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,

Respondent.

On Writ Of Certiorari
To The Supreme Court Of Montana

AMICUS CURIAE BRIEF OF THE AMERICAN ASSOCIATION FOR JUSTICE IN SUPPORT OF RESPONDENTS

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IDENTITY AND INTEREST OF AMICUS CURIAE

The American Association for Justice ("AAJ") is a voluntary national bar association whose trial lawyer members primarily represent plaintiffs in personal injury, employment rights, civil rights, and consumer rights litigation. Almost from its inception in 1946, AAJ has included lawyers who have advocated specifically for the rights of injured railroad workers to compensation under the Federal Employers' Liability Act.

AAJ believes that the right to bring a FELA action in any state court where the employer-railroad does business reflects Congress's recognition that workers may be injured wherever the rails may take them. The narrow rule of personal jurisdiction urged by Petitioner in this case would deprive railroad workers of this substantial right.[1]

SUMMARY OF ARGUMENT

Congress enacted the Federal Employers' Liability Act in 1908, responding to an accident crisis that killed and injured hundreds of thousands of railroad workers each year. Congress sought to make railroads more accountable for their negligence, by compensating victims and their families and providing a strong incentive for railroads to adopt

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[1] The parties have consented to the filing of this brief. The undersigned counsel for amicus curiae affirms, pursuant to Supreme Court Rule 37.6, that no counsel for a party authored this brief in whole or in part and no person or entity other than amicus curiae, its members, and its counsel contributed monetarily to the preparation or submission of this brief.

safer operations. Recognizing that railroad employees can suffer injury wherever the rails take them, Congress amended the FELA in 1910 to permit plaintiffs to sue where the railroad "shall be doing business."

This Court's precedents establish that Congress thereby granted permission to sue in state courts where the carrier conducts operations, and that the statute's broad grant of jurisdiction was not inequitable, oppressive, or fundamentally unfair.

1b. Alternatively, the decision below may be upheld on the basis of consent. Because personal jurisdiction is a right that may be waived, consent was accepted as a basis for state court jurisdiction over foreign corporations prior to this Court' expansion of jurisdiction in *International Shoe,* and even before the adoption of the Fourteenth Amendment. This Court has consistently held that appointment of an agent to receive service of process on behalf of a corporation that actually does business in the state is effective. Historically, courts found that state courts could assert jurisdiction even as to claims not arising out of the corporation's in-state activities.

Consent jurisdiction is not inconsistent with either *International Shoe* or *Daimler*, both of which expressly addressed the assertion of jurisdiction over foreign corporations that had not consented to jurisdiction. Indeed, to hold that consent jurisdiction is no longer viable would be inconsistent with this Court's decisions upholding contractual forum selection provisions and arbitration agreements, which are a species of forum selection clause. A corporation that has consented to state court jurisdiction in order to conduct business in the state

has fair notice that it may be sued there and can plan accordingly.

In this case, BNSF has registered to do business in Montana, has appointed an agent to receive service, and has actually conducted substantial business in the state. BNSF has regularly appeared in Montana courts to protects its own interests in the state.

2a. Petitioner asserts that due process requires that general jurisdiction may only be exercised by state courts in the corporate defendant's state of incorporation or principal place of business. To the contrary, due process is not served by such inflexible jurisdictional rules, but by a fact-based assessment of the fairness of asserting jurisdiction in the particular case. This Court in *Daimler* expressly rejected BNSF's inflexible rule that a corporation can only be subject to general jurisdiction in its state of incorporation and the state of its principal place of business, but instead reaffirmed the more flexible standard set forth in *International Shoe*.

2b. Indeed, limiting general jurisdiction to a corporation's state of incorporation or single principal place of business does not comport with due process. BNSF's argument leans heavily on the "at home" metaphor it garners from this Court's precedents instead of addressing the ultimate question whether it is fundamentally unfair for an injured worker to file a FELA action in the courts of another state in which BNSF conducts substantial railroad activities.

For example, it is difficult to credit BNSF's claim to be "at home," and thus amenable to suit, in its state of incorporation, Delaware, where it conducts

no rail operations, owns no track, and employs no workers. Businesses choose to incorporate in particular states for a variety of reasons that have little to do with their actual business operations, including internal governance laws and tax advantages. Many of the nearly one million corporations that are incorporated in Delaware carry on no business in the state except to maintain a dropbox as a legal address. It cannot be credibly maintained that BNSF is "at home" for suit by an injured railroad worker in Delaware, but not in Montana, where BNSF actually conducts railroading operations.

Similarly, it is not reasonable to assert that BNSF can be "at home" based on its business activities in only one state, its principal place of business. Large companies may engage in activities in several states that may be sufficient to treat the company as "at home" in each. This Court has itself suggested a company may be deemed "at home" in more than one state based on the quantity and nature of its operations and contacts there.

In this case, the court below found that jurisdiction was fair, based on BNSF's extensive business operations in Montana. Significantly those contacts include ownership of over 2,000 miles of track in Montana, a share of BNSF's total track that is a close second to that of Texas. Because BNSF cannot easily sell or abandon its track in Montana, its activities in the state go far beyond ephemeral contacts and constitute a continual and permanent presence.

Additionally, BNSF's Montana contacts are not unrelated to plaintiffs' causes of action. Plaintiffs

allege negligence on the part of BNSF that resulted in injury that is compensable under FELA. BNSF employees working in Montana are likewise covered by FELA and may bring suit against BNSF for the same allegedly negligent practices as are alleged by plaintiffs in this case.

3a. Petitioner's assertion that this Court should combat "forum shopping" provides no support for restricting the exercise of general jurisdiction by state courts. BNSF has neither defined "forum shopping" nor explained how permitting FELA plaintiffs to sue in Montana for injury occurring elsewhere deprives it of due process or substantial justice.

The plaintiff is the master of the complaint and a plaintiff's right to select an advantageous forum is well settled. Railroad workers may be injured far from home so that a state other than the place of injury may offer greater convenience and lesser cost. Representation of FELA plaintiffs is a relatively specialized field, and plaintiff's counsel of choice may practice in another state. One state's procedural rules may allow for more efficient and inexpensive litigation of a particular case. In addition, one state's courts may have greater experience in presiding over FELA cases or have less crowded dockets. The fees required for obtaining a trial by jury, expressly guaranteed to FELA plaintiffs, may be lower in the forum state. Plaintiffs' lawyers would not be fulfilling their legal duties to their clients if they failed to make use of such differences between jurisdictions.

