No.

IN THE
Supreme Court of the United States

BNSF RAILWAY COMPANY, NANCY AHERN, AND JOHN DOES 1–10,

Petitioners,

v.

MONTANA EIGHTH JUDICIAL DISTRICT COURT, CASCADE COUNTY; THE HONORABLE KATHERINE BIDEGARAY, PRESIDING JUDGE; AND ROBERT DANNELS,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Montana

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Federal Employers Liability Act ("FELA"), 45 U.S.C. § 51, establishes a "comprehensive" and "exclusive" federal framework governing railroads' liability for their employees' on-the-job injuries. *N.Y. Cent. R.R. Co.* v. *Winfield*, 244 U.S. 147, 151 (1917). In Montana, however, a self-insured employer who is sued under FELA owes additional state-law duties to the plaintiff, beyond those established by FELA, that exist in no other jurisdiction. If the employer's FELA liability is reasonably clear, Montana law requires that it immediately advance the plaintiff's wages and medical expenses during the pendency of the suit, and that it enter into a "prompt, fair, and equitable settlement." If the employer fails to satisfy these state-law duties because, for example, it chooses to contest the merits of the plaintiff's FELA claim, the employer is subject to a follow-on bad-faith suit under Montana law that exposes the employer to additional liability not authorized by FELA.

The question presented is:

Whether FELA preempts bad-faith claims under Montana law that seek to impose state-law liability based on the litigation conduct of a self-insured employer sued under FELA.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

All parties to the proceeding below are named in the caption.

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

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PETITION FOR A WRIT OF CERTIORARI

Petitioners BNSF Railway Company, Nancy Ahern, and John Does 1–10 respectfully petition for a writ of certiorari to review the judgment of the Montana Supreme Court.

OPINIONS BELOW

The opinion of the Montana Supreme Court denying petitioners' second petition for a writ of supervisory control is unreported but available at 2019 WL 1125342. Pet. App. 1a–11a. The opinion of the district court granting Dannels's motion for sanctions is unreported. Pet. App. 12a–52a. The opinion of the Montana Supreme Court denying petitioners' first petition for a writ of supervisory control is unreported but available at 2018 WL 4094463. Pet. App. 53a–57a. The opinion of the district court denying petitioners' motion for summary judgment is unreported. Pet. App. 58a–72a.

JURISDICTION

The judgment of the Montana Supreme Court was entered on March 12, 2019. Pet. App. 1a.

This Court has jurisdiction under 28 U.S.C. § 1257(a). Petitioners sought a writ of supervisory control in the Montana Supreme Court on the ground that the district court exceeded its authority by imposing liability-determining sanctions in an action that is preempted by the Federal Employers Liability Act ("FELA"), 45 U.S.C. § 51. The Montana Supreme Court denied that petition on March 12, 2019. Because the petition for a writ of supervisory control is an independent suit, the Montana Supreme Court's judgment disposing of the suit is a final judgment for

purposes of this Court's jurisdiction. *See Bandini Petroleum Co.* v. *Superior Court*, 284 U.S. 8, 14 (1931) ("The proceeding for a writ of prohibition is a distinct suit, and the judgment finally disposing of it is a final judgment . . . .").

Moreover, the Montana Supreme Court's "judgment is plainly final on the federal issue" of preemption. *Cox Broad. Corp.* v. *Cohn*, 420 U.S. 469, 485 (1975). Petitioners may prevail at trial on nonfederal grounds on the issue of damages—or on appeal on other nonfederal grounds—thereby preventing this Court's review of the federal issue, and if the Montana Supreme Court's preemption ruling is erroneous, then "there should be no trial at all." *Ibid.*; *see also infra* Part III.B (discussing finality).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

All pertinent constitutional and statutory provisions are reproduced in the Petition Appendix at 73a–77a.

INTRODUCTION

In FELA, Congress established a "comprehensive" and "exclusive" liability framework for "the responsibility of interstate carriers by railroad to their employees injured in such commerce." *N.Y. Cent. R.R. Co.* v. *Winfield*, 244 U.S. 147, 151–52 (1917) (internal quotation marks omitted). In every State except one, a defendant in a lawsuit brought under FELA is entitled to contest liability and damages. That is not the case in Montana. Under Montana's "bad-faith" laws, a self-insured FELA defendant—*i.e.*, a defendant that relies on its own assets, rather than an insurer, to pay damages awards—has "an implied covenant of good faith and fair dealing" with a FELA plaintiff that requires

the defendant to "settle in an appropriate case" on "fair" and "equitable" terms. Mont. Code Ann. § 33-18-201(6); *Gibson* v. *W. Fire Ins. Co.*, 682 P.2d 725, 730 (Mont. 1984); *see also* Mont. Code Ann. § 33-18-242(8). The consequence of this bad-faith regime is that in Montana—and only in Montana—a self-insured FELA defendant can be subject to a follow-on "bad-faith" suit merely for defending itself on the merits against the underlying FELA claim.

This is not the national, uniform legal framework that Congress envisioned when it enacted FELA. *See S. Buffalo Ry. Co.* v. *Ahern*, 344 U.S. 367, 371 (1953). Yet the Montana Supreme Court has now twice refused in this case to hold that FELA preempts such bad-faith claims. That ruling is impossible to reconcile with this Court's precedent or with the FELA jurisprudence of other lower courts.

This Court has held that FELA's exclusive federal liability regime preempts state-law causes of action that impose on railroads additional liability beyond that provided by FELA itself. *See N.Y. Cent. & Hudson R.R. Co.* v. *Tonsellito*, 244 U.S. 360, 361–62 (1917). In fact, FELA's preemptive force extends not only to state-law claims based on employment-related injuries covered by FELA but also to state rules that interfere with railroads' ability to defend themselves against FELA claims. As the Court has explained, "the federal rights affording relief to injured railroad employees under a federally declared standard could be defeated if states were permitted to have the final say as to what defenses could and could not be properly interposed to suits under [FELA]." *Dice* v. *Akron, Canton & Youngstown R.R. Co.*, 342 U.S. 359, 361 (1952).

None of this seems to matter to the Montana Supreme Court. By permitting this state-law suit to proceed based on BNSF's refusal to settle a FELA case, the Montana Supreme Court has broken from this Court's FELA precedent and from the decisions of other lower courts (including Montana's federal courts) faithfully applying that precedent. In so doing, it has upended the comprehensive federal framework that Congress established in FELA by expanding the potential liability of FELA defendants beyond the congressionally defined limits and restricting their ability to raise defenses to FELA claims.

This Court should grant review to restore the nationally uniform legal framework that Congress established in FELA and to ensure that FELA defendants sued in Montana have the same right to defend themselves as in every other State.

