Application No. A-_____

IN THE
Supreme Court of the United States

NO. 18-1246

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 Application to Stay Judgment and Proceedings

APPLICATION FOR STAY AND EMERGENCY ADMINISTRATIVE STAY OF JUDGMENT AND PROCEEDINGS

ANDREW S. TULUMELLO
Counsel of Record
AMIR C. TAYRANI
JOSHUA M. WESNESKI
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500
atulumello@gibsondunn.com

Counsel for Petitioners

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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To the Honorable Elena Kagan, Associate Justice of the Supreme Court of the United States and Circuit Justice for the Ninth Circuit:

Petitioners respectfully move for a stay of the judgment of the Montana Supreme Court in *BNSF Railway Co.* v. *Montana Eighth Judicial District Court, Cascade County*, No. OP 18-0693, and of the proceedings in the Montana Eighth Judicial District Court, Cascade County, in *Dannels* v. *BNSF Railway Co.*, No. BDV-14-001, pending resolution of the petition for a writ of certiorari, *see* 28 U.S.C. § 2101(f); 28 U.S.C. § 1651(a)–(b); Sup. Ct. R. 23, and for an emergency

administrative stay pending the disposition of this application. An immediate stay is needed because the district court has ordered petitioner BNSF Railway Company ("BNSF") to produce privileged documents, and has ordered BNSF's General Counsel and outside counsel to appear and show cause on April 5 for why they and BNSF should not be held in contempt for failing to produce those materials. The plaintiff has sought case-ending, default sanctions. The petition for a writ of certiorari filed on March 22, 2019 raises the question whether the Federal Employers Liability Act ("FELA"), 45 U.S.C. § 51, preempts "bad-faith" claims under Montana law, which authorizes a cause of action against self-insured FELA defendants for failing to promptly and equitably settle FELA cases before trial, failing to advance medical expenses and wages during the pendency of suit, or otherwise engaging in purported "bad faith" in handling a plaintiff's FELA claim, to the complete undoing of FELA's exclusive remedial scheme. *See N.Y. Cent. R.R. Co.* v. *Winfield*, 244 U.S. 147, 151 (1917). Petitioners sought a stay in the Montana Supreme Court on March 18. The Montana Supreme Court has not yet ruled on that application, but immediate relief is needed.

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." *Winfield*, 244 U.S. at 151–52 (internal quotation marks omitted). In every state except Montana, a defendant in a lawsuit brought under FELA is entitled to contest liability and damages. But under Montana's "bad-faith"

laws, a self-insured FELA defendant—*i.e.*, a railroad 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." *Gibson* v. *W. Fire Ins. Co.*, 682 P.2d 725, 730 (Mont. 1984); *see also* Mont. Code Ann. § 33-18-201(6). The consequence is that in Montana, a self-insured FELA defendant can be subject, after a FELA lawsuit, to a follow-on "bad-faith" suit merely for defending itself on the merits against the underlying FELA claim.

Montana's regime conflicts with the national, uniform legal framework that Congress enacted through FELA. *See S. Buffalo Ry. Co.* v. *Ahern*, 344 U.S. 367, 371 (1953) (FELA "supplant[ed] a patchwork of state legislation with a nationwide uniform system of liberal remedial rules"). The Montana Supreme Court's refusal in this case (twice) to recognize that such bad-faith claims are preempted by FELA conflicts with this Court's FELA precedents. This Court has held that FELA's liability and damages scheme is comprehensive and exclusive, *see Winfield*, 244 U.S. at 151–52, and that FELA therefore 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). And FELA's preemptive force extends not just 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: "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).

The Montana Supreme Court has consistently refused to acknowledge FELA's preemptive force over bad-faith claims that seek to punish self-insured defendants for the temerity of defending themselves against FELA liability. Indeed, under Montana's bad-faith state-law regime, even a defense verdict in a FELA case is no defense to a follow-on "bad faith" claim. *See Graf* v. *Cont'l W. Ins. Co.*, 89 P.3d 22, 26 (Mont. 2004).