"Forum shopping" that amounts to no more than selection of a forum offering a legitimate advantage to the plaintiff provides no basis for

limiting plaintiff's ability to choose the most favorable forum in which to pursue his or her claim.

3b. In this case, BNSF has failed to establish that allowing plaintiffs to sue in Montana, where BNSF does business, rather than requiring them to sue in Delaware or Texas, or in the state of injury, is fundamentally unfair. For example, Montana's application of FELA's three-year statute of limitations is firmly rooted in this Court's FELA precedents. The fact that some federal courts are perceived to hold a more defendant-friendly interpretation is not relevant to forum shopping among state courts. Moreover, if a state court's interpretation of the federal statute is erroneous, the appropriate vehicle is review by this Court, not restricting the personal jurisdiction of state courts. Similarly, Montana's view of reduction of damages for preexisting conditions is a valid construction of FELA's text which may, if erroneous, be corrected by this Court.

Nor are Montana's discovery practice and evidentiary rules regarding expert testimony unfair to defendants. BNSF's claimed state-federal differences are not relevant to "forum shopping" among state courts.

Montana's rule against *forum non conveniens* motions in FELA cases comports with this Courts decisions leaving such matters to the states. In addition, Montana's *pro hac vice* rule does not unfairly disadvantage a railroad that does substantial business in Montana. Finally, the fact that plaintiffs in this case are not residents of Montana has no bearing on whether Montana's courts may exercise jurisdiction over BNSF.

ARGUMENT

I. A STATE COURT MAY, CONSISTENT WITH DUE PROCESS, ASSERT PERSONAL JURISDICTION OVER A FELA CLAIM ARISING IN ANOTHER STATE, BASED ON DEFENDANT'S SUBSTANTIAL RAIL OPERATIONS IN THE FORUM STATE.

A. FELA Allows Injured Railroad Workers to File Suit Where Their Employer Is Doing Business.

Congress enacted the Federal Employers' Liability Act, 45 U.S.C. § 51 *et seq*. in 1908, following "an accident crisis like none the world had ever seen and like none any Western nation has witnessed since." John Fabian Witt, *Toward a New History of American Accident Law: Classical Tort Law and the Cooperative Firstparty Insurance Movement*, 114 Harv. L. Rev. 690, 694 (2001). Casualties among railroad workers in particular were astronomical. *See generally* Walter Licht, Working for the Railroad 190-200 (1983) and Melvin L. Griffith, *The Vindication of a National Public Policy Under the Federal Employers' Liability Act*, 18 Law & Contemp. Probs. 160, 163 (1953). In 1908 alone, 281,645 trainmen were killed or injured. *CSX Transp., Inc. v. McBride*, 564 U.S. 685, 691 (2011).

American courts at that time offered little in the way of justice or compensation for injured workers and their families. AAJ's founder noted that, prior to worker's compensation laws, workers lost approximately 80 percent of their personal injury tort actions against their employers. Samuel B. Horovitz, *Assaults and Horseplay Under Workmen's*

Compensation Laws, 41 Ill. L. Rev. 311, 311 (1946), *cited in Simms v. Ruby Tuesday, Inc.*, 704 S.E.2d 359, 361 (Va. 2011). The primary obstacle was judicial application of "harsh and technical common-law rules which sometimes made recovery difficult or even impossible." *Trainmen v. Virginia ex rel. Virginia State Bar*, 377 U.S. 1, 3 (1964). FELA's purpose was most expansively stated by the Senate Committee on the Judiciary in a report accompanying the 1910 amendment to the Act:

> [FELA] places such stringent liability upon the railroads for injuries to their employees as to compel the highest safeguarding of the lives and limbs of the men in this dangerous employment. . . . It was the intention of Congress . . . to shift the burden of the loss resulting from these casualties from "those least able to bear it" and place it upon those who can . . . "measurably control their causes."[2]

45 Cong. Rec. 4034, 4041, 61st Cong., 2d Sess. (1910).

Thus, as this Court has explained, Congress intended not only "to provide compensation for the injuries and deaths" of railway employees, but also "to encourage employers to improve safety measures in

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[2] The quotation is from *St. Louis & Iron Mountain & Southern Railway Co. v. Taylor*, 210 U. S. 281, 296 (1908), where this Court found no federal constitutional impediment to the courts of Arkansas asserting jurisdiction over a suit for the wrongful death of a railroad worker in the Indian territory (now Oklahoma) against a Missouri corporation. *Id*. at 285.

order to avoid those claims." *Consol. Rail Corp. v. Gottshall*, 512 U.S. 532, 555 (1994).

Consistent with this remedial purpose, Congress in 1910 amended the statute to provide that a plaintiff may bring a FELA action in a district "in which the defendant shall be doing business at the time of commencing such action," and that jurisdiction of the district courts "shall be concurrent with that of the courts of the several States." 45 U.S.C. § 56.

This Court has construed that provision as "permission granted by Congress to sue in state courts . . . where the carrier is found doing business." *Miles v. Illinois Cent. R.R. Co.*, 315 U.S. 698, 705 (1942). The Montana Supreme Court also relied on *Pope v. Atl. Coast Line R.R. Co.*, 345 U.S. 379 (1953), where this Court stated that FELA "establishes petitioner's right to sue in Alabama" for an injury in Georgia or "wherever the carrier 'shall be doing business,'" *Id.* at 382. *See also Denver & Rio Grande W. R.R. Co. v. Terte*, 284 U.S. 284, 286–87 (1932) (similar).

Petitioner and supporting amici strenuously dispute the Montana court's reading of *Miles*, *Pope*, and *Terte* because "not one of these cases so much as mentioned personal jurisdiction under the Due Process Clause." Pet'r Br. 20. *See also* Brief for Amici Curiae the Chamber of Commerce of the United States of America, et al. ("U.S. Chamber Br.") 16-17; Brief of Amicus Curiae National Association of Manufacturers ("NAM Br.") 10-11.[3]

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[3] The Solicitor General gives a fairer reading of these decisions: "It may well be that the Court in those cases believed that a state court hearing a FELA case could exercise personal jurisdiction

Although this Court's opinions did not use those terms, they may fairly be read as finding no violation of "traditional notions of fair play and substantial justice," which are the objects of the due process protection. *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945). The *Miles* Court, for example, concluded that plaintiff's pursuit of her claim in the Illinois court, even if inconvenient to the railroad, could not be enjoined as "inequitable and unconscionable," *Miles,* 315 U.S. at 705, particularly where the railroad was "not merely soliciting business but actually carrying on railroading by operating trains." *Id.* at 702.