STATEMENT

A. FELA's Comprehensive Framework For Railroad Liability

FELA provides, in relevant, part, that "[e]very common carrier by railroad" engaged in interstate commerce "shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce." 45 U.S.C. § 51. A plaintiff bringing suit under FELA must prove that "employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought." *Rogers* v. *Mo. Pac. R.R. Co.*, 352 U.S. 500, 506 (1957). The standard for liability under FELA is governed by federal law. *See Urie* v. *Thompson*, 337 U.S. 163, 174 (1949) (holding that negligence is defined "by the common law principles as established and applied in the federal courts" (internal quotation marks omitted)).

The linchpin of a FELA claim is negligence by the employer—"FELA does not make the employer the insurer of the safety of his employees while they are on duty. The basis of his liability is his negligence, not the fact that injuries occur." *Consol. Rail Corp.* v. *Gottshall*, 512 U.S. 532, 543 (1994) (internal quotation marks omitted). This framework of railroad liability is both "comprehensive" and "exclusive," displacing any state-law causes of action that impose additional liability on railroads. *Winfield*, 244 U.S. at 151–52.

As with liability, damages under FELA are governed by uniform federal law. *See Norfolk & W. Ry. Co.* v. *Liepelt*, 444 U.S. 490, 493 (1980) ("[Q]uestions concerning the measure of damages in an FELA action are federal in character."). An injured FELA employee or representative who proves negligence on the part of his employer is entitled to "such damages as would have compensated him for his expense, loss of time, suffering, and diminished earning power." *Mich. Cent. R.R. Co.* v. *Vreeland*, 227 U.S. 59, 65 (1913). Injured employees are entitled to damages for emotional distress "caused by the negligent conduct of their employers that threatens them imminently with physical impact." *Gottshall*, 512 U.S. at 556. Courts generally agree that punitive damages are not available under FELA. *See, e.g.*, *Wildman* v. *Burlington N. R.R. Co.*, 825 F.2d 1392, 1394 (9th Cir. 1987); *Kozar* v. *Chesapeake & Ohio Ry. Co.*, 449 F.2d 1238, 1241–42 (6th Cir. 1971).

B. Montana's Statutory And Common-Law Bad-Faith Claims Against Insurers

Under Montana common law, insurers owe a duty of good faith and fair dealing to their insureds. *See Stephens* v. *Safeco Ins. Co. of Am.*, 852 P.2d 565, 567 (Mont. 1993). Although all contracts in Montana

carry an implicit duty of good faith and fair dealing, where there is a "special relationship"—as between an insurer and an insured—an aggrieved plaintiff may bring a tort claim to recover damages against a defendant who has allegedly acted in bad faith, including damages beyond those caused by any alleged breach of the contract (such as damages for mental distress). *See Story* v. *City of Bozeman*, 791 P.2d 767, 776 (Mont. 1990), *overruled on other grounds by Arrowhead Sch. Dist. No. 75* v. *Klyap*, 79 P.3d 250 (Mont. 2003). A plaintiff may also obtain punitive damages if he can prove the insurer is guilty of actual malice or fraud. *See* Mont. Code Ann. §§ 27-1-220, 27-1-221. This common-law duty exists in parallel with the prohibition in Montana's Unfair Trade Practices Act ("UTPA") against unfair claim settlement practices by insurers. *See* Mont. Code Ann. §§ 33-18-201, 33-18-242(1).

Both precedent and statutes define the scope of an insurer's good-faith duty under Montana law. That duty includes an obligation to "settle in an appropriate case," *Gibson*, 682 P.2d at 730; to "attempt in good faith to effectuate prompt, fair, and equitable settlements of claims in which liability has become reasonably clear," Mont. Code Ann. § 33-18-201(6); to "conduct[ ] a reasonable investigation based upon all available information," *id.* § 33-18-201(4); and to pay the claimant's medical expenses and lost wages pending a settlement or judgment on the underlying claim when liability is "reasonably clear." *DuBray* v. *Farmers Ins. Exch.*, 36 P.3d 897, 900 (Mont. 2001); *see also Ridley* v. *Guar. Nat'l Ins. Co.*, 951 P.2d 987, 992 (Mont. 1997). Accordingly, the alleged failure of an insurer to promptly settle a claim for a "fair" and "equitable" amount—and to pay the claimant's medical expenses and lost wages pending finalization of the

settlement—is grounds for a bad-faith suit against the insurer following the disposition of the underlying claim.

These duties are not limited to the ordinary insurer–insured relationship. An insurer's duty in Montana extends not only to directly insured entities, but also to third-party claimants—individuals or entities to whom an insured is liable, but whose damages will ultimately be paid by the insurer. *See* Mont. Code Ann. § 33-18-242(1); *Brewington* v. *Emp'rs Fire Ins. Co.*, 992 P.2d 237, 240–41 (Mont. 1999). Most strikingly, these duties also apply to self-insured entities—entities who, instead of purchasing insurance from a third party, pay out of their own assets to cover claims that ordinarily would be paid by a third-party insurer. Under Montana law, a self-insured entity, by way of its status as an insurer (of itself), owes a third-party claimant the same duties owed by an insurance company to its customers. *See* Mont. Code Ann. § 33-18-242(8). This means that a company not engaged in the business of insurance is nonetheless subject to a bad-faith suit for its treatment of claims filed against it simply because the company insures itself against such claims and because it chose to litigate a suit against it rather than settle for the demanded amount.

C. The Montana Supreme Court's Decision In *Reidelbach*

In *Reidelbach* v. *Burlington Northern & Santa Fe Railway Co.*, 60 P.3d 418 (Mont. 2002), the Montana Supreme Court held that FELA does not preempt the application of Montana's bad-faith laws to self-insured FELA employers. *Id.* at 430–31. There, the plaintiff allegedly suffered an injury while working for

BNSF. *See id.* at 421. The plaintiff sought compensation for his injuries, and BNSF indicated that a fair settlement for the injury would be approximately $280,000; BNSF paid the plaintiff advance wages and oversaw the plaintiff's medical care. *See ibid.* The plaintiff demanded $450,000, and when BNSF refused to settle at that amount, the plaintiff filed suit, bringing both a claim under FELA and under Montana's common-law bad-faith laws, alleging that BNSF and its claims representative had engaged in bad faith by refusing to pay the higher settlement amount. *See ibid.* BNSF successfully moved to dismiss the bad-faith claims in the district court, arguing that FELA preempted all such claims. *See id.* at 422.

