant amenable to summons."). It is Respondents' position that threatens an established practice, two centuries old, in which Congress does not attempt to alter the personal jurisdiction of the state courts.

Respondents suggest (at 28) that, after *International Shoe*, Judge Learned Hand held that FELA conferred personal jurisdiction. Resp. Br. 28 (citing *Kilpatrick v. Tex. & Pac. Ry. Co.*, 166 F.2d 788 (2d Cir. 1948)). That is incorrect. *Kilpatrick* was filed in federal court, where the Fourteenth Amendment and *International Shoe* did not apply. Moreover, the issue in

Kilpatrick was not personal jurisdiction—which the defendant had waived—but forum non conveniens. *Id.* at 790–91. Similarly, *Boyd v. Grand Trunk Western Railroad Co.*, 338 U.S. 263 (1949) (per curiam), is unhelpful to Respondents. *Contra* Resp. Br. 31. That case interpreted not Section 56 but a different provision of FELA, and the defendant did not contest personal jurisdiction.

2. Respondents offer unconvincing interpretations of the cases from this Court that directly refute their position. In response to *Missouri ex rel. Southern Railway Co. v. Mayfield*, 340 U.S. 1, 3 (1950), where this Court stated that, in a FELA case, a state court must have personal jurisdiction, Respondents say (at 29) that "context" shows the Court referred "to the limitations of a state's local law, not FELA." That is precisely the point: State law, not FELA, determines personal jurisdiction in state courts, subject to the Fourteenth Amendment's limits. *See, e.g.*, *Douglas v. N.Y., New Haven & Hartford R.R. Co.*, 279 U.S. 377, 387 (1929) (a state court may decline to hear a FELA case for lack of personal jurisdiction under state law); *Taylor v. S. Ry. Co.*, 182 N.E. 805, 807 (Ill. 1932) (FELA does not give jurisdiction "to any specified state courts" or limit "the venue in such state courts").

FELA's silence as to personal jurisdiction is also reflected in Section 56's clause prohibiting removal from a state court of "competent jurisdiction," *contra* Resp. Br. 30 n.9, meaning a court with subject-matter *and personal* jurisdiction under state law. *See* Pet. Br. 39–40.

D. Respondents' Arguments Would Unsettle Other Venue Statutes And Cripple *Daimler*

1. Respondents' argument that venue provisions can sometimes carry hidden, as-yet unrevealed grants of personal jurisdiction, if accepted, will invite a tidal wave of new litigation about whether the wide range of other special venue statutes also alter personal jurisdiction in state courts. Some of these statutes, like FELA, were enacted in response to the 1888 Act's "inhabitation" limitation on venue, including the Copyright Act, ch. 320, § 35, 35 Stat. 1075, 1084 (1909), which was enacted one year before Section 56. 28 U.S.C. § 1400(a) (a case "may be instituted in the district in which the defendant or his agent resides or may be found"); *see also* Pet. Br. 31–32; Wright & Miller, *supra*.

2. Respondents' argument would also undermine *Daimler*'s constitutional limitations on state courts' personal jurisdiction. Respondents and their amici contend that it would be unjust if those BNSF employees who travel out-of-state to perform their jobs were unable to sue in their home states. *E.g.*, Resp. Br. 34–35. But it is difficult to treat Respondents seriously when *they* deliberately traveled "far from their homes," Resp. Br. 32, to sue in state court in Montana.

In any event, there is nothing unusual or unjust about a plaintiff who, being injured while visiting another state, cannot obtain *general* personal jurisdiction in his home state. What Respondents dismissively label "BNSF's theor[y]" (at 34) is actually this Court's unanimous holding in *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 929 n.5 (2011), that the Due Process Clause makes the plain-

tiff's residence irrelevant to general personal jurisdiction. As the Court has explained, "[d]ue process limits on the State's adjudicative authority principally protect the liberty of the nonresident defendant—not the convenience of plaintiffs or third parties." *Walden v. Fiore*, 134 S. Ct. 1115, 1122 (2014). Even FELA does not extend venue to the plaintiff's home state.

For those rail employees who happen to be injured in a state that is not their regular place of employment, this Court has developed a whole body of specific-personal-jurisdiction jurisprudence to determine where a case arises. This Court has held that a plaintiff's residence may sometimes "strengthen the case for the exercise of *specific jurisdiction*," *Goodyear*, 564 U.S. at 929 n.5, although residence alone ordinarily is not "decisive," *Walden*, 134 S. Ct. at 1125 (quotation marks omitted). But these principles are not at issue here because Respondents have abandoned a claim to specific personal jurisdiction: They brought suit in a state that was not their ordinary workplace and where they do not allege that any wrongdoing or injury occurred.