Likewise, in *Pope*, this Court rejected the railroad's claim that the state court suit be enjoined as oppressive because the suit "subject[ed] it to the burden and expense of defending the claim in a distant forum." 345 U.S. at 381. In *Terte*, this Court allowed plaintiff's Missouri lawsuit despite the railroad's argument that jurisdiction based on doing business in the state violated its Fourteenth Amendment due process rights. 284 U.S. 285.[4]

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over a defendant railroad doing business in the State." Brief for the United States ("U.S. Br.") 23.

[4] *See also McKnett v. St. Louis & S.F. Ry. Co.,* 292 U.S. 230 (1934), where a Tennessee resident who was injured in Tennessee filed a FELA action in Alabama state court against "a foreign corporation doing business in Alabama." *Id.* This Court, in an opinion by Justice Brandeis, held that Alabama's courts were required to open their doors to plaintiffs suing under the federal statute. *Id.* at 233-34. In *Douglas v. N.Y., N.H. & H.R. Co.,* 279 U.S. 377 (1929), plaintiff brought suit in a New York court for injury sustained in Connecticut while working for defendant, a Connecticut corporation, which was doing business in New York. *Id.* at 385. The Court, in an opinion by Justice

Clearly, a great many justices on this Court, both in the majority and in dissent, did not perceive fundamental unfairness in requiring railroads to defend against FELA claims by injured railroad workers in states where those companies conducted railroading operations.

B. Historically, State Courts Have Exercised Jurisdiction Over Foreign Corporations Based on Their Consent To Jurisdiction as a Condition For Doing Business In the State.

1. Jurisdiction based on registering to do business and actually doing business in the forum state has long been an accepted basis for exercising jurisdiction over foreign corporations.

One amicus in this case correctly observes that Congress amended the FELA in 1910 in light of "then current doctrine allowing states to hear cases against corporations doing business within their borders." Stephen Sachs Br. 6. As Justice Scalia has noted, by the late 19th century, courts had expanded their jurisdiction over corporations beyond the state of their incorporation using two theories: "consent" and "presence." *Burnham v. Superior Court*, 495 U.S. 604, 617 (1990) (plurality opinion). These theories are closely intertwined, and, under both, the first question

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Holmes, held that "the *grant of jurisdiction* in [FELA] does not purport to require State Courts to entertain suits arising under it but only to empower them to do so." *Id.* at 387 (emphasis added).

to be determined was whether or not the corporation was 'doing business' within a state." 4 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1066 (4th ed.).

The consent basis for jurisdiction over foreign corporations predated *International Shoe*'s minimum contacts standard and was well-accepted prior to the adoption of the Fourteenth Amendment. Its rationale is that, "[b]ecause the requirement of personal jurisdiction represents first of all an individual right, it can, like other such rights, be waived." *Ins. Corp. of Ir., Ltd. v. Compagnie des Bauxites de Guinee,* 456 U.S. 694, 703 (1982). Thus in *Lafayette Ins. Co. v. French*, 59 U.S. (18 How.) 404 (1856), this Court upheld the jurisdiction of an Ohio court to hear a suit against an Indiana corporation with its principal business office in Indiana. By voluntarily appointing a registered agent to receive service of process on the corporation's behalf, service was effective "as if the defendant were within the State." *Id*. at 407.

The Court returned to this issue in *St. Clair v. Cox,* 106 U.S. 350 (1882), on review of a judgment rendered by a Michigan court against an Illinois corporation. Justice Field wrote for the Court that the rule that corporations may be sued only in their state of incorporation "was the cause of much inconvenience and often of manifest injustice." *Id*. at 355. To remedy this injustice, many state legislatures imposed as a condition of doing business in the state, that foreign corporations consent to the jurisdiction of its courts. As Justice Field explained:

> [W]hen a foreign corporation sent its officers and agents into other states and opened offices, and carried on its

> business there, it was, in effect, *as much represented by them there as in the state of its creation*. As it was protected by the laws of those states, allowed to carry on its business within their borders, and to sue in their courts, it seemed only right that it should be held responsible in those courts to obligations and liabilities there incurred.

Id. (emphasis added). Such jurisdiction does not violate "natural justice," so long as process was properly served on the designated agent. *Id.* at 357. Significantly, as indicated by the emphasized text, the Court viewed a foreign corporation that not only appointed a registered agent, but actually opened offices and carried on business in the forum state, as essentially at home there as in the state of its creation.

This Court has consistently upheld a state court's personal jurisdiction over a foreign corporation where state law required appointment of an agent to receive process, and the corporation did in fact designate such an agent. *See, e.g., Pennsylvania Fire Insurance Co. v. Gold Issue Mining & Milling Co.,* 243 U.S. 93, 94-96 (1917). In *Robert Mitchell Furniture Co. v. Selden Breck Construction Co.,* 257 U.S. 213 (1921), the Court indicated no federal impediment to construe such consent to apply to conduct outside the forum state if state law so provided. Again, in *Neirbo Co. v. Bethlehem Shipbuilding Corp.*, 308 U.S. 165 (1939), the Court upheld the exercise of general jurisdiction over a foreign corporation based on the state's business registration procedures, as such consent was part of the bargain by which a corporation enjoys the benefits of doing business in the state. *Id.* at 175. *See also National Bank of N. Am. v. Assocs. of Obstetrics*

& Female Surgery, Inc., 425 U.S. 460, 462 (1976) (Rehnquist, J., concurring) ("*Neirbo* establishes that petitioner National Bank could be deemed to have consented to being sued in Utah by providing an agent for service of process in that State or otherwise qualifying to do business therein.").