The Montana Supreme Court reversed, holding that FELA did not preempt the plaintiff's bad-faith claims. The court first concluded, without citing any cases from this Court construing FELA's preemptive force, that the "plain language of the FELA" shows that the purpose of the statute "was to enact a compensatory scheme under which railway employees who were physically injured by the negligence of their employer while on-the-job and in pursuit of interstate commerce could obtain relief," not to regulate "the entire field of injuries and claims a railroad employee may have." *Reidelbach*, 60 P.3d at 425.

The Montana Supreme Court then went on to hold that there is no conflict between Montana's bad-faith laws and the purpose and objectives of FELA. *See Reidelbach*, 60 P.3d at 425. The court largely relied on cases in which other state courts have concluded that FELA does not preempt state-law claims for intentional torts—even though none of those other cases pertained to bad-faith claims premised on an employer's refusal to settle a FELA suit. *See id.* at 427

(citing *Monarch* v. *S. Pac. Transp. Co.*, 83 Cal. Rptr. 2d 247 (Cal. Ct. App. 1999); *Pikop* v. *Burlington N. R.R. Co.*, 390 N.W.2d 743 (Minn. 1986)). The court dismissed the significance of this Court's decision in *Dice*, 342 U.S. 359—which held that States are not permitted "to have the final say as to what defenses could and could not be properly interposed to suit under" FELA, *id.* at 361—on the ground that the plaintiff's claims in *Reidelbach* "[we]re distinct and separate from his physical injury FELA claim." *Reidelbach*, 60 P.3d at 428.

The court instead relied on this Court's holding in *Farmer* v. *United Brotherhood of Carpenters & Joiners of America*, 430 U.S. 290 (1977), a non-FELA case that the Montana Supreme Court admitted had never been applied in the FELA context. *Reidelbach*, 60 P.3d at 429. In *Farmer*, this Court instructed courts determining whether a claim brought under state law is preempted by the National Labor Relations Act to consider (1) whether the underlying conduct is protected by the Act, (2) whether there is an overriding state interest in regulating the conduct, and (3) whether there is a risk of interfering with the effective administration of national labor policy. 430 U.S. at 298. Transplanting *Farmer*'s preemption test into the FELA context, the Montana Supreme Court concluded that FELA does not preempt the application of Montana's bad-faith laws to self-insured FELA defendants in light of the State's interest in protecting its citizens from unfair claim practices and "the humanitarian purpose of the FELA." *Reidelbach*, 60 P.3d at 429–30.

Reidelbach has remained the Montana Supreme Court's authoritative interpretation of the preemptive scope of FELA for seventeen years.

D. The Proceedings In This Case

This case arises out of a FELA suit that respondent Robert Dannels filed against BNSF in 2010 for injuries he allegedly suffered during an on-the-job activity. Pet. App. 14a. Dannels worked for BNSF for twenty years, during which, he alleged, BNSF negligently assigned him to physical work activities that carried a high risk of injuring his spine. Compl. ¶¶ 7–8. As a result, Dannels alleged, his lower back and spine slowly degenerated. *Id.* ¶ 9. Dannels alleged that he became disabled in an incident in 2010 in which the vehicle he was operating struck a steel wellhead buried under snow, and that he had not been able to return to productive employment since. *Id.* ¶ 10.

BNSF defended itself on the merits, denying liability. Following a jury verdict in Dannels's favor for $1.7 million, Dannels and BNSF settled for the full amount of the verdict in June 2013. Pet. App. 14a.

Six months later, Dannels filed this case in Montana state court alleging that BNSF had violated the UTPA, Mont. Code Ann. § 33-18-201, and Montana common law by failing to handle Dannels's claim in good faith. Pet. App. 14a–15a. In the complaint, Dannels named not only BNSF, but also Nancy Ahern, the individual claims investigator who handled Dannels's claim. Compl. ¶ 4.[1]

Dannels alleges that BNSF, as a self-insured entity, owed common-law and statutory duties to him to handle his FELA claim in good faith, and that BNSF

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[1] Dannels has represented that he will move to dismiss the claims against Nancy Ahern. Dannels also named as defendants John Does 1–10, alleged agents of BNSF who participated in decisions regarding his claims.

violated those duties. Specifically, Dannels alleges that it was reasonably clear that BNSF was liable for Dannels's injuries, and that BNSF breached its duties by failing to promptly respond to Dannels's communications with respect to his claim, failing to offer an adequate settlement amount or negotiate in good faith, and failing to advance Dannels his lost wages and retirement benefits during the pendency of his FELA suit. Compl. ¶¶ 17–26. For that conduct, Dannels seeks damages for his mental distress and expenses. *Id.* ¶ 27. He also seeks punitive damages for BNSF's "actual fraud and malice" in routinely using these "illegal and deceitful" settlement practices. *Id.* ¶ 29.

Petitioners moved for summary judgment on several grounds, including that Dannels's claims are preempted by FELA. Pet. App. 60a. Petitioners argued that a "railroad's substantive duties are defined by federal, not state law," and that "federal law preempts efforts to control the settlement of a FELA claim through state law." Defs.' Combined Br. in Supp. of Supplemental Mot. for Summ. J. 5. Petitioners further explained that permitting a plaintiff to bring bad-faith claims under Montana law "would have a chilling effect on BNSF's right to have liability, damages, and its defenses tried by a jury," and enable the plaintiff "to make an end-run around FELA's preclusion of various types of damages." *Id.* at 6, 8. The district court denied BNSF's motion, citing the Montana Supreme Court's controlling decision in *Reidelbach*, 60 P.3d 418. Pet. App. 61a–63a.

In response, petitioners filed a petition for a writ of supervisory control in the Montana Supreme Court, seeking, among other relief, dismissal of Dannels's claims as preempted by FELA. Petitioners argued that "FELA is comprehensive and exclusive regarding

a railroad's liability for injuries suffered by its employees while engaging in interstate commerce," and that Dannels sought to recover damages not provided for under FELA, "including emotional distress damages unaccompanied by risk of physical injury." Pet. for Writ of Supervisory Control 14–15.

The Montana Supreme Court denied that petition with only a citation to its prior decision in *Reidelbach*, explaining that if reevaluation of *Reidelbach* is warranted, "the normal appeal process is certainly adequate for that purpose." Pet. App. 56a.

As the case progressed, Dannels sought discovery from BNSF of large amounts of privileged, confidential, or otherwise protected documents, including privileged documents concerning Dannels's claim, "monthly summaries" of litigation prepared by in-house counsel, non-disparagement clauses in the separation agreements of several former BNSF claims personnel, and confidential materials concerning BNSF's procedures for setting reserves. Pet. App. 23a. BNSF objected to producing these materials, citing attorney-client privilege and work-product protections. The district court consistently overruled those objections. *Id.* at 25a.