In 2013, respondent Robert Dannels brought this "bad-faith" suit against BNSF, an individual BNSF employee (Nancy Ahern), and ten John Does alleging that they violated their duties to him by failing to promptly and equitably settle with him in a FELA case that was tried to a $1.7 million verdict in that same year. As a result of discovery demands and severe sanctions in the district court below, petitioner BNSF has been ordered to turn over to Dannels highly protected, privileged, and work-product material, including "all documents" relating to the handling, evaluation, and settlement of his claim; "monthly summar[y]" reports of FELA claims nationwide, for the last twenty years, from BNSF's in-house counsel; and "any study or review of BNSF's FELA claims handling practices or procedures and/or amounts paid out on FELA claims." Attachment B at 8, 27. The district court further ordered BNSF to produce all monthly status reports on all of its FELA cases *nationwide* from 2010 to present, notwithstanding that those monthly status reports contain otherwise

protected or privileged attorney work product and attorney-client communications. *See* Attachment C at 35.

Disclosure of this information would compromise BNSF's ability to defend itself in FELA suits across the country by, at a minimum, revealing proprietary information about how BNSF values FELA cases, its internal assessments of particular cases, and private settlements of FELA cases. These materials are privileged and confidential, and attorney work product, and they would be utterly irrelevant to Dannels *but for* the fact that he has been permitted to pursue this "bad-faith" claim. Because the claims in this case are preempted by FELA, the case should have been dismissed at the outset. Instead, BNSF and its counsel are being threatened with contempt and default judgment by the Montana district court for failing to produce highly sensitive, privileged and confidential information.

A stay is necessary to preserve BNSF's privileged and confidential information while this Court considers whether to grant certiorari to address the conflict between Montana Supreme Court's FELA preemption rulings and this Court's precedent. Moreover, an emergency administrative stay pending disposition of this application is appropriate in light of the Dannels's request to hold BNSF and its counsel in contempt on April 5, 2019, and to impose default judgment.

STATEMENT

1. 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.

Federal law provides both the standard for liability, *see Urie* v. *Thompson*, 337 U.S. 163, 174 (1949), and the measure of damages, *see Norfolk & W. Ry. Co.* v. *Liepelt*, 444 U.S. 490, 493 (1980), under FELA. That framework is "comprehensive" and "exclusive," *see Winfield*, 244 U.S. at 151, and preempts any state law that "extend[s]" or "abridge[s]" a defendant's FELA liability, *see Tonsellito*, 244 U.S. at 361–62. FELA's preemptive force extends also to state rules that interfere with railroads' ability to defend themselves against FELA claims. *See Dice*, 342 U.S. at 361 ("[T]he 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].").

2. Insurers in Montana owe a statutory and common-law duty of good faith and fair dealing to their insureds. *See* Mont. Code Ann. §§ 33-18-201, 33-18-242(1); *Stephens* v. *Safeco Ins. Co of Am.*, 852 P.2d 565, 567 (Mont. 1993). 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), and to "conduct[] a reasonable investigation based upon all available information," *id.* § 33-18-201(4). The alleged failure of an insurer to promptly settle a claim at a "fair" and "equitable" amount is grounds for a suit against the insurer following the disposition of the underlying claim. The plaintiff may seek 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), and can even 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.

These duties exist not just between insurers and insureds, but also between insurers and 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). Moreover, according to the Montana Supreme Court, these duties also apply to self-insured entities—entities that, 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, for any claim made against a self-insured entity, that entity, by way of its status as an insurer (of itself), owes the claimant the same duties owed by an insurance company to its customer. *See* Mont. Code Ann. § 33-18-242(8).

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. The court reasoned that the purpose of FELA "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." *Id.* at 425. The court further held that there is no conflict between Montana's bad-faith laws and FELA, relying on state-court precedent and applying this Court's test

in *Farmer* v. *United Brotherhood of Carpenters & Joiners of America*, 430 U.S. 290 (1977), for preemption under the National Labor Relations Act. *Reidelbach*, 60 P.3d at 429. Relying on the *Farmer* test, which the court admitted had never been applied in the FELA context, the Montana Supreme Court held that bad-faith claims in Montana are not preempted by FELA because Montana has an interest in protecting its citizens from unfair claim practices, emphasizing "the humanitarian purpose of the FELA." *Id.* at 429–30. That holding, to which the Montana Supreme Court has adhered for the last seventeen years, is the subject of the petition for a writ of certiorari in this case.

3. The petition arises out of a FELA suit that plaintiff Robert Dannels filed against BNSF in 2010 for injuries he allegedly suffered during an on-the-job injury. Dannels alleged that during his twenty-year employment with BNSF, he was subjected to physical work activities that carried a high risk of injuring his spine, and that in 2010, he was involved in an accident caused by BNSF's negligence that injured him permanently. BNSF defended itself on the merits and denied 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.