II. *DAIMLER* FORECLOSES GENERAL PERSONAL JURISDICTION IN THESE CASES

1. Respondents ask this Court to hold that BNSF is "at home" in Montana because it has a "substantial, ongoing *presence* in [the] state." Resp. Br. 42. This is little more than a request for the Court to retract its opinion in *Daimler*. *See* 134 S. Ct. at 761 (rejecting as "unacceptably grasping" general personal jurisdiction "in every State in which a corporation engages in a substantial, continuous, and systematic course of business") (quotation marks omitted).

BNSF is not at home in Montana any more than Daimler AG was at home in California, on any relevant metric. Respondents emphasize, for example, that BNSF is the largest railroad in Montana, that it has significant property in the state including a division headquarters, and that it generates billions of dollars in annual revenue from Montana operations. Resp. Br. 47–49. But Daimler, acting through its United States subsidiary (whose contacts the Court assumed were attributable to Daimler, 134 S. Ct. at 760), was "the largest supplier of luxury vehicles to the California market," which itself was the largest in the United States, accounting for 10% of all new car sales. *Id.* at 752. Daimler had multiple corporate properties in California "including a regional headquarters," and an enormous volume of business—importing 200,000 vehicles per year for a total of $4.6 billion in sales, *id.* at 767 (Sotomayor, J., concurring in judgment).

BNSF's ordinary business activities in Montana are nothing like the facts of *Perkins v. Benguet Consolidated Mining Co.*, 342 U.S. 437 (1952), where the nerve center of corporate decision-making had moved to the forum state of Ohio. BNSF runs trains through Montana, but it indisputably runs the company from Fort Worth, Texas. Nor are railroads unique in operating interstate while owning property in several states. *Contra* Resp. Br. 49. Interstate companies in every sector of the American economy—airlines, hotel chains, cable companies, retailers, manufacturers, financial institutions, energy, technology, insurance, and health-care companies—all do business that way.

2. More fundamentally, Respondents' arguments are an attack on the reasoning that underlies *Daimler*, where this Court adopted "[s]imple jurisdictional

rules" for general personal jurisdiction—focused on the "paradigm[s]" of a corporate defendant's place of incorporation and principal place of business—in order to "promote greater predictability." 134 S. Ct. at 760 (quotation marks omitted). Although the Court noted the possibility that a corporation could be "at home" on exceptional facts like those in *Perkins*, the Court stated that such a case would need to be based on an "appraisal of a corporation's activities in their entirety, nationwide and worldwide." *Id.* at 762 n.20. Here, across any relevant measure, that appraisal shows that BNSF's Montana contacts are merely a fraction of its nationwide operations. JA26–JA27 (BNSF earns less than 10% of its revenue in Montana and has less than 5% of its workforce there).

Daimler also held that a company can be at home only in places that are "unique" and "easily ascertainable," 134 S. Ct. at 760, without the need for "much in the way of discovery," *id.* at 762 n.20. Yet Respondents would have this Court sift through affidavits, reports, maps, administrative filings, newspaper clips, political contributions, and more, Resp. Br. 47–49—much of which Respondents did not include in the record below—to evaluate the extent of BNSF's "presence" in Montana. Respondents' test also would make a company like BNSF "at home" in 28 different states, contrary to *Daimler*'s express holding that "[a] corporation that operates in many places can scarcely be deemed at home in all of them." 134 S. Ct. at 762 n.20.

Respondents' argument for general "all purpose" jurisdiction fails because they cannot show why BNSF's activity in Montana, however substantial, "should give [the] State authority over a far larger quantum of activity having no connection to any in-

state activity." *Daimler*, 134 S. Ct. at 762 n.20 (quotation marks and alterations omitted).[6]

III. CONGRESS CANNOT AUTHORIZE STATES TO EXERCISE PERSONAL JURISDICTION THAT THE FOURTEENTH AMENDMENT FORBIDS

Even if the text of Section 56 could bear Respondents' reading, this Court should reject their interpretation in order to avoid raising grave constitutional questions.

1. The Due Process Clause protects states' "status as coequal sovereigns in a federal system." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980). But the Montana courts operated outside their legitimate sphere of authority and intruded upon the sovereignty of sister states when they arrogated the power to issue judgments over parties from other states involving events that took place in other states. Even if Respondents' reading of Section 56 were correct, congressional approval would not diminish the sovereign injury.