Dannels subsequently moved for sanctions based on BNSF's alleged failure to produce these privileged materials. The district court granted that application—adopting Dannels's proposed order nearly verbatim—imposing a default judgment against petitioners on liability and causation, directing BNSF to pay Dannels's expenses and attorneys' fees, and ordering BNSF to produce additional documents that had never before been ordered produced by the court. Pet. App. 51a–52a. Among those documents are additional

privileged communications and attorney work product, including monthly status reports on *all* FELA claims, both in Montana and in other States, up to the present. *Id.* at 9a, 52a. The court directed that the case would proceed to trial on the issue of damages only.

Petitioners filed a second petition for a writ of supervisory control in the Montana Supreme Court, arguing that the district court abused its discretion in entering a default judgment on liability and ordering the production of additional privileged materials. Petitioners also reiterated their argument that Dannels's claims are preempted by FELA, explaining that "FELA is *comprehensive* as to railroad employers' liability to their employees for injuries incurred while engaged in interstate commerce" and that Montana's bad-faith laws impermissibly "restrict the defenses an employer may raise to a FELA lawsuit." Pet. for Writ of Supervisory Control and for an Order Staying Further Proceedings 15–16. Petitioners moved in the district court for a stay.

Petitioners asked the court to vacate the sanctions order and to stay the district court's order. Pet. for Writ of Supervisory Control and for an Order Staying Further Proceedings 17. The district court granted a stay on January 18, 2019, but the Montana Supreme Court denied the petition on March 12, 2019. Pet. App. 1a. With respect to preemption, the court held that the district court did not commit a "'mistake of law'" in "applying existing precedent," and that there was "no reason why a normal appeal is an inadequate process for addressing BNSF's request to revisit . . . *Reidelbach*." *Id.* at 7a. Justice McKinnon dissented, pointing out that "there is ample federal authority, not discussed in *Reidelbach*, which appears

to provide FELA is the exclusive remedy for injured railroad workers." *Id.* at 11a. Justice McKinnon added that the case had "grown even more cumbersome because the District Court has entered a default when there still lingers a question of preemption," and emphasized that the court was "affirming an order for sanctions requiring BNSF to produce documents that are otherwise undiscoverable, *but for the case's status as a UTPA action*." *Ibid.* For those reasons, Justice McKinnon would have invited further briefing.

REASONS FOR GRANTING THE PETITION

The Montana Supreme Court's decisions in this case and in *Reidelbach* rejecting preemption defenses to bad-faith claims against self-insured FELA defendants conflict with this Court's FELA jurisprudence (as well as the decisions of other lower courts), undermine the comprehensive federal legal framework established by Congress in FELA, and deprive self-insured defendants in Montana of their fundamental right to defend themselves against FELA claims.

This Court has held that FELA occupies the entire field of railroad employer liability to employees and creates a nationally uniform liability framework governed by federal law. For that reason, the Court has repeatedly held that States may not impose liability or damages beyond that provided by FELA. *See N.Y. Cent. R.R. Co.* v. *Winfield*, 244 U.S. 147, 153 (1917) (holding that States do not "have a right to interfere," or, "by way of complement to the legislation of Congress, to prescribe additional regulations, and what they may deem auxiliary provisions for the same purpose"); *N.Y. Cent. & Hudson R.R. Co.* v. *Tonsellito*, 244 U.S. 360, 362 (1917) ("[FELA] liability can neither be extended nor abridged by common or statutory laws of

the state."). The Court has further held that the defenses available to a FELA defendant are governed by federal, not state, law, *see Dice* v. *Akron, Canton & Youngstown R.R. Co.*, 342 U.S. 359, 361 (1952) (holding that states are not permitted "the final say as to what defenses could and could not be properly interposed to suits under [FELA]"). Other state and federal courts—including the U.S. District Court for the District of Montana in a case addressing Montana's bad-faith laws—agree that FELA leaves no place for overlapping state liability or state-law restrictions on federal defenses.

The decision below defies this precedent, permitting employees to recover against self-insured FELA defendants *twice*—once for the underlying FELA claim, and again for the alleged emotional distress attributable to the FELA claim—even though FELA itself strictly limits employers' liability to damages incurred as a result of on-the-job injuries and does not authorize damages based on employers' litigation conduct. And although federal law governs the defenses a defendant may raise in a FELA suit, the Montana Supreme Court has permitted state law to supplant those federal defenses by imposing bad-faith liability on self-insured employers who elect to defend themselves against FELA claims rather than acceding to a plaintiff's settlement demands.

The Court should not permit Montana to continue its assault on the comprehensive federal liability regime that Congress established in FELA. As long as Montana's outlier, bad-faith regime remains on the books, FELA defendants in Montana will continue to face state-law liability that Congress never intended to countenance and will be compelled to settle nonmeritorious FELA suits that Congress never intended

to result in recovery. This Court should grant review to restore the supremacy of federal law in this field in which Congress has preserved no role for the States.

I. THE DECISION BELOW CONFLICTS WITH THIS COURT'S FELA PRECEDENT

The Montana Supreme Court's opinion in *Reidelbach*—and its decisions here adhering to that ruling—squarely conflict with this Court's FELA precedent. Montana's bad-faith scheme is fundamentally incompatible with FELA's structure and purpose, and the Montana Supreme Court's decisions upholding those state laws against preemption challenges are directly at odds with this Court's decisions regarding the preemptive force of FELA.

A. FELA was enacted as a comprehensive federal remedy for railroad employees injured in on-the-job accidents. Congress "was dissatisfied with the common-law duty of the master to his servant" and sought to reduce disputes between railroads and their employees to "the single question whether negligence of the employer played any part . . . in the injury or death which is the subject of the suit." *Rogers* v. *Mo. Pac. R.R. Co.*, 352 U.S. 500, 507–08 (1957). It accomplished that objective by enacting FELA, which "withdraw[s] all injuries to railroad employees in interstate commerce from the operation of varying state laws, and . . . appl[ies] to them a national law having a uniform operation throughout all the states." *Winfield*, 244 U.S. at 150.

FELA seeks "uniform application throughout the country." *Dice*, 342 U.S. at 361; *see also Garrett* v. *Moore-McCormack Co.*, 317 U.S. 239, 244 (1942) (emphasizing that FELA "requires uniform interpreta-

tion"). As this Court has explained, "[o]ne of the purposes of the [FELA] was to create uniformity throughout the Union with respect to railroads' financial responsibility for injuries to their employees." *Norfolk & W. Ry. Co.* v. *Liepelt*, 444 U.S. 490, 493 n.5 (1980) (internal quotation marks omitted).