Dannels filed this follow-on bad-faith suit six months later, alleging that BNSF had violated its statutory and common-law duties by failing to investigate, process, handle, and settle his claim in good faith. Dannels specifically alleges that it was reasonably clear that BNSF was liable for his FELA injuries, and that petitioners breached their duties to Dannels 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 at a court-ordered mediation, and failing to advance Dannels his lost wages and retirement benefits during the pendency of his FELA suit. Dannels seeks damages for his mental distress and expenses, and also seeks punitive damages for BNSF's "actual fraud and malice." Compl. ¶ 29.

Discovery disputes have permeated this case. Dannels filed a motion to compel discovery on March 20, 2015, and a renewed motion to compel on May 19, 2015. *See* Attachment A at 1–2. Dannels sought to compel BNSF to produce, among other things, internal training documents for claims adjusters, materials generated for or used in connection with any committees BNSF confers with concerning claims-adjustment strategy and litigation strategies, and documents generated by BNSF groups involved in claims practices and litigation strategies over the past fifteen years. BNSF objected to those requests on a number of grounds, including privilege and work-product protection.

On January 26, 2017, the district court granted Dannels's renewed motion to compel and largely overruled BNSF's objections. The court held that the attorney-client privilege does not attach when an attorney acts a claims adjuster, and that the "limited" work product privilege was overcome by Dannels's need for the materials. Attachment A at 4–6. The court ordered BNSF to provide the requested discovery, but did permit BNSF to log and redact those documents it contended contained privileged information. *Ibid.*

Petitioners filed a motion for summary judgment on May 1, 2017, arguing 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. The court denied that motion on January 9, 2018, citing *Reidelbach*. Petitioners filed their first petition for a writ of supervisory control on January 25, 2018, contending that Dannels's bad-faith claims were preempted by FELA. The Montana Supreme Court denied that petition on February 20, 2018, relying exclusively on *Reidelbach*.

On January 18, 2018, Dannels filed another motion to compel, along with a motion for sanctions for petitioners' discovery objections. Among other things, Dannels sought "[a]ny and all documents generated since 2007 relating to any study or review of BNSF's FELA claims handling practices or procedures . . . conducted by" BNSF or it agents, Attachment B at 8, as well as "[a]ny and all documents relating in any way to the claim(s) of Robert Dannels," which would include assessments and analyses by outside counsel, *id.* at 10. BNSF objected on the ground of privilege and on the ground that Dannels had refused to agree to a protective order. The court again overruled BNSF's objections. *See id.* at 26. With respect to Dannels's motion for sanctions, the court invited the parties to submit "proposed orders" on sanctions. *Id.* at 27.

On November 16, 2018, the district court issued the sanctions order that ultimately led to the petition for certiorari, adopting Dannels's proposed order nearly verbatim. Finding that BNSF had engaged in sanctionable conduct in objecting to

and resisting Dannels's discovery demands, the court entered default judgment on liability and causation against petitioners, and stated that the "case shall proceed to trial solely on the measure of damages." Attachment C at 34. The court then ordered, "as an additional sanction," BNSF to produce documents that had never before been demanded. *Id.* at 35. The court ordered BNSF to produce "actuarial reports . . . relating to FELA claims," as well as all "annual executive slide presentations on FELA claims." *Ibid.* Most critically, the court directed BNSF to produce "[a]ll monthly status reports on FELA claims . . . from 2010 to date." *Ibid.* Those status reports necessarily contain privileged information from BNSF's own lawyers regarding litigated and settled FELA cases. *Id.* at 11. Before the sanctions order, BNSF had never been ordered to produce such reports and Dannels had never sought to compel production of those reports.

BNSF filed its second petition for a writ of supervisory control with the Montana Supreme Court on December 11, 2018. In addition to arguing that Dannels's bad-faith claims are preempted because Montana's bad-faith laws "undermine uniformity and interfere with FELA's 'purpose and objectives,'" BNSF emphasized to the court the substantial prejudice it would face were it forced to comply with the district court's erroneous order compelling production of such privileged information, pointing out that disclosure of BNSF's monthly FELA reports would "result in the disclosure of attorney work product and privileged communications that can be used against BNSF." Pet. for Writ of Supervisory Control and for Order Staying Further Proceedings 12–14, 16. The Montana

Supreme Court denied that petition on March 12, 2019, reasoning 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 our holding in *Reidelbach*." Attachment D at 5.