Moreover, "prior to *International Shoe*, the general view seemed to be 'that corporate presence, once established, was sufficient to support jurisdiction without regard to whether the claims arose from activity inside or outside the state.'" Walter W. Heiser, *General Jurisdiction in the Place of Incorporation: An Artificial "Home" for an Artificial Person*, 53 Hous. L. Rev. 631, 636 & n.13 (2016) (quoting Alfred Hill, *Choice of Law and Jurisdiction in the Supreme Court*, 81 Colum. L. Rev. 960, 980 n.94 (1981)); *see, e.g., Tauza v. Susquehanna Coal Co.*, 115 N.E. 915, 917-18 (N.Y. 1917) (Cardozo, J.) (New York courts could exercise personal jurisdiction over a nonresident corporation which "is engaged in business within this state" and the agent of which was properly served within New York even though "the cause of action sued upon has no relation in its origin to the business here transacted.").

Jurisdiction based on consent is in no way inconsistent with *International Shoe*, which established that "if he be not present within the territory of the forum," 326 U.S. at 316, and "even though no consent to be sued or authorization to an agent to accept service of process has been given," *id.* at 317, the defendant may be subject to the state's jurisdiction based on "the quality and nature of [his] activity" in relation to the forum. *Id.* at 319. In *Mississippi Pub. Corp. v. Murphree,* 326 U.S. 438 (1946), decided shortly after *International Shoe*, this

Court held that a defendant "consenting to service of process upon its agent residing in the southern district, . . . rendered itself 'present' there." Id at 442.

Nor is such general jurisdiction based on consent inconsistent with this Court's decision in *Daimler AG v. Bauman,* 134 S. Ct. 746 (2014). The *Daimler* Court limited its discussion to general jurisdiction over "a foreign corporation that has not consented to suit in the forum." 134 S.Ct. at 755-56. *See also, Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 928 (2011)). The notion that consent jurisdiction is no longer viable after *Daimler* would convert a waivable due process right to one that is not waivable.

Such a holding would also cast grave doubt on this Court's precedents favoring enforcement of contract provisions agreeing to arbitration, which this Court has described as "a species of forum-selection clause." *Allied-Bruce Terminix Companies, Inc. v. Dobson*, 513 U.S. 265, 289 (1995). Such provisions are favored, *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 345-46 (2011), and agreements to submit to a particular forum are broadly enforced, *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 591 (1991), as part of "a broader right to select the forum for resolving disputes, whether it be judicial or otherwise." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 29 (1991). *See also National Equipment Rental, Ltd. v. Szukhent,* 375 U.S. 311, 315-16 (1964) ("[I]t is settled . . . that parties to a contract may agree in advance to submit to the jurisdiction of a given court"); Walter W. Heiser, *Forum Selection Clauses in State Courts: Limitations on Enforcement After* Stewart *and* Carnival Cruise, 45 Fla. L. Rev. 361, 378-

92 (1993) (examining forum selection provisions as a waiver of objection to personal jurisdiction).

Corporations that register to do business in a state and actually conduct business there assuredly have "fair warning" they may be sued there and can structure their conduct accordingly. *See Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985).

2. BNSF has consented to the jurisdiction of Montana courts

Unlike the defendants in *Daimler* and *Goodyear,*[5] BNSF applied for and obtained a license to do business in the state and appointed an agent to receive service of process there.[6] As the court below

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[5] *See Goodyear*, 564 U.S. at 921; *Bauman v. DaimlerChrysler AG,* No. C-04-00194 RMW, 2005 WL 3157472, at *6 (N.D. Cal. Nov. 22, 2005).

[6] BNSF applied for and was granted a Certificate of Authorization, which empowered it to transact business in Montana and vested it with "the same" rights and privileges "as a domestic corporation of similar character," including the ability "to sue and be sued, complain and defend" in the Montana courts. *See* Mont. Code Ann. § 35-1-1030(1)-(2); § 35-1-115. *Tyrrell v. BNSF Ry. Co.*, 2015 WL 5517415, at *12-13 (Mont. July 15, 2015) (Tyrrell/Nelson's Consol. Answer Br.).

The Solicitor General notes that Respondents argued that BNSF had consented to the state courts' jurisdiction, but that the "Montana Supreme Court declined to address that argument." U.S. Br. 4. This Court, of course, does "often affirm a judgment on a ground not relied upon by the court below [if it was raised below]." *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 740 (1989) (SCALIA, J., concurring in part and concurring in the judgment). *See also Thigpen v. Roberts*, 468 U.S. 27, 29–30 (1984) ("[W]e may affirm on any ground that the law and the record permit and that will not expand the relief granted.").

emphasized, BNSF conducted substantial business in the state.

Inexplicably, NAM claims that BNSF has "never availed itself of Montana laws such that it could be subject to lawsuits there." NAM Br. 8. To the contrary, in addition to the actions identified by Respondents by which BNSF has "invoke[ed] the benefits and protections of [Montana's] laws," *see e.g., J. McIntyre Mach., Ltd. v. Nicastro,* 564 U.S. 873, 880 (2011)(plurality), BNSF (and its predecessor Burlington Northern, Inc.) regularly appeared in Montana courts to protect or advance its interests in the state. Among the reported decisions are *BNSF Ry. Co. v. Shipley*, 366 Mont. 542 (2012) (unpublished), in which BNSF appeared as a plaintiff to recover unpaid rent on property it owned; and *Langemo v. Montana Rail Link, Inc.*, 38 P.3d 782 (Mont. 2001) in which BNSF as a defendant in a personal injury action along with MRL, filed a counterclaim.

BNSF has also made use of Montana courts to challenge or reduce state or county taxes levied on it.[7] *E.g., Schwinden v. Burlington N., Inc.*, 691 P.2d 1351 (Mont. 1984) (challenge to the Montana corporation license tax); *Burlington N., Inc. v. Flathead Cty.*, 575

Alternatively, as Respondents suggest, this Court may deem it appropriate to remand this case to the Montana court in light of the state law aspects of the consent analysis. Resp. Br. 50.

[7] BNSF is the second largest property taxpayer in Montana, paying $17 million in 2015. Pat Corcoran, *Northwestern and Property Taxes*, The Missoulian, Nov. 14, 2016, available online at http://missoulian.com/news/opinion/columnists/northwestern-and-property-taxes/article_40acdb6c-a51d-539d-b4bf-3d0ed78137c0.html

P.2d 912 (Mont. 1978) (challenging county property tax levy for teachers' retirement fund); *Burlington N., Inc. v. Richland Cty.*, 512 P.2d 707 (Mont. 1973) (successfully challenging county tax for airport bond). *See also Burlington N., Inc. v. Montana Dep't of Revenue*, 781 P.2d 1121 (Mont. 1989) (upholding subpoena of employee pay records in connection with state income taxation on railroad employee earnings).