"That [FELA] is comprehensive and also exclusive is distinctly recognized in repeated decisions of this Court," *Winfield*, 244 U.S. at 151, which emphasize that Congress "undert[ook] to cover the subject of the liability of railroad companies to their employees injured while engaged in interstate commerce" and that the federal liability regime "is paramount and exclusive," *id.* at 151–52 (internal quotation marks omitted). FELA therefore "displaces any state law trenching on the province of the Act." *S. Buffalo Ry. Co.* v. *Ahern*, 344 U.S. 367, 371 (1953).

The Court has affirmed the preemptive force of FELA in multiple opinions. In *Winfield*, for example, the Court held that FELA preempted a state-law claim for an on-the-job injury that did not result from negligence by the railroad employer. 244 U.S. at 153–54. The plaintiff sought recovery from his employer for an injury that "arose out of one of the ordinary risks of the work" in which he was engaged. *Id.* at 148. There was no allegation of fault or negligence, *ibid.*, and, in an effort to evade FELA preemption, the plaintiff argued that FELA did "not cover injuries occurring without such negligence, and therefore leaves that class of injuries to be dealt with by state laws." *Id.* at 149.

This Court disagreed. It explained that FELA was intended to establish a nationally "uniform" law for injuries sustained by railroad employees in interstate commerce, and although FELA does not provide

for liability where the railroad "is not chargeable with negligence," FELA does not "leave the states free to require compensation where the act withholds it." *Winfield*, 244 U.S. at 149–50. "[N]o state," the Court emphasized, "is at liberty thus to interfere with the operation of a law of Congress." *Id.* at 153. Where Congress has regulated in an area within its constitutional powers, the Court continued, "it cannot be that the state legislatures have a right to interfere; and, as it were, by way of complement to the legislation of Congress, to prescribe additional regulations." *Ibid.*; *see also Erie R.R. Co.* v. *Winfield*, 244 U.S. 170, 172 (1917) (same).

This Court has likewise held that "[q]uestions concerning the measure of damages in an FELA action are federal in character," *Liepelt*, 444 U.S. at 493, because "the proper measure of damages is inseparably connected with the right of action," *Chesapeake & Ohio Ry. Co.* v. *Kelly*, 241 U.S. 485, 491 (1916). Thus, in *Tonsellito*, this Court held that FELA preempted a state-law claim by the father of an injured railroad worker who sought to recover expenses incurred for medical attention to his son and for the loss of his son's services. 244 U.S. at 361. This Court explained that the claim was preempted because "Congress having declared when, how far, and to whom carriers shall be liable on account of accidents in the specified class, such liability can neither be extended nor abridged by common or statutory laws of the state." *Id.* at 362; *see also Monessen Sw. Ry. Co.* v. *Morgan*, 486 U.S. 330, 335–39 (1988) (holding that FELA preempted a state rule providing for prejudgment interest because such interest is not available under federal law and "constitute[d] a significant portion of an FELA plaintiff's total recovery").

The Court reached a similar conclusion in *Dice*, where it held that federal law controlled the validity of a release of liability that a defendant had raised in defense of a FELA claim. *See* 342 U.S. at 361. In holding that federal, not state law, controls, the Court emphasized the importance of a uniform standard governing FELA defenses: "the federal rights affording relief to injured railroad employees under a federally declared standard could be defeated if states were permitted to have the final say as to what defenses could and could not be properly interposed to suits under the Act." *Ibid.* "[O]nly if federal law controls," the Court continued, "can the federal Act be given that uniform application throughout the country essential to effectuate its purposes." *Ibid.*; *see also Howlett ex rel. Howlett* v. *Rose*, 496 U.S. 356, 375 (1990) ("The elements of, and the defenses to, a federal cause of action are defined by federal law.").

B. The Montana Supreme Court's decisions in this case permitting Dannels's bad-faith claim to proceed under Montana law are impossible to reconcile with this Court's precedent. Dannels has already obtained damages under FELA for his on-the-job injury while working for BNSF. As *Winfield* and *Tonsellito* make clear, FELA bars Montana from imposing *additional* liability on BNSF arising out of that same injury: FELA "liability can neither be extended nor abridged by common or statutory laws of the state." *Tonsellito*, 244 U.S. at 362. This expansion of liability under Montana law affects not only the damages a plaintiff may obtain, but from whom the plaintiff may obtain them—it is only through Montana's bad-faith laws that Dannels has a cause of action against his coemployee, Nancy Ahern, the individual claims investigator. *See O'Fallon* v. *Farmers Ins. Exch.*, 859 P.2d

1008, 1015 (Mont. 1993) ("[I]ndividuals, as well as insurers, are prohibited from engaging in . . . unfair trade practices . . . .").

Montana's bad-faith laws also impermissibly limit the defenses an employer may raise in a FELA lawsuit—even though this Court has made clear that the defenses available to a FELA defendant are governed by federal law. *See Dice*, 342 U.S. at 361. In any other jurisdiction, a FELA defendant can assert any nonfrivolous defense to liability or damages, without any risk that it will expose itself to a larger damages award as a result of its litigation conduct. But in Montana, a self-insured FELA defendant faces the prospect of bad-faith liability under Montana law whenever a jury finds that its FELA liability was reasonably clear and it refused to promptly accept the plaintiff's settlement demand, because Montana's bad-faith laws require a self-insured FELA defendant to "settle in an appropriate case." *Gibson* v. *W. Fire Ins. Co.*, 682 P.2d 725, 730 (Mont. 1984). Indeed, even a *defense* verdict on the underlying FELA claim will not preclude a plaintiff from recovering in a follow-on bad-faith suit. *See Graf* v. *Cont'l W. Ins. Co.*, 89 P.3d 22, 26 (Mont. 2004).

In addition, under Montana law, a self-insured entity whose FELA liability (in the judgment of a Montana judge or jury) was reasonably clear can be held liable for bad-faith damages if it failed to pay the full amount of the claimant's medical expenses and lost wages pending a settlement or judgment on the underlying FELA claim. *See DuBray* v. *Farmers Ins. Exch.*, 36 P.3d 897, 900 (Mont. 2001); *Ridley* v. *Guar. Nat'l Ins. Co.*, 951 P.2d 987, 992 (Mont. 1997). This obligation runs headlong into a FELA defendant's right to raise the defense of comparative negligence,

which provides that an employee's recovery is diminished "in proportion to the amount of negligence attributable to such employee." 45 U.S.C. § 53. The obligation under Montana law that a self-insured FELA defendant pay the *full* amount claimed by the plaintiff, without regard to the employee's fault, is inconsistent with this statutorily conferred defense under FELA.