Justice McKinnon dissented. She pointed out that "there is ample federal authority, not discussed in *Reidelbach*, which appears to provide FELA is the exclusive remedy for injured railroad workers." Attachment D at 8. She noted also that the case "has now grown even more cumbersome because the District Court has entered a default when there still lingers a question of preemption," and that the Montana Supreme Court affirmed "an order for sanctions requiring BNSF to produce documents that are otherwise undiscoverable, *but for the case's status as a UTPA action*." *Ibid.* Justice McKinnon finally added that "the documents ordered to be disclosed are potentially protected pursuant to the attorney work-product and attorney-client privileges." *Ibid*.

On March 14, following the Montana Supreme Court's denial of the petition for a writ of supervisory control, the district court held a status conference in which it ordered BNSF to produce the privileged and confidential documents by March 22, 2019. BNSF advised the district court that it would seek a stay in the Montana Supreme Court and would be filing a petition for a writ of certiorari. On March 18, 2019, petitioners moved for a stay in the Montana Supreme Court pending the disposition of the petition for a writ of certiorari. While that motion was pending, petitioners filed the petition for a writ of certiorari in this case, *see* Attachment F,

and on March 25, advised counsel for Dannels that it would not produce the confidential documents in light of the pending motion for a stay in the Montana Supreme Court.

Notwithstanding the pending motion for a stay in the Montana Supreme Court, and the petition for a writ of certiorari in this Court, Dannels filed a motion for sanctions in the district court on March 28, 2019. As sanctions for BNSF's failure to produce the privileged and confidential materials, Dannels asked the district court to strike BNSF's Answer; accept all of Dannels's allegations as true; and hold an evidentiary hearing on damages at which only Dannels would be permitted to submit evidence. Dannels further demanded that Roger Nober—BNSF's Executive Vice President, Law and Corporate Affairs—and BNSF's outside counsel in the district court be ordered to appear in person to show cause why they should not be held in contempt (despite no evidence that Mr. Nober had any involvement with this litigation). Dannels also asked that "BNSF be fined $25,000.00 a day from March 22, 2019, until the damages hearing or until it fully complies with the Court's March 15, 2019, Order." Br. in Support of Pl.'s Mot. for Rule 37(b) Sanctions and for Order to Show Cause Why Contempt Sanctions Should Not Be Granted 15. BNSF filed its opposition to Dannels's motion the next day, pointing out that there was no evidence that Mr. Nober or anyone else from BNSF's executive leadership team was involved in BNSF's defense of the case in the trial court.

On March 30, the district court granted Dannels's request for a hearing, ordering BNSF's outside counsel and its General Counsel to appear before the court

on April 5 to show cause as to why "contempt sanctions should not be imposed against them and Defendant BNSF Railway Company for the disobedience of this Court's discovery orders." Attachment E. On April 1, 2019, petitioners supplemented their pending stay motion at the Montana Supreme Court with a request for an emergency interim stay.

As of this filing, the Montana Supreme Court has not yet ruled on the pending application for a stay. Petitioners have sought immediate relief in this Court because "[t]he timing and substance" of the impending contempt hearing, combined with the Montana Supreme Court's inaction for over two weeks, makes further delay "impossible and legally futile." *W. Airlines, Inc.* v. *Teamsters*, 480 U.S. 1301, 1304 (1987) (O'Connor, J., in chambers).

REASONS FOR GRANTING THE APPLICATION

This Court "has settled upon three conditions that must be met" before a Circuit Justice may issue a stay pending the disposition of a petition for a writ of certiorari: "There must be a reasonable probability that certiorari will be granted (or probable jurisdiction noted), a significant possibility that the judgment below will be reversed, and a likelihood of irreparable harm (assuming the correctness of the applicant's position) if the judgment is not stayed." *Barnes* v. *E-Sys., Inc. Grp. Hosp. Med. & Surgical Ins. Plan*, 501 U.S. 1301, 1302 (1991) (Scalia, J., in chambers) (citing *Times-Picayune Publ'g Corp.* v. *Schulingkamp*, 419 U.S. 1301, 1305 (1974) (Powell, J., in chambers)). In a "close case," the Circuit Justice may also "balance the equities." *Rostker* v. *Goldberg*, 448 U.S. 1306, 1308 (1980) (Brennan, J., in chambers) (internal

quotation marks omitted). Because petitioners have satisfied each of these requirements, a stay of the judgment and an emergency administrative stay is warranted.