II. DUE PROCESS MUST BE MEASURED AGAINST THE FACTS OF INDIVIDUAL CASES.

A. Inflexible Jurisdictional Requirements Do Not Serve Fundamental Fairness or Substantial Justice.

"[T]he Due Process Clauses protect civil litigants who seek recourse in the courts, either as defendants hoping to protect their property or as plaintiffs attempting to redress grievances." *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 429 (1982).

Petitioner, however, argues that this Court's *Daimler* decision imposes a bright-line "straightforward constitutional rule." Pet'r Br. 4. Petitioner's version of this rule would permit a state court to assert general personal jurisdiction over a corporate defendant only in the state where it is incorporated or has its principle place of business or has a "surrogate principal place of business," a reference to *Perkins v. Benguet Consol. Min. Co.*, 342 U.S. 437 (1952). Pet'r Br. 24.

This Court has emphasized that due process "is not a technical conception with a fixed content unrelated to time, place and circumstances." *Cafeteria*

& Rest. Workers Union, Local 473 v. McElroy, 367 U.S. 886, 895 (1961) (citations omitted). Indeed, the "very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation." *Id*.

This Court has explained that with respect to personal jurisdiction "few answers will be written in black and white. The greys are dominant and even among them the shades are innumerable." *Kulko v. Super. Ct.,* 436 U.S. 84, 92 (1978). Due process simply resists "clear-cut jurisdictional rules" and "talismanic jurisdictional formulas." *Burger King*, 471 U.S. at 485-86.

Petitioner's inflexible, one-size rule cannot provide the flexibility and fact-based assessment of fairness that due process requires.

> Mechanical or quantitative evaluations of the defendant's activities in the forum could not resolve the question of reasonableness: "Whether due process is satisfied must depend rather upon the quality and nature of the activity in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure."

Shaffer v. Heitner, 433 U.S. 186, 204 (1977) (quoting *International Shoe*, 326 U.S. at 319).

In *International Shoe*, this Court declared that Due Process requires only that a defendant have sufficient "contacts with the State such that the maintenance of the suit does not offend traditional

notions of fair play and substantial justice." *Id*. at 316 (internal quotation omitted). The Court did not suggest that general jurisdiction over corporate defendants warranted its own separate, bright-line rule. Rather, the Court made clear that a corporation may be subject to all-purpose jurisdiction when its contacts with the forum consist not only of "continuous activity of some sorts within a state," but contacts "*so* substantial and of such a nature as to justify suit against it on causes of action arising from dealings entirely distinct from those activities." *Id*. at 318 (emphasis added).

This Court in *Daimler* explicitly rejected the rule advanced by BNSF here. 134 S. Ct. at 760 ("*Goodyear* did not hold that a corporation may be subject to general jurisdiction *only* in a forum where it is incorporated or has its principal place of business.") (emphasis in original). Rather, the Court reaffirmed the flexible standard it had set out in *International Shoe*, looking to whether the corporation's "affiliations with the State are *so* 'continuous and systematic' as to render [it] essentially at home in the forum State." *Id.* at 761, (quoting *Goodyear*, 564 U.S. at 919 (emphasis added)).

B. Limiting General Jurisdiction to a Corporation's State of Incorporation or Single Principal Place of Business Does Not Comport With Due Process.

BNSF insists that due process requires that it be subject to general personal jurisdiction in only two states. Pet'r Br. 23. *See also* NAM Br. 2 ("As a matter of due process, a state can exercise general personal jurisdiction over a business only where the business is

'at home,' namely its place of incorporation or principal place of business.")[8]; Chamber Br 9. (similar).[9]

AAJ submits that little can be gained by leaning heavily on the "at home" metaphor. Judge Jerome Frank astutely warned that "danger lurks in the literal use of a metaphor as if it were a complete statement of actual fact rather than a sort of analogy or 'fiction ....'" *Larson v. Jo Ann Cab Corp.*, 209 F.2d 929, 932 (2d Cir. 1954). Indeed, a few years prior to *Daimler*, Justice Kennedy pointed out that reliance on the "stream of commerce" metaphor had carried the lower court to an erroneous conclusion because "like other metaphors, [it] has its deficiencies as well as its utility." *Nicastro*, 564 U.S. at 877.

1. A Corporation's State of Incorporation Has Little Bearing on the Fairness of Jurisdiction in the Courts of that State.

In this case, BNSF rests on the "at home" metaphor rather than address whether its "continuous corporate operations within [Montana]

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[8] BNSF acknowledged below that under its proposed rule, "a Montana resident, hired and employed by BNSF in Montana, who was injured while working—even temporarily—for BNSF in another state, would not be able to bring his action in the state in which he regularly resides and where his employer regularly conducts business." *Tyrrell v. BNSF Ry. Co.,* 373 P.3d 1, 7 (2016).

[9] The United States espouses the position that a corporation can be "at home" in multiple states, based on "contacts sufficient to make the corporation at home in the State," such that "it would [not] be unfair to make the corporation answer for any and all claims against it in the State's courts." U.S. Br. 28.

were ... so substantial and of such a nature as to justify suit against it on causes of action arising" in other states. *International Shoe*, 326 U.S. at 318-19.

For example, BNSF claims to be "at home" in its state of incorporation, Delaware, despite the fact that it conducts no operations there, owns no track there, and has no employees there. *See* BNSF, Operating Divisions Alignment Map, May 24, 2016.[10] Businesses select their state of incorporation for a variety of reasons, many of which have little to do with their actual business operations. *See* Lucian Bebchuk, Alma Cohen & Allen Ferrell, *Does the Evidence Favor State Competition in Corporate Law?*, 90 Calif. L. Rev. 1775 (2002) (analyzing the empirical evidence that a state's anti-takeover statutes and legal protection of managerial interests influence the decision of where to incorporate or reincorporate); Scott D. Dyreng, Bradley P. Lindsey & Jacob R. Thornock, *Exploring the Role Delaware Plays as a Domestic Tax Haven*, 108 J. Fin. Econ. 751, 761 (2013), available online at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1737937.