Each of these elements of Montana's bad-faith laws is unfair to self-insured FELA defendants. Taken together, they impose tremendous pressure on self-insured FELA defendants to promptly settle even non-meritorious FELA suits in the full amount demanded by the plaintiff. The imposition of this state-law liability above and beyond that authorized by FELA, as well as these state-law restrictions on FELA defendants' statutory defenses, is incompatible with the comprehensive federal remedial framework established in FELA. As this Court has emphasized, FELA "does not make the employer the insurer of the safety of his employees while they are on duty," *Consol. Rail Corp.* v. *Gottshall*, 512 U.S. 532, 543 (1994) (internal quotation marks omitted), but by stripping self-insured defendants of their right to contest FELA claims on the merits, that is precisely what Montana has done.

C. The Montana Supreme Court did not make any attempt in this case to reconcile its rejection of petitioners' preemption defense with this Court's FELA precedent. It instead mechanically adhered to *Reidelbach*, which rejected BNSF's preemption defense in a similar bad-faith suit under Montana law. The court's reasoning in *Reidelbach* underscores the conflict with this Court's FELA jurisprudence.

In *Reidelbach*, the Montana Supreme Court relied on two erroneous grounds for dismissing FELA's preemptive force. First, citing no FELA authority from this Court, the Montana Supreme Court asserted that FELA was intended only to "enact a compensatory scheme under which railway employees who were physically injured by the negligence of their employer while on-the-job and in pursuit of interstate commerce could obtain relief," and therefore did not preempt state-law bad-faith claims that compensate employees for mental and emotional injuries. *Reidelbach* v. *Burlington N. & Santa Fe Ry. Co.*, 60 P.3d 418, 425 (Mont. 2002). This contention is wrong as a factual matter: FELA permits plaintiffs to obtain damages for mental or emotional injuries in some circumstances. *See Gottshall*, 512 U.S. at 550. It is also wrong as an analytical matter: the fact that FELA does not provide a specific remedy does not mean that States are free to supplement FELA's comprehensive liability regime with state-law claims providing additional remedies. This Court has rejected that very reasoning, explaining that a State cannot "extend[ ]" or "abridge[ ]" FELA liability, even when FELA itself does not provide such a remedy. *See Tonsellito*, 244 U.S. at 361.

Second, the *Reidelbach* court held that because the plaintiff's "state claims [were] distinct and separate from his physical injury FELA claim," state law could provide an additional remedy. 60 P.3d at 428. But this Court rejected a nearly identical argument in *Winfield*, where the plaintiff contended that, in light of FELA's silence as to liability for injuries not attributable to a railroad's negligence, state law can fill this void with its own liability framework. 244 U.S. at 149–50. The Court categorically dismissed that contention. *See id.* at 153 ("[N]o state is at liberty thus

to interfere with the operation of a law of Congress."). In any event, a bad-faith claim based on a self-insured FELA defendant's litigation conduct is inextricably intertwined with the conduct addressed by FELA—the employer's alleged negligence in connection with the on-the-job injury—because the litigation conduct occurred in a case in which the plaintiff was seeking to recover for that alleged negligence. Bad-faith claims under Montana law are therefore no different from the claim this Court held preempted in *Tonsellito*, where the harm sought to be remedied was analytically distinct from the underlying on-the-job injury, but the claim was still preempted by FELA because the harm ultimately arose out of that underlying injury. *See* 244 U.S. at 361–62.

In addition, although the Montana Supreme Court in *Reidelbach* discussed *Dice* as it relates to a FELA employer's liability and damages (while citing neither *Winfield* nor *Tonsellito*), it failed completely to grapple with the fact that Montana's bad-faith laws limit the defenses a FELA defendant may raise and therefore are preempted under *Dice*. In fact, not only did the court fail to acknowledge that this Court has already spoken on the need to enforce a uniform regime for FELA claims and defenses, but it also disregarded much of this Court's FELA precedent by applying an inapposite preemption test used under the National Labor Relations Act. *See Reidelbach*, 60 P.3d at 429 (citing *Farmer* v. *United Bhd. of Carpenters & Joiners of Am.*, 430 U.S. 290 (1977)). That test relies on a three-factor framework that focuses on what conduct is *protected* by the National Labor Relations Act, and what interest the State has in regulating the conduct. *See Farmer*, 430 U.S. at 298. This Court has never held those considerations relevant in the FELA context.

If the Montana Supreme Court had not disregarded this Court's explicit guidance on the preemptive power of FELA, it would have concluded that FELA preempts the application of Montana's bad-faith laws to self-insured FELA defendants. Dannels's bad-faith claims exist only as a result of petitioners' handling of his FELA claim, which means that petitioners' potential liability under Montana law arises entirely out of BNSF's employment relationship with Dannels—a relationship governed comprehensively and exclusively by FELA. *See Chi., Milwaukee & St. Paul Ry. Co.* v. *Coogan*, 271 U.S. 472, 474 (1926). Whether Montana treats BNSF's conduct in FELA litigation as distinct from its conduct that allegedly contributed to the employers' underlying on-the-job-injury is irrelevant. *See Tonsellito*, 244 U.S. at 361–62. State law can neither restrict nor enlarge the scope of Dannels's claims. Nor can it impair petitioners' right to raise a full and vigorous defense to those claims. *See Dice*, 342 U.S. at 361.

The Court should grant review to ensure that FELA defendants in Montana are not subjected to state-law liability for conduct that, as this Court has recognized on multiple occasions, Congress intended to be governed exclusively by federal law.

II. THE DECISION BELOW CONFLICTS WITH THE FELA PRECEDENT OF OTHER LOWER COURTS

The Montana Supreme Court's holding that FELA does not preempt bad-faith claims against self-insured FELA defendants also conflicts with the FELA precedent of other lower courts, including federal courts in Montana and elsewhere.

A. Federal And State Courts In Montana Are Split On The Question Presented

Federal and state courts in Montana are divided on the preemption question presented in this case. When the Montana Supreme Court held in *Reidelbach* that Montana's bad-faith laws are not preempted as applied to self-insured FELA defendants, it expressly acknowledged that its decision was in tension with the decision of the United States District Court for the District of Montana in *Toscano* v. *Burlington Northern Railroad Co.*, 678 F. Supp. 1477 (D. Mont. 1987). *See Reidelbach*, 60 P.3d 418.