I. There Is A Reasonable Probability That Certiorari Will Be Granted And A Significant Possibility That The Judgment Below Will Be Reversed

The "threshold" question in an application for stay is whether there is "a reasonable probability that four Members of the Court will consider the issue sufficiently meritorious to grant certiorari or to note probable jurisdiction," and "whether five justices are likely to conclude that the case was erroneously decided below." *Graves* v. *Barnes*, 405 U.S. 1201, 1203 (1972) (Powell, J., in chambers). A stay applicant must show only "a fair prospect that the Court will . . . reverse the decision below." *Maryland* v. *King*, 567 U.S. 1301, 1302 (2012) (Roberts, C.J., in chambers) (internal quotation marks omitted). Here, there is a reasonable probability that this Court will grant certiorari and a significant possibility it will reverse the judgment below.

The petition for a writ of certiorari thoroughly explains why a grant of certiorari and reversal is warranted, and petitioners will not repeat that entire discussion here. The fundamental reasons for certiorari and reversal are, however, reemphasized below.

First, the Montana Supreme Court's decision directly conflicts with this Court's precedent. This Court has made clear that States may not impose liability or damages beyond that contemplated by FELA. In *Winfield*, 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, but there was no allegation of fault or negligence on the part of the employer. *Id.* at 148. The plaintiff argued that he could proceed under state law because FELA does "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 rejected that reasoning, explaining 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." *Id.* at 149–50.

Similarly, 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.

This Court has used similar reasoning to hold preempted state laws or rules that dictate the defenses a defendant may raise in a FELA action. In *Dice*, the Court held that federal law controlled the validity of a release of liability that a defendant

had raised in defense of a FELA claim, explaining that "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." *Dice*, 342 U.S. at 361. "[O]nly if federal law controls," the Court explained, "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.").

The Montana Supreme Court's refusal in this case to recognize that Dannels's claims are preempted by FELA—and the court's prior decision in *Reidelbach* to which the court continues to adhere—conflict with this Court's FELA precedent. Dannels has already obtained damages under FELA for his on-the-job injury while working for BNSF. Both *Winfield* and *Tonsellito* make clear that FELA bars Montana from imposing *additional* liability on petitioners arising out of that same injury, because FELA "liability can neither be extended nor abridged by common or statutory laws of the state." *Tonsellito*, 244 U.S. at 362.

By punishing employers for defending themselves on the merits, Montana's bad-faith laws also impermissibly limit the defenses an employer may raise in a FELA lawsuit, in plain conflict with this Court's holding that the defenses available to a FELA defendant are governed by federal law, not state law. *See Dice*, 342 U.S. at 361. Only in Montana are FELA defendants exposed to this draconian regime.

In both *Reidelbach* and here, the Montana Supreme Court failed entirely to grapple with this controlling precedent. In *Reidelbach*, the court did not even cite *Winfield* or *Tonsellito*, and instead relied on the preemption test used under the National Labor Relations Act developed by this Court in *Farmer*, 430 U.S. 290. *See Reidelbach*, 60 P.3d at 429. That test had never before been used in the FELA context, and relies on factors—such as the state's interest in regulating the conduct—that have no place in the FELA preemption inquiry. And although the court acknowledged *Dice*, it dismissed the relevance of that case, saying simply that because the plaintiff's "state claims [were] distinct and separate from his physical injury FELA claim," state law could provide an additional remedy. *Id.* at 428. That reasoning, however, was squarely rejected by this Court in both *Winfield* and *Tonsellito*.

Because the decision below is in direct conflict with this Court's FELA precedents, there is a "reasonable probability" that this Court will grant certiorari, and a "fair prospect" that the Court will reverse the decision and enforce the preemptive power of FELA, as it has done before. *See, e.g.*, *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 that interest was not available under federal law and "constitute[d] a significant portion of an FELA plaintiff's total recovery"); *Brown* v. *W. Ry. of Ala.*, 338 U.S. 294, 296 (1949) (holding that FELA preempted a state rule imposing a higher standard for pleadings).

