No. 18-1246

IN THE
Supreme Court of the United States

BNSF RAILWAY CO., 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

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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Date: April 25, 2019

MOTION OF WASHINGTON LEGAL FOUNDATION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

Pursuant to Rule 37.2 of the Rules of this Court, the Washington Legal Foundation (WLF) respectfully moves for leave to file the attached brief as *amicus curiae* in support of Petitioners. Counsel for Petitioners has consented to the filing of this brief. Counsel for Respondents did not respond to a request for consent. Accordingly, this motion for leave to file is necessary.

WLF is a nonprofit public-interest law and policy center based in Washington, D.C., with supporters nationwide, including in Montana. WLF promotes and defends free enterprise, individual rights, a limited and accountable government, and the rule of law.

WLF frequently files briefs in both state and federal courts on issues arising under the Federal Employers' Liability Act (FELA), 45 U.S.C. §§ 51-60. *See, e.g., BNSF Railway Co. v. Tyrrell*, 137 S. Ct. 1549 (2017); *CSX Transportation, Inc. v. Hensley*, 556 U.S. 838 (2009). WLF filed a brief in support of the petition for a writ of supervisory control filed by BNSF with the Montana Supreme Court on December 11, 2018. WLF has also appeared frequently as *amicus curiae* in cases involving federal preemption issues, to point out the economic inefficiencies often created when multiple layers of government seek simultaneously to regulate the same business activity. *See, e.g., Kurns v. Railroad Friction Products Corp.*, 565 U.S. 625 (2012).

FELA is a unique federal negligence statute under which railroad employees may seek

compensation from their employing railroads for work-related injuries. The compensation scheme differs sharply from that available to most other types of employees, who generally must seek compensation for work-related injuries in no-fault administrative proceedings established by state law. In general, the compensation available to railroad employees under FELA is more generous than that available to employees whose claims are governed by state worker-compensation statutes.

WLF is concerned that Montana state courts are interfering with the efficient, uniform compensation system established by FELA by overlaying a separate state-law regime on top of the one established by Congress. WLF seeks to file this brief to urge the Court to grant the petition and rein in unwarranted state-law claims of this sort.

For the foregoing reasons, WLF requests leave to file the attached brief.

Respectfully submitted,

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QUESTION PRESENTED

Whether the Federal Employers Liability Act (FELA), 45 U.S.C. § 51, 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.

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INTEREST OF *AMICUS CURIAE*

The Washington Legal Foundation (WLF) is a public-interest law firm and policy center with supporters in all 50 States, including Montana.[1] WLF promotes and defends free enterprise, individual rights, a limited and accountable government, and the rule of law.

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[1] Pursuant to Supreme Court Rule 37.6, WLF state that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than WLF and its counsel, made a monetary contribution intended to fund the preparation and submission of this brief. More than 10 days before filing this brief, WLF notified counsel for Respondent Dannels of its intent to file.

injuries in no-fault administrative proceedings established by state law. In general, the compensation available to railroad employees under FELA is more generous that available to employees whose claims are governed by state worker-compensation statutes.

WLF is concerned that Montana state courts are interfering with the efficient, uniform compensation system established by FELA by overlaying a separate state-law regime on top of the one established by Congress.

STATEMENT OF THE CASE

Respondent Robert Dannels suffered an injury in March 2010 while working for Petitioner BNSF Railway Co. Several months later, he sued BNSF in Montana state court under FELA, alleging that BNSF's negligent conduct contributed to his injury. BNSF defended against that claim. The case came to trial in 2013, and a jury awarded Dannels $1.7 million. That judgment has been fully satisfied.

Dannels filed this second state-court lawsuit in 2014, alleging that BNSF and Petitioner Nancy Ahern violated Montana's Unfair Trade Practices Act (UTPA), MCA § 33-18-201, and Montana common law by breaching a duty of good faith in handling and defending against Dannels's FELA claim. He alleges that Petitioners' FELA-related misconduct caused him to suffer emotional distress, for which he is entitled to compensatory damages. Dannels also seeks an award of punitive damages based on his allegation that BNSF acted with malice and fraud for the purpose of avoiding fair and equitable settlement of FELA claims.

Throughout the district court proceedings, BNSF and Ahern have asserted (without success) that Dannels's claims are preempted by federal law. On January 9, 2018, the district court denied Petitioners' supplemental motion for summary judgment. Pet. App. 58a-72a. It held that the Montana Supreme Court's decision in *Reidelbach v. Burlington N. & Santa Fe Ry. Co.*, 312 Mont. 49 (2002), "disposes the Defendants' preemption arguments in Dannels' favor." *Id.* at 63a.

The parties repeatedly clashed over discovery issues. In an order dated November 16, 2018 (the "Sanctions Order," Pet. App. 12a-52a), the district court concluded that BNSF inadequately responded to discovery requests, and it rejected BNSF's efforts to invoke attorney-client privilege, work product privilege, and trade secret confidentiality. As a sanction, it entered a default judgment against BNSF on liability and causation and stated, "This case shall proceed to trial solely on the measure of damages," including punitive damages. *Id.* at 51a.

As "an additional sanction" it ordered BNSF to produce documents that had not previously been demanded. Among the additional documents were "monthly status reports" prepared by BNSF attorneys on all its pending FELA claims nationwide from 2010 to date. *Id.* at 52a. BNSF contends that the reports "include the privileged or protected observations and impressions of BNSF's counsel regarding FELA cases, both litigated to judgment and settled," and that their disclosure "threatens BNSF's nationwide operations." BNSF Application for Stay (No. 18A1006, filed April 2, 2009) at 22-23.