In *Toscano*, the district court held that bad-faith claims brought under Montana law against FELA defendants are preempted because "FELA presents the exclusive remedy in all actions falling within the ambit of the Act." 678 F. Supp. at 1479. FELA therefore precludes plaintiffs from using state law to "impos[e] liability upon the [defendant] for actions relating to an FELA claim, when"—as with Montana's bad-faith cause of action—"the liability is predicated upon a duty having its genesis in state law." *Ibid.*; *see also Giard* v. *Burlington N. Santa Fe Ry. Co.*, No. 12-CV-113, 2014 WL 37687, at *10 (D. Mont. Jan. 6, 2014) (holding a "mismanagement claim" under Montana law preempted because "[f]ederal law must control so that the FELA may be given the uniform application" (internal quotation marks omitted)).

Although the Ninth Circuit has not addressed whether FELA preempts the application of Montana's bad-faith laws to self-insured FELA defendants, several of its holdings are in direct tension with *Reidelbach* and leave little doubt that, if the court had the opportunity to address the issue, it would agree with the District of Montana that these state-law claims

are preempted. In *Counts* v. *Burlington Northern Railroad Co.*, 896 F.2d 424 (9th Cir. 1990), for example, the Ninth Circuit held that FELA preempted a railroad employee's state-law claim seeking to invalidate his release of his FELA claim on the basis of fraud. *Id.* at 425–26. The court held that "[t]o permit independent state-law actions for fraud in inducing FELA releases would lead to results that would vary from state to state. That we cannot allow." *Id.* at 425. The court therefore concluded that FELA preempted the plaintiff's state-law claim, "regardless of whether federal law provides the remedy he seeks." *Id.* at 426.

This division between state and federal authority means that the success or failure of a plaintiff's bad-faith claim against a self-insured FELA defendant depends entirely on whether the claim is brought in state or federal court. Indeed, if petitioners had been able to remove this case to federal court—which they were prevented from doing by Dannels's decision to sue the individual BNSF claims adjuster responsible for his claim—there is no doubt that it would have been dismissed on preemption grounds by both the District of Montana and the Ninth Circuit. A self-insured employer's right to defend itself against FELA liability should not depend on whether the plaintiff is able to identify a nondiverse defendant to foreclose removal to federal court.

B. The Montana Supreme Court's Decisions Conflict With The FELA Decisions Of Other Federal And State Courts

Montana is an outlier: It is the only State that currently permits "third-party claimant" actions against self-insured defendants under its unfair trade practices code. *See* Greg Munro, *Continuing*

Development of Insurance Bad Faith in Montana, Tr. Trends 25–26 (2007), https://scholarship.law.umt.edu/faculty_barjournals/13/; *see also* Mont. Code Ann. § 33-18-242(8). The preemption question presented in this case is therefore unlikely to arise in the context of a circuit split—not because there is no difference of opinion, but because other States do not permit plaintiffs to use state law to exact damages from FELA defendants that FELA itself does not authorize.

Nevertheless, even in the absence of comparable bad-faith regimes, the Montana Supreme Court has managed to set itself apart. Unlike the Montana Supreme Court, numerous federal courts of appeals have recognized that FELA offers the *exclusive* remedy for railroad employees injured on the job. In *Janelle* v. *Seaboard Coast Line Railroad Co.*, 524 F.2d 1259 (5th Cir. 1975), for example, the Fifth Circuit dismissed a follow-on state-law action seeking to recover additional damages for the death of a railroad employee that could not have been recovered in the prior FELA lawsuit, pointing to "the exclusivity of the remedy under the FELA." *Id.* at 1261–62. Likewise, the Tenth Circuit has held that claims for loss of consortium are not cognizable under FELA, even if they are permitted under state law, because FELA's remedies are exclusive. *See Anderson* v. *Burlington N., Inc.*, 469 F.2d 288, 290 (10th Cir. 1972); *see also Jess* v. *Great N. Ry. Co.*, 401 F.2d 535, 536 (9th Cir. 1968) (per curiam) ("The [FELA] not only provides the exclusive remedy for the recovery by an employee of damages sustained by him as a result of an injury to him, but also governs the recovery by others for damages resulting from such injury.").

State courts outside of Montana have likewise followed this Court's precedent and foreclosed attempts by plaintiffs to recover damages beyond those authorized by FELA. For example, in *Boyd* v. *BNSF Railway Co.*, 874 N.W.2d 234 (Minn. 2016), the Supreme Court of Minnesota held that FELA preempted a state rule that provided for double costs after a rejected settlement offer. *Id.* at 242. And, like the federal courts of appeals, state courts have held that FELA preempts state-law claims for loss of consortium. *See, e.g.*, *In re Estate of Gearhart*, 584 N.W.2d 327, 329 (Iowa 1998); *Kinney* v. *S. Pac. Co.*, 375 P.2d 418, 419–20 (Or. 1961) (citing *Tonsellito*, 244 U.S. 360; *Winfield*, 244 U.S. 147); *Louisville & Nashville R.R. Co.* v. *Lunsford*, 116 S.E.2d 232, 233 (Ga. 1960) (same).

Montana is thus an outlier not only because it imposes a unique and onerous regime of liability on FELA defendants (and, as here, their employees), but also because it is alone in its refusal to recognize that FELA's liability framework is comprehensive and exclusive. The Court should grant review to ensure that all FELA defendants are afforded the same right to defend themselves, and are subject to the same damages regime, no matter the jurisdiction in which suit is filed.

III. THE QUESTION PRESENTED IS EXCEPTIONALLY IMPORTANT TO FELA DEFENDANTS AND TO THE PRESERVATION OF FELA'S UNIFORM FEDERAL FRAMEWORK

The question presented directly implicates the right of defendants in Montana to defend themselves against FELA claims as well as the integrity of the nationally uniform legal framework that Congress established when it enacted FELA. This Court should grant review now—rather than permitting this

preempted claim to proceed further—because the Montana Supreme Court has twice made clear in this litigation that it is unwilling to apply this Court's FELA preemption jurisprudence. Requiring petitioners to litigate this case to resolution would waste judicial resources, imperil the confidentiality of BNSF's privileged communications, and undermine FELA's statutory objectives.

A. Montana's Bad-Faith Laws Deprive FELA Defendants Of Their Fundamental Right To Defend Themselves On The Merits

Montana's bad-faith laws effectively bar self-insured FELA employers in Montana from vigorously defending themselves against claims brought against them, lest they trigger a bad-faith suit seeking millions of dollars in additional damages for mental pain and suffering, or even punitive damages, not authorized under FELA. This risk is real and concrete. This case does not represent the first time that BNSF has been sued in a Montana bad-faith suit based on its decision to defend itself against a FELA claim. BNSF was also the defendant in the case that culminated in the Montana Supreme Court's controlling opinion in *Reidelbach*. *See* 60 P.3d 418. There are a number of more recent examples, as well. *See, e.g.*, *LeDoux* v. *BNSF Ry. Co.*, No. 17-CV-16, 2017 WL 3750203 (D. Mont. Aug. 15, 2017); *Lee* v. *BNSF Ry. Co.*, No. 17-CV-9, 2017 WL 3822019 (D. Mont. Aug. 14, 2017); *Toscano*, 678 F. Supp. 1477.