Second, certiorari and reversal are also likely because the Montana Supreme Court's decision conflicts with the FELA precedent of other lower courts. State and federal courts in Montana are in direct conflict on this issue. A federal district court in Montana has held that Montana's bad-faith laws are preempted as to FELA defendants. *See Toscano* v. *Burlington N. R.R. Co.*, 678 F. Supp. 1477, 1480 (D. Mont. 1987). That ruling is squarely at odds with the Montana Supreme Court's holding in *Reidelbach*, 60 P.3d 418. Moreover, the Ninth Circuit, unlike the Montana Supreme Court, has properly given FELA broad preemptive effect, holding preempted a claim by a railroad employee to invalidate his release of his FELA claim on the grounds of fraud, *see Counts* v. *Burlington N. R.R. Co.*, 896 F.2d 424, 425 (9th Cir. 1990), and a claim for loss of consortium arising out of a railroad employee's on-the-job injury, *see Jess* v. *Great N. Ry. Co.*, 401 F.2d 535, 536 (9th Cir. 1968) (per curiam). The result is that a FELA defendant's liability in Montana depends on whether the follow-on bad-faith suit is brought in federal or state court. But because many plaintiffs strategically name as defendants the individual claims adjusters—who typically reside in Montana—FELA defendants often have no opportunity to remove these cases to federal court, and instead are forced to litigate under Montana's misapplication of FELA preemption. Indeed, that is the case here: Dannels named both BNSF and petitioner Nancy Ahern, a claims investigator and resident of Montana, to defeat the complete diversity necessary for removal to federal court. *See* 28 U.S.C. § 1332.

The Montana Supreme Court's decision is also in conflict with decisions in other federal courts of appeals and state courts. Montana is an outlier in that it is the only state that imposes on self-insured parties a duty to promptly and equitably settle claims. *See* Greg Munro, *Continuing Development of Insurance Bad Faith in Montana*, Tr. Trends 25–26 (2007), https://scholarship.law.umt.edu/faculty_barjournals/13/. There is unlikely to be a direct conflict with the federal courts of appeals in other jurisdictions because no other State has promulgated such a double-dipping scheme of liability. Even still, federal courts of appeals in other jurisdictions have properly recognized the preemptive force of FELA in holding that state-law claims seeking to impose additional liability on railroads beyond that contemplated by FELA are preempted. *See, e.g.*, *Janelle* v. *Seaboard Coast Line R.R. Co.*, 524 F.2d 1259, 1261–62 (5th Cir. 1975) (holding that adult children of a deceased worker could not sue a FELA defendant under state law because no such claim is permitted under FELA); *Anderson* v. *Burlington N., Inc.*, 469 F.2d 288, 290 (10th Cir. 1972) (holding that the spouse of an injured worker could not sue for loss of consortium). State courts are in accord. *See, e.g.*, *Boyd* v. *BNSF Ry. Co.*, 874 N.W.2d 234 (Minn. 2016) (holding that FELA preempts a state rule providing for double costs after a rejected settlement offer); *In re Estate of Gearhart*, 584 N.W.2d 327, 329 (Iowa 1998) (holding that FELA preempts claims for loss of consortium); *Kinney* v. *S. Pac. Co.*, 375 P.2d 418, 419–20 (Or. 1961) (same). Certiorari is therefore likely to be granted so that this Court may resolve a split among the lower courts as to the

preemptive force of FELA, the great weight of which support reversal of the decision below.

Third, the question presented is exceptionally important to FELA defendants and to the preservation of FELA's uniform federal framework. Montana's bad-faith laws effectively bar self-insured FELA employers in Montana from vigorously defending against claims brought against them, lest they risk triggering a bad-faith suit seeking millions of dollars in additional damages. Not only is this contrary to FELA's comprehensive framework, it also is in tension with 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). This specter of follow-on litigation infects every FELA lawsuit in Montana, and even has the collateral effect of exposing a FELA defendant—like BNSF here—to intrusive discovery that would not be permitted in any other context. Indeed, the fact that BNSF is being directed to disclose documents otherwise privileged *but for* the nature of the bad-faith suit was one of the reasons Justice McKinnon dissented. Attachment D at 8. There is a reasonable probability that this Court will review the lawfulness of such a coercive regime and reject Montana's outlier approach.

* * *

This case presents an important and substantial question of law on which courts are divided and that is likely to garner the support of at least four Justices for further review. And the merits of the case plainly favor petitioners—in elevating Montana law over federal law, the Montana Supreme Court has defied this Court's

FELA precedents. That is enough to establish a "fair prospect that a majority of the Court will conclude that the decision below was erroneous." *Rostker*, 448 U.S. at 1308. The first two elements for a stay in this Court are satisfied.