Moreover, the Due Process Clause protects defendants' individual liberty interest in avoiding "the

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[6] Respondents contend (at 50) that they have a viable argument that BNSF consented to general jurisdiction in Montana by registering and appointing an agent for service. But courts after *Daimler* have strongly suggested that it would be unconstitutional for a state to force a corporation to consent to unlimited personal jurisdiction as a price for doing business in the state. *See, e.g.*, *Brown v. Lockheed Martin Corp.*, 814 F.3d 619, 639 (2d Cir. 2016). Respondents' argument is also frivolous under Montana law, which provides that "[t]he appointment or maintenance in this state of a registered agent does not by itself create the basis for personal jurisdiction over the represented entity in this state." Mont. Code Ann. § 35-7-115.

burdens of litigating in a distant or inconvenient forum" without a reasonable relationship between the defendant, the forum, and "the particular suit which is brought there." *World-Wide Volkswagen*, 444 U.S. at 292 (quoting *International Shoe*, 326 U.S. at 317). Due process also guarantees "some minimum assurance" of where the defendant will be "liable to suit." *Daimler*, 134 S. Ct. at 761–62 (quotation marks omitted). BNSF would suffer those constitutional injuries if Respondents were right that Mr. Nelson's slip-and-fall in Washington could be litigated in any of the 28 states where BNSF does business, or if BNSF were forced to defend these cases in a Montana court with no connection to the parties or events.

2. Respondents do not cite a single authority for their contention (at 36) that a state can deny due process of law in violation of the Fourteenth Amendment, so long as Congress approves. That is unsurprising, as this Court has repeatedly held just the opposite. Pet. Br. 48–49, 52. That Congress has never attempted to expand state courts' personal jurisdiction beyond due-process limits is persuasive evidence that such a power is "constitutionally proscribed." *Plaut v. Spendthrift Farm, Inc.* 514 U.S. 211, 230 (1995).

Respondents reply that this Court has not addressed the *Fifth Amendment* limits on Congress's power to "confer[ ] personal jurisdiction." Resp. Br. 41. What the Court has reserved is the limit of Congress's power to authorize personal jurisdiction in "*federal* court[s]." *Omni Capital*, 484 U.S. at 102 n.5 (emphasis added). The plurality in *J. McIntyre Machinery, Ltd. v. Nicastro*, 564 U.S. 873, 885 (2011), similarly reserved judgment on the hypothetical in *Asahi Metal Industry Co. v. Superior Court of California, Solano County*, 480 U.S. 102, 113 n.* (1987), where Congress

"authorize[d] federal court personal jurisdiction." The plurality did not endorse a never-before-seen power in Congress to authorize states to exercise personal jurisdiction beyond the Fourteenth Amendment's limits. *Contra* Resp. Br. 37.[7]

Respondents are also mistaken (at 36–38) about which constitutional limit applies to these cases. It is the Montana state courts that have attempted to exercise personal jurisdiction over BNSF, so it is the Fourteenth Amendment that restrains them. BNSF needs relief against the State, not the United States, in order to prevent the unconstitutional exercise of jurisdiction, and only the Fourteenth Amendment can provide that relief. This Court's cases have invoked the Fourteenth Amendment—not the Fifth Amendment—in order to prohibit challenged state actions irrespective of purported congressional authorization. Pet. Br. 48–49, 52.[8]

The Due Process Clause is an unequivocal prohibition that makes no exception for congressional authorization, mirroring the text of the "[n]o State shall … " prohibitions in Article I, section 10, clause 1. The Fourteenth Amendment did not need any other clauses to make its ban absolute. *Contra* Resp. Br. 41.

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[7] Contrary to Respondents' brief (at 39), BNSF did not concede that Congress could authorize personal jurisdiction over these FELA cases in a Montana federal court. Congress did not authorize that, and the cases were not brought in federal court, so the issue is not presented. Pet. Br. 33 n.4.

[8] Respondents' suggestion (at 41–42) that BNSF forfeited its constitutional objection is demonstrably incorrect. BNSF argued that FELA cannot be interpreted to confer personal jurisdiction that the Fourteenth Amendment forbids both to the Montana Supreme Court (as Justice McKinnon recognized, Pet. App. 29a–30a) and in the Petition for Certiorari, Pet. 23.

The generation that ratified the Fourteenth Amendment at the close of the Civil War—partly to ensure that newly freed slaves were not murdered or dispossessed of their property, *Slaughter-House Cases*, 83 U.S. 36, 71 (1872)—would not have allowed states to take life, liberty, or property without due process simply because a future Congress approved. *See* Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 Va. L. Rev. 947, 958 (1995) (the Fourteenth Amendment was enacted in part "to ensure that future Congresses would not be able to repeal" the 1866 Civil Rights Act). The Amendment gave Congress the power to enforce its protections, U.S. Const. amend XIV, § 5; it did not leave those protections vulnerable to congressional override.

CONCLUSION

The judgment of the Montana Supreme Court should be reversed.

Respectfully submitted.

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