In 2007, nearly one million corporations were incorporated in Delaware. *See* Lewis S. Black, Jr., *Why Corporations Choose Delaware* 1 (Del. Dep't of State 2007), available at https://corp.delaware.gov/pdfs/whycorporations_english.pdf. In fact, over 285,000 separate corporations have their legal address at one address—a small office building at 1209 North Orange Street in Wilmington, Delaware. Heiser, 53 Hous. L. Rev. at 665 & n.162

[10] Available at http://www.bnsf.com/customers/pdf/maps/network-map.pdf.

(2016). Most of these corporations "have no office, employees, or actual business operations" in Delaware; "they simply have a dropbox." *Id.* at 665.

For BNSF to insist that it might reasonably expect to be sued in Delaware by an injured rail worker, but not in Montana, where it actually engages in railroading operations is simply not credible.

2. Fundamental Fairness Does Not Limit Jurisdiction to the Courts of a Single Principal Place of Business.

Nor is it reasonable for BNSF to assert that it can be "at home" based on its business activities in only one other state, its "principal place of business."

A large company like BNSF may engage in activities in several states apart from its principal place of business that may be sufficient to treat the company as if it were a domestic corporation. *See* Judy M. Cornett & Michael H. Hoffheimer, *Good-Bye Significant Contacts: General Jurisdiction After Daimler AG v. Bauman*, 76 Ohio St. L.J. 101, 151-55 (2015) (discussing several situations where the level of a corporation's in-state activities justify general jurisdiction in a state other than the principal place of business). It may not only be difficult to identify a major corporation's principal place of business, but the fact that a corporation might have more contacts in another state "seems virtually irrelevant to any of the convenience or fairness policies underlying the imposition of general jurisdiction over a defendant" in the forum. Lea Brilmayer, et al., *A General Look at General Jurisdiction*, 66 Tex. L. Rev. 721, 742 (1988).

This Court has itself strongly suggested that a company can be subject to general personal jurisdiction in a state that is not its state of incorporation or primary place of business, but in which it conducts substantial activities. In *Perkins*, the Benguet Consolidated Mining Co. was organized in the Philippine Islands for the purpose of mining and selling gold and silver. The company at no time mined or sold gold or silver in Ohio. Its Philippine operations had been interrupted by World War II and had not resumed at the time suit was filed in 1947. *Perkins v. First Nat. Bank of Cincinnati,* 79 N.E.2d 159, 165 (Ohio Com. Pl. 1948). The company's operations consisted of rehabilitating the mines, activities which were conducted in the Philippines. Equipment was purchased for this purpose outside of Ohio. However, many of the purchase orders were signed by the company's president and general manager, residing temporarily in Ohio, who also "disbursed funds due employees to their relatives in the United States when requested so to do." *Id*. This Court stated that Benguet was "at home" and subject to general jurisdiction in Ohio because "Ohio was the corporation's principal, if temporary, place of business." *Daimler* at 756. But assuredly Benguet's Philippines operations were sufficient to deem that it was essentially at home there as well, even aside from its place of incorporation.

Daimler also indicated that a corporation may be deemed sufficiently "at home" by virtue of its substantial business operations in the forum. This Court assumed, for purposes of its decision, "that MBUSA [Daimler's American importer and distributor] qualifies as at home in California." 134 S.Ct. at 758. Because MBUSA was neither incorporated in California nor had its principal place

of business there, *id.* at 761, the Court must have assumed MBUSA to be "essentially at home" by virtue of its continuous and systematic business operations as "the largest supplier of luxury vehicles to the California market." 134 S. Ct. at 752. If MBUSA's contacts in California were not sufficient to make it "essentially at home," then the thrust of the Court's discussion – whether MBUSA's California contacts could be attributed to *Daimler* – was not at all necessary.

BNSF argues that this case requires the same result as *Daimler* because Montana has violated BNSF's "liberty interest in not being subject to the binding judgments of a forum with which [BNSF] has established no meaningful 'contacts, ties, or relations'" Pet'r Br. 47 (quoting *International Shoe*, 326 U.S. at 319). Similarly, AAR argues that affirmance of the Montana court's ruling "would make railroads susceptible to suit in jurisdictions having *no* connection to the parties or the underlying cause of action." AAR Br. 8 (emphasis added). The Chamber sees the decision below as exposing corporations "to suit on claims having no connection whatever to the forum State." Chamber Br 20.

That is clearly not this case. The Montana court summarized the extensive business operations BNSF conducts in the state. Moreover, even if one accepts the characterization of Texas as BNSF's principal place of business, the nature and quality of its Montana contacts make it essentially at home there as well.

For example, in the 2013 Annual Report BNSF is required (under 49 U.S.C. § 11145) to file with the

U.S. Surface Transportation Board (STB)[11], BNSF reported it owned 23,319 miles of track in the U.S. and Canada. It owned 2,061 miles of track in Montana (8.84% of the total), second only to Texas, where BNSF owned 2,856 miles (11.09%). Comparatively, in most of the remaining 26 states and territories BNSF owns far less track. In addition, track ownership demonstrates the permanent and continuous nature of BNSF's contacts with Montana. BNSF cannot sell or abandon track without first obtaining approval from the U.S. Surface Transportation Board (STB). *See* 49 U.S.C. § 11321 *et seq*; 49 U.S.C. § 10903 *et seq*. Thus, BNSF's contacts in Montana are precisely the kind of contacts that render it as essentially at home in Montana as in Texas.

3. The Nature of Defendant's Contacts With the Forum State and Their "Relatedness" To the Litigation Should Be A Factor In Assessing the Fairness of Jurisdiction.

Goodyear and *Daimler* were cases in which general jurisdiction was asserted over corporations that had not consented to jurisdiction in the forum and had only tenuous connections with the forum through corporate affiliates. In this case, although plaintiffs' causes of action do not arise out of BNSF's railroading operations in Montana, they assuredly "relate[] to the defendant's contacts with the forum." *Goodyear*, 564 U.S. at 924. Plaintiffs' causes of action

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[11] Available at Tab P-75 at: https://www.stb.gov/econdata.nsf/f039526076cc0f8e8525660b006870c9/0c2ea96fedde563985257b41004c7d41?OpenDocument OR http://www.bnsf.com/about-bnsf/financial-information/surface-transportation-board-reports/#%23subtabs-2 (page 96 of the pdf)

arise out of conduct in other states that mirrors BNSF's conduct in Montana. BNSF employees engaged in those operations are covered by FELA and may themselves bring FELA suits against BNSF in Montana courts. The same allegedly negligent practices and procedures at issue in this case also affect Montana residents working in BNSF's Montana facilities and on BNSF's Montana track.