II. Petitioners Will Suffer Irreparable Harm If The Judgment Is Not Stayed

The district court in this case has imposed liability-determining sanctions on petitioners and has ordered the production of privileged or protected information, the disclosure of which threatens BNSF's nationwide operations. As the dissent correctly pointed out, those documents "are otherwise undiscoverable, *but for the case's status as a UTPA action*." Attachment D at 8. Worse still, Dannels has moved for *additional* sanctions against BNSF and its counsel, requesting that BNSF's defenses be stricken in their entirety, that Dannels be permitted to present evidence of damages with no opportunity for rebuttal from BNSF, and that BNSF be ordered to pay a $25,000 per day fine. The district court has ordered BNSF's counsel and General Counsel to appear and show cause why they should not be held in contempt. That is more than sufficient to establish irreparable harm, and Dannels's actions have necessitated an emergency administrative stay, as well as a stay of the judgment and proceedings pending this Court's disposition of the Petition for a Writ of Certiorari.

The district court has consistently ruled that BNSF's assertions of privilege and work-product protection in this case are insufficient to override Dannels's interest in obtaining those documents. In its first order compelling the production of documents, the district court ordered production of documents reflecting attorney

work product, *see* Attachment A at 5–6, even while acknowledging that those materials would be protected but for the fact that Dannels allegedly needs those materials to litigate preempted "bad-faith" claims, *see* Mont. R. Civ. P. 26(b)(3) (providing protection for attorneys' work product). The district court ruled similarly with respect to assessments by outside counsel of the strength of Dannels's FELA claims, ordering production even though those documents ordinarily would be protected by the attorney-client privilege. *See* Attachment B at 26.

In sanctioning petitioners, the district court did not simply enter judgment on liability, but also ordered BNSF to turn over documents that had never before been the subject of a motion to compel. Those documents include actuarial reports related to FELA claims, slide presentations to executives regarding FELA claims, and "[a]ll monthly status reports on FELA claims . . . from 2010 to date." Attachment C at 35. Those reports include the privileged or protected observations and impressions of BNSF's counsel regarding FELA cases, both litigated to judgment and settled. *Id.* at 11.

In light of the proceedings in this Court, BNSF has not produced the confidential documents. In response—and notwithstanding that BNSF had sought a stay in the Montana Supreme Court and further relief here—Dannels has asked the district court to impose additional sanctions on BNSF, and the district court has ordered BNSF's General Counsel and outside counsel to face potential contempt at a hearing on April 5, where Dannels will also request that the court impose a $25,000 fine on BNSF for each day it continues to resist production.

Justices of this Court have recognized that such circumstances give rise to irreparable harm. In *In re Roche*, 448 U.S. 1312 (1980), Justice Brennan granted a stay where a reporter had been held in contempt for his refusal to disclose the identity of confidential sources, asserting a First Amendment "newsman's privilege." *Id.* at 1312–13. After granting an interim stay, Justice Brennan considered whether a continuing stay was warranted. *Id.* at 1314. Discussing irreparable harm, Justice Brennan observed that without a stay, the reporter would have to "either surrender his secrets (and moot his claim of right to protect them) or face commitment to jail." *Id.* at 1316. Although acknowledging that staying the proceedings would cause some hardship with respect to the ability of other parties to obtain information needed to litigate the underlying action, Justice Brennan held that such hardship did "not outweigh the unpalatable choice that civil contempt would impose upon the applicant." *Ibid.*

This case presents similar circumstances. While this case does not implicate the First Amendment, it *does* directly implicate sensitive, privileged documents and communications that a national railroad relies upon to defend itself in FELA cases past and present. BNSF faces the "unpalatable choice" of either "surrender[ing] [its] secrets"—which implicate litigation across the Nation—or facing civil contempt, which has now been sought by Dannels. BNSF has a substantial interest in protecting the confidentiality of its privileged materials and attorneys' work product. BNSF litigates numerous FELA cases each year. These documents would not be discoverable "*but for the case's status as a UTPA action*." Attachment D at 8 (dissent).