The unavoidable consequence (and apparent purpose) of Montana's bad-faith regime is that BNSF and other FELA defendants are deterred from defending themselves on the merits and instead settle even highly dubious claims in order to mitigate the risk of

potential bad-faith liability. This is anathema to the framework that Congress established in FELA—which does not provide for no-fault liability but instead requires employees to prove negligence to recover—as well as to this Court's longstanding recognition that a defendant has a due process right "to present every available defense." *Lindsey* v. *Normet*, 405 U.S. 56, 66 (1972) (internal quotation marks omitted). Nor is there an opportunity for a self-insured FELA defendant to seek to settle the FELA claim and any follow-on bad-faith claim together, because even attempting to do so could itself be deemed an act of bad faith. *See Shilhanek* v. *D-2 Trucking, Inc.*, 70 P.3d 721, 726 (Mont. 2003); *Watters* v. *Guar. Nat'l Ins. Co.*, 3 P.3d 626, 638 (Mont. 2000). Thus, self-insured FELA defendants in Montana are under inexorable pressure to settle for the full amount demanded by the plaintiff promptly after suit is filed—no matter the merits of the claim—in order to minimize the risk of additional liability in a follow-on bad-faith suit.

Moreover, the prejudice from Montana's bad-faith regime extends beyond monetary liability. Petitioners face the possibility of a default judgment in this bad-faith litigation solely because they have declined to produce privileged or otherwise protected documents that would not be discoverable in ordinary litigation. *See* Mont. Code Ann. § 26-1-803 (privileging communications between attorneys and clients); Mont. R. Civ. P. 26(b)(3) (setting forth the protections for attorney work product). Justice McKinnon in dissent pointed out this disturbing anomaly, noting that the documents to be produced "are otherwise undiscoverable, *but for the case's status as a UTPA action*." Pet. App. 11a. A plaintiff bringing a bad-faith suit therefore is uniquely positioned under Montana law to use discovery to override the attorney-client privilege and

work-product doctrine. *See, e.g.*, *Barnard Pipeline, Inc.* v. *Travelers Prop. Cas. Co. of Am.*, No. 13-CV-7, 2014 WL 1576543, at *3–4 (D. Mont. Apr. 17, 2014).

On Dannels's motion to compel, the district court ordered BNSF to produce "all documents" relating to the handling, evaluation, and settlement of Dannels's underlying claim; "monthly summary" reports of FELA claims from the last twenty years; and "any study or review of BNSF's claims handling practices or procedures and/or amounts paid out on FELA claims." Order on Pl.'s Mot. to Compel 8, 27. In response to Dannels' motion for sanctions, the district court went even further by ordering BNSF to produce all monthly status reports on FELA claims from 2010 to present. Pet. App. 52a. BNSF's objections to the production of privileged or protected materials have largely been overruled by the district court, which ruled that the attorney-client privilege does not apply when an attorney provides advice related to claims adjustment and that work-product protections do not attach if the documents are necessary for the plaintiff's case. *See* Order Denying Pl.'s Mot. to Compel, Granting in Part Pl.'s Renewed Mot. to Compel, and Denying in Part Defs.' Mot. for Protective Order 4–6. The result is that Montana's bad-faith laws not only have exposed BNSF to the possibility of additional liability beyond that authorized by FELA, but also threaten BNSF's ability to protect privileged communications and work product essential to its ability to defend itself against FELA claims in Montana and elsewhere.

The stakes for self-insured employers facing the prospect of a FELA suit in Montana—and for the viability of the exclusive federal legal framework that Congress sought to establish in FELA—are therefore impossible to overstate.

B. Immediate Review Is Warranted

The question presented warrants immediate review. The Montana Supreme Court has denied petitioners' two petitions for writs of supervisory control regarding the preemption issue. No further record development is needed.

This Court has jurisdiction to decide the preemption issue now because the Montana Supreme Court's judgment denying the petition for a writ of supervisory control constitutes a final judgment. *See Bandini Petroleum Co.* v. *Superior Court*, 284 U.S. 8, 14 (1931) ("The proceeding for a writ of prohibition is a distinct suit, and the judgment finally disposing of it is a final judgment . . . ."); *see also Costarelli* v. *Massachusetts*, 421 U.S. 193, 198 (1975) (same). The finality of the Montana Supreme Court's ruling on the preemption issue is not diminished by the ongoing state-court proceedings regarding the underlying merits of Dannels's bad-faith claim. This Court "has been inclined to follow a 'pragmatic approach' to the question of finality" and has held that a final decision "'does not necessarily mean the last order possible to be made in a case.'" *Bradley* v. *Sch. Bd. of City of Richmond*, 416 U.S. 696, 722 n.28 (1974). Review may therefore be appropriate where, for example,

> the federal issue has been finally decided in the state courts with further proceedings pending in which the party seeking review [in this Court] might prevail on the merits on nonfederal grounds, thus rendering unnecessary review of the federal issue by this Court, and where reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action rather than merely controlling the nature and

> character of . . . the state proceedings still to come.

Cox Broad. Corp. v. *Cohn*, 420 U.S. 469, 482–83 (1975); *see also* Stephen M. Shapiro et al., *Supreme Court Practice* 163–69 (10th ed. 2013).

That is the precise situation here. The Montana Supreme Court definitively resolved the preemption question when it denied review of petitioners' two petitions for writs of supervisory control based on its controlling decision in *Reidelbach*, 60 P.3d 418. Petitioners intend to appeal the default judgment entered against them on state-law grounds and might well prevail on the merits on nonfederal grounds. Reversal of the Montana Supreme Court on the federal issue, however, "would be preclusive of any further litigation on the relevant cause of action." *Cox Broad. Corp.*, 420 U.S. at 482–83. This Court has granted certiorari in several state-court cases with a nearly identical procedural posture. *See, e.g.*, *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. 286, 289–90 (1980) (granting a writ of certiorari on a petition from a state supreme court's denial of a writ of prohibition); *Madruga* v. *Superior Court*, 346 U.S. 556, 557 n.1 (1954) (treating as final a state supreme court's denial of a writ of prohibition). As in those cases, there is no reason to delay review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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