III. FORUM SHOPPING PROVIDES NO SUPPORT FOR NARROWING STATE COURT JURISDICTION OVER CORPORATE DEFENDANTS.

A. "Forum Shopping" Provides No Support For Limiting the Jurisdiction of State Courts Absent Demonstrable Fundamental Unfairness To Defendants.

Petitioner nevertheless insists that this Court shut plaintiffs out of Montana state courts to combat "rampant forum shopping" in Montana and elsewhere. Petition 24. Amicus NAM similarly calls upon this Court to reverse and "send a clear message against improper forum shopping," calling it "jurisdictional gamesmanship" that threatens "traditional notions of fair play and substantial justice." NAM Br. 16.

Beyond such rhetorical flourishes, however, neither BNSF nor its supporting amici provide a definition of "forum shopping" nor any explanation of how adjudicating plaintiffs' claims against BNSF in Montana, where BNSF conducts substantial railroading operations, deprives the corporation of due process or substantial justice. Their use of "forum

shopping" as an epithet does not assist this Court's analysis. *See* Friedrich K. Juenger, *What's Wrong with Forum Shopping?*, 16 Sydney L. Rev. 5, 13 (1994) ("[T]here must be a stop put to the customary, almost ritualistic, condemnation of forum shopping"); Richard Maloy, *Forum Shopping? What's Wrong with That?*, 24 QLR 25, 25 (2005) (denouncing "rhetoric [that] simply proclaimed, almost ipse dixit, that forum shopping was wrong, without the slightest explanation as to why.")

"Forum shopping," states the California Supreme Court, is the "'practice of choosing the most favorable jurisdiction . . . in which a claim might be heard.'" *California v. Posey*, 82 P.3d 755, 774 n.12 (Cal. 2004) (quoting Black's Law Dictionary 666 (7th ed. 1999)). The plaintiff is, of course, "the master of the complaint." *Standard Fire Ins. Co. v. Knowles*, 133 S. Ct. 1345, 1350 (2013); *Lincoln Prop. Co. v. Roche,* 546 U.S. 81, 91 (2005); *Caterpillar Inc. v. Williams*, 482 U.S. 386, 398–99 (1987), and is entitled to make that choice. *See, e.g., Boyd v. Grand Trunk W. R. Co.*, 338 U.S. 263, 266 (1949) ("The right to select the forum granted in [FELA § 56] is a substantial right. It would thwart the express purpose of the Federal Employers' Liability Act to sanction defeat of that right.").

Plaintiffs' counsel "would not be fulfilling their legal duties towards their clients if they failed to make use of jurisdictional options." Markus Petsche, *What's Wrong with Forum Shopping? An Attempt to Identify and Assess the Real Issues of A Controversial Practice,* 45 Int'l Law. 1005, 1007 (2011).

Thus, as Justice Rehnquist observed, it is the accepted "litigation strategy of countless plaintiffs [to]

seek a forum with favorable substantive or procedural rules or sympathetic local populations." *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 779 (1984). Justice Robert Jackson, concurring in *Miles*, similarly recognized that plaintiffs, who are given "choices of tribunal," make use of those choices to obtain favorable courts and juries. 315 U.S. at 706–07 (Jackson, J., concurring).

As trial lawyers are well aware, the selection of a favorable forum may turn on any of countless interjurisdictional variations. AAJ would emphasize that representation of rail employees pursuing FELA claims is a specialized area of practice, and practitioners are not evenly distributed throughout the country. An injured worker's counsel of choice may practice in a different state. As well, some state courts may be more experienced in presiding over FELA cases. Trial in one state may also be more convenient because the courthouse is nearer to plaintiff's home, even though it is in an adjoining state. Injury may occur in small or remote localities. The forum state may promise a more expeditious disposition simply because its docket is less crowded.

Another important decisional factor is the cost of a jury trial. The right to have a claim tried by a jury is "part and parcel of the remedy afforded railroad workers" under FELA. *Dice v. Akron, Canton & Youngstown R.R.*, 342 U.S. 359, 363 (1952); *Bailey v. Cent. Vermont Ry.*, 319 U.S. 350, 354 (1943). Yet the cost of jury fees can vary substantially from state to state. For example, in Louisiana, the party requesting trial by jury must deposit with the Clerk of Court $2,000 for the first day of trial and $400 for each additional day the trial is expected to last. LA. C.C.P. art. 1734.1. In neighboring Texas, however, the clerk

of a district court is required to collect a jury fee of $30. Tex. Gov't Code § 101.0611(17). For a Louisiana brakeman injured in Louisiana, who desires to try his case to a jury, the option to file in Texas, where the employer conducts substantial business, is, as the *Boyd* Court stated, "a substantial right." 338 U.S. at 266.

These advantageous choices for plaintiffs do not impose unfair disadvantages on defendants. "Forum shopping" that amounts to no more than "forum selection" for legitimate advantage provides no legitimate basis for limiting a party's ability to choose the most favorable forum in which to pursue his or her claim. *Cf.*, *Carnival Cruise Lines*, 499 U.S. at 591-96 (approving defendants' use of forum selection clauses in arbitration agreements).

For that reason, thoughtful scholars take the view that forum shopping is an abuse to be combatted, not where it yields an advantage to the plaintiff, but only where it results in "the taking of an unfair advantage of [the opposing] party in litigation." Maloy, *supra,* at 28; Petsche, *supra,* at 1008 (similar); Juenger, *supra,* at 13 (similar).

BNSF has failed to make such a showing in this case.

B. BNSF Has Not Established Any Unfairness In Permitting Plaintiffs To Bring Their FELA Actions In Montana, Rather Than In the Courts Of Delaware or Texas.