If BNSF is held in contempt, direct appeal will be of no help—Dannels has sought a daily fine against BNSF, plainly calculated to compel BNSF to relinquish the documents. If BNSF does so, it will be irreparably harmed: although the court entered a limited protective order for certain of BNSF's documents, it is far from clear that the protective order will protect the monthly summaries that are at the heart of the court's order. *See* Attachment B at 27. Absent a stay, BNSF will therefore have no opportunity to claw those documents back if it prevails in this Court—the damage will have been done The alternative, if BNSF is held in contempt, is to incur thousands of dollars in fees that BNSF can recoup only by yielding to the district court's unlawful order. As Justice Brennan recognized in *In re Roche*, a stay is warranted in precisely these circumstances, and indeed, Justice Brennan entered an interim stay in *In re Roche*, as should also be done here.

Not only has BNSF been threatened with monetary sanctions, its outside counsel and General Counsel have been called into to court to show cause why "contempt sanctions should not be imposed against them." Attachment E. While Dannels has not yet suggested what he relief he might seek against these individuals, the real and imminent threat of personal sanctions against BNSF's attorneys justifies immediate intervention by this Court.

More fundamentally, BNSF is being forced to litigate claims that should have been dismissed years ago. BNSF will have no opportunity to recover the costs it will inevitably incur to continue defending against these preempted claims. While monetary damages are ordinarily not considered irreparable, "that is because money

can usually be recovered from the person to whom it is paid." *Philip Morris USA Inc.* v. *Scott*, 561 U.S. 1301, 1304 (2010) (Scalia, J., in chambers). But "[i]f expenditures cannot be recouped, the resulting loss may be irreparable." *Ibid.*; *see also Mori* v. *Int'l Bhd. of Boilermakers*, 454 U.S. 1301, 1303 (1981) (Rehnquist, J., in chambers) (granting a stay where the funds expended "would be very difficult to recover should applicants' stay not be granted"). BNSF has been litigating this bad-faith case since 2013 and has already invested substantial resources in defending itself. This case should have been dismissed at the outset, and so long as Montana courts persist in allowing Dannels to prosecute this suit against BNSF, BNSF will be irreparably harmed. A stay is necessary to avoid such harm.

III. The Equities Favor A Stay

In addition to the above factors, a Circuit Justice may also consider the relative equities of granting a stay. *See Rostker*, 448 U.S. at 1308 ("[I]n a close case it may be appropriate to 'balance the equities'—to explore the relative harms to applicant and respondent, as well as the interests of the public at large."). The equities favor a stay where "[r]efusing a stay may visit an irreversible harm on applicants, but granting it will apparently do no permanent injury to respondents." *Philip Morris*, 561 U.S. at 1305.

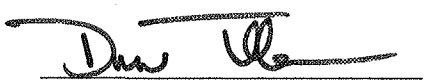
Denial of a stay will visit "an irreversible harm on" BNSF, because it and its attorneys face a real and imminent threat of civil contempt, which can abated only by the disclosure of privileged or protected documents that relate to BNSF's litigation strategy in unrelated FELA cases. And there is no harm to respondents—Dannels is

the only respondent with a stake in the underlying litigation, and he will suffer no substantial prejudice from a stay of the district court proceedings. Petitioners attempted, diligently and in good faith, to obtain a stay from the Montana Supreme Court. That application has been pending for over two weeks now, with no relief, and given the hearing scheduled for April 5, it would be "legally futile" to wait for the Montana Supreme Court to deny the pending stay application at the eleventh hour, leaving petitioners with no recourse. *See W. Airlines*, 480 U.S. at 1304. The equities here favor a stay. *See In re Roche*, 448 U.S. at 1316–17 (granting a stay in similar circumstance after balancing the equities).

CONCLUSION

For the foregoing reasons, petitioners respectfully request a stay of the judgment of the Montana Supreme Court in *BNSF Railway Co.* v. *Montana Eighth Judicial District Court, Cascade County*, No. OP 18-0693, and of the proceedings in the Montana Eighth Judicial District Court, Cascade County, in *Dannels* v. *BNSF Railway Co.*, No. BDV-14-001, *see* 28 U.S.C. § 2101(f); 28 U.S.C. § 1651(a)–(b); Sup. Ct. R. 23, pending this Court's disposition of the petition for a writ of certiorari in *BNSF Railway Co.* v. *Montana Eighth Judicial District Court*, No. 18-1246. Petitioners further request an emergency administrative stay pending resolution of this application.

Respectfully submitted.



ANDREW S. TULUMELLO
Counsel of Record
AMIR C. TAYRANI
JOSHUA M. WESNESKI
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500
atulumello@gibsondunn.com

Counsel for Petitioners

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