A FELA plaintiff's choice of state forum offers little in substantive law advantage, because federal

law provides the substantive rules of liability. *Urie v. Thompson,* 337 U.S. 163, 174 (1949). More basically, unless a state's law is fundamentally unfair to the litigant, this Court has "no occasion to enquire by what law the rights of the parties are governed" when assessing the propriety of the choice of forum. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 247–48 (1981) (quoting *Canada Malting Co. v. Paterson Steamships, Ltd.,* 285 U.S. 413, 419 (1932)). The differences BNSF sets forth as reasons plaintiffs might choose to file their FELA actions in Montana do not result in any fundamental unfairness to defendants.

1. Montana's application of FELA's statute of limitations is not fundamentally unfair to BNSF.

BNSF complains that Montana courts apply FELA's three-year statute of limitations in a plaintiff-friendly fashion. Pet'r Br. 11. *See also* NAM Br. 17 ("[T]he Montana Supreme Court has adopted a more liberal interpretation of the statute of limitations than several federal circuits."). This Court has previously indicated that the fact that a plaintiff has selected a forum with the most favorable statute of limitations "does not alter the jurisdictional calculus." *Keeton*, 465 U.S. at 779. In addition, the fact that a state court's interpretation of FELA differs from that of some federal courts does not speak to the "forum shopping" claimed by BNSF in this case – plaintiffs' decision to sue in Montana rather than another state's courts. Finally, the Montana Supreme Court's decision on this matter, is firmly grounded in this Court's FELA precedent *Urie,* 337 U.S. at 174, as well as this Court's holding in *McBride,* 564 U.S. at 690. *See also Anderson v. BNSF Ry. Co.*, 354 P.3d 1248, 1260–61 (Mont. 2015), *cert. denied*, 136 S. Ct. 1493 (2016). If

that interpretation of the federal statute is in error, the appropriate vehicle for correction is review by this Court in the proper case, not a broad jurisdictional rule closing the doors of state courts against FELA plaintiffs.

BNSF also complains, "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." Pet'r Br. 10. It is difficult to discern what advantage this rule bestows on plaintiffs in FELA cases, where the defendant is seldom difficult to locate. This procedure is unlikely to influence a plaintiff's choice of forum.

2. Montana's "suggestion" that FELA damages may not be reduced for plaintiff's preexisting condition is not fundamentally unfair.

Petitioner also states, "Whereas railroad defendants in other courts are entitled to have their FELA liability apportioned to account for a plaintiff 's preexisting conditions, the Montana Supreme Court has strongly suggested that railroads cannot make this defense." Pet'r Br. 11, *citing Anderson.*, 354 P.3d at 1263-64.

This interpretation is firmly grounded in the statutory text. As the *Anderson* Court pointed out, Congress provided for apportionment of damages only based on plaintiff's comparative negligence and for no other reason. 354 P.3d at 1263. If this interpretation is in error, the proper vehicle for relief is review by this Court in the appropriate case, not closing the doors of state courts to FELA plaintiffs.

3. Montana discovery practice is not fundamentally unfair to BNSF.

Petitioner states that "Montana does not require discovery to be proportional to the needs of the case." Pet'r Br. 10. In fact, although the Montana rule does not use the term "proportional," it tracks the federal rule closely. The federal rule allows parties to obtain discovery that is

> [P]roportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.

Fed. R. Civ. P. 26(b)(1).

By comparison, Montana's rule requires the court to limit discovery if

> the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues.

Mont. R. Civ. P. 26(b)(2)(C).

Any difference in discovery practice does not render Montana's rule fundamentally unfair. Moreover, a difference in discovery rules between Montana and federal courts is not relevant to BNSF's contention that plaintiffs should not be permitted to sue in Montana, rather than other state courts.

4. Montana's evidentiary rules regarding expert testimony are not fundamentally unfair.

Petitioner complains that Montana generally does not follow the standards for expert witnesses set out in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). Pet'r Br. 11. BNSF does not explain how Montana's rule is necessarily unfair to defendants. And, once again, the distinction in procedural rules between state and federal courts does not speak to whether there may be potentially unfair forum shopping among states where the railroad is present and doing business.

5. Montana's Rule Against Forum Non Conveniens in FELA cases is not fundamentally unfair.

Petitioner claims that it is disadvantaged because the Montana Supreme Court "refuses to allow motions to transfer FELA cases based on forum non conveniens." Pet'r Br. 10.

This Court has already established that a state court "should be free[] to decide the availability of the principle of forum non conveniens in these [FELA] suits according to its own local law." *State of Mo. ex rel. S. Ry. Co. v. Mayfield*, 340 U.S. 1, 5 (1950). *See also Am. Dredging Co. v. Miller,* 510 U.S. 443, 444

(1994) (The Jones Act, which incorporates FELA, 46 U.S.C. § 30104, permits state courts to apply their local forum non conveniens rules.).

6. Montana's pro hac vice rules are not fundamentally unfair.

The Chamber, in addition to its unsupported claim that Montana "has become a magnet for FELA suits given its plaintiff-friendly procedural and substantive FELA law," also complains that "Montana has some of the strictest pro hac vice rules in the country." U.S. Chamber Br. 21.

BNSF has extensive railroading operations in Montana and must be prepared to defend FELA suits in Montana arising out of those operations. BNSF certainly faces no greater difficulty retaining counsel who are authorized to appear in Montana courts than nonresident plaintiffs.

7. The fact that Montana permits FELA suits by nonresident plaintiffs is not fundamentally unfair.

Petitioner and supporting amici emphasize the fact that plaintiffs "are residents of other states (North Dakota and South Dakota) who never worked a day in Montana." Pet'r Br. 4. *See also* NAM Br. 18 (Complaining of asbestos claims in Illinois state courts filed by nonresidents). However, this Court made clear that "general jurisdiction to adjudicate has in [United States] practice never been based on the plaintiff 's relationship to the forum." *Goodyear*, 564 U.S. at 929 n.5. *See also Keeton*, 465 U.S. at 779 (plaintiffs are not required to have "minimum contacts"' with the forum State). Indeed, this Court

has invalidated an agreement between a railroad worker and his employer that purported to limit any FELA action to "the county or district where I resided at the time my injuries were sustained, or in the county or district where my injuries were sustained" as violative of the "substantial right" granted by FELA for plaintiffs to select their forum. *Boyd*, 338 U.S. at 264 & 266 (1949).

CONCLUSION

For the foregoing reasons, AAJ urges this Court to affirm the judgment of the Montana Supreme Court.

Respectfully submitted,

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