Petitioners responded on December 11, 2018, by filing a petition for a writ of supervisory control with the Montana Supreme Court, the second time they had done so in these proceedings. Among the issues raised by both petitions: the court should overrule its *Reidelbach* decision and hold that FELA preempts state-law claims based on a railroad's alleged bad faith in handling and defending against FELA claim.

The Montana Supreme Court issued an order denying the second petition on March 12, 2019. Pet. App. 1a-11a. It acknowledged Petitioner's challenge to *Reidelbach*'s holding on FELA preemption but stated that "this is an issue for which the normal appeal process is adequate." *Id.* at 9a. Judge McKinnon dissented, stating that the court should order additional briefing on whether to overrule *Reidelbach*. *Id.* at 10a-11a. She expressed concern that "the Court is affirming an order for sanctions requiring BNSF to produce documents that are otherwise undiscoverable, *but for the case's status as a UTPA action*; and the documents ordered to be disclosed are potentially protected pursuant to the attorney work-product and attorney client privileges." *Id.* at 11a (emphasis in original).

The Certiorari Petition seeks review of the March 12 Montana Supreme Court final judgment denying the petition for supervisory control. But the district court is not awaiting this Court's disposition of the Petition. At a March 14 status conference, the district court ordered BNSF to produce the privileged and confidential documents identified in the Sanctions

Order no later than March 22.[2] When BNSF delayed complying with the Sanctions Order while it pursued appellate relief, Dannels filed a motion for sanctions in the district court on March 28. On March 30, the district court granted Dannels's request for a hearing and issued an order to BNSF's outside counsel and its General Counsel to show cause why they should not be held in contempt of court for failing to produce documents required by the Sanctions Order—confidential documents that (as Justice McKinnon pointed out, Pet. App. 11a) would be undiscoverable if (as Petitioners contend and as numerous courts have held) FELA preempts state-law claims alleging bad-faith handling of FELA claims. *See* BNSF Application for Stay (No. 18A1006, April 2, 2019), Attachment E.

Given the magnitude of the potential contempt citation—Dannels has asked that BNSF be fined $25,000 per day from March 22 until the date that it produces all contested documents—awaiting completion of the post-trial appeals process to seek this Court's review of the preemption issue is not a realistic option for BNSF. The district court has already sanctioned BNSF by entering a default judgment on liability and causation. In the absence of immediate review by this Court, contempt fines could easily amount to tens of millions of dollars (in addition to

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[2] Petitioners responded to that directive by moving on March 18 in the Montana Supreme Court for a stay pending disposition of its Certiorari Petition. That motion was denied on April 2. Justice Kagan on April 3 denied Petitioners' application for stay and emergency administrative stay of judgment and proceedings.

potential punitive damages) before BNSF would be positioned to file another certiorari petition from a potentially adverse judgment on the merits from the Montana Supreme Court.

SUMMARY OF ARGUMENT

As the Montana Supreme Court readily concedes, it has "used the bad faith tort in a manner uniformly rejected by all other jurisdictions." *Story v. City of Bozman*, 242 Mont. 436, 447 (1990). In particular, it is the only State that recognizes a cause of action against an employer alleged to have acted in bad faith in handling a FELA claim filed by one of its employees. If the employer's FELA liability is reasonably clear, Montana law imposes on the employer a duty to advance wages and medical expenses while the suit is pending and to enter into a fair and equitable settlement. The implication is clear: a Montana employer defends a FELA suit at its peril.[3]

Montana courts have repeatedly rejected arguments that the state-law cause of action against railroads for handling FELA claims in bad faith is

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[3] Montana justifies imposing these fiduciary duties on FELA employers by likening them to insurance companies. A railroad could, of course, purchase insurance to cover the costs of FELA claims filed by injured employees. But many larger railroads (including BNSF) have concluded that insurance is unnecessary because they can predict overall FELA claims rates reasonably accurately. Montana law classifies such railroads as "self-insured" and imposes on them the same claims-settlement obligations that it imposes on insurance companies in their dealing with both their insureds and the third-party beneficiaries of insurance contracts. Mont. Code Ann. §§ 33-18-201, 33-18-202(8).

preempted by FELA. The Montana Supreme Court rejected that preemption argument in its 2002 *Reidelbach* decision and has consistently affirmed that decision in the ensuing two decades. BNSF repeatedly raised the preemption argument in lower-court proceedings. Concluding that it was "bound to follow *Reidelbach*," the district court rejected BNSF's assertion that FELA preempted Dannels's bad-faith claims and denied its motion for summary judgment. Pet. App. 63. The Montana Supreme Court rejected two separate petitions for a writ of supervisory control file by BNSF, each time explicitly citing *Reidelbach* in support of its decision not to dismiss on preemption grounds. *Id.* at 9a, 56a.

Review is warranted because the Montana Supreme Court's decision sharply conflicts with FELA decisions from both this Court and other federal and state courts. This Court has repeatedly held that FELA comprehensively "occupies the field" of railroad-employee injury claims. It has explained that FELA provides the *exclusive* remedy for injured railroad employees engaged in interstate commerce. *See, e.g., New York Central R.R. Co. v. Winfield*, 244 U.S. 147, 150 (1917); *Erie R.R. Co. v. Winfield*, 244 U.S. 170, 172 (1917); *New York Central & Hudson River R.R. Co. v. Tonsellito*, 244 U.S. 360, 361 (1917). Indeed, the conflict between those decisions and the Montana Supreme Court decision is so stark that the Court may wish to consider summary reversal.

Reidelbach sought to distinguish this Court's preemption precedents by arguing that any emotional distress damages suffered by a railroad employee during the FELA claims process are analytically

distinct from the on-the-job injury giving rise to the FELA claim because they are incurred at a later time. 312 Mont. at 507. But that argument ignores the close relationship between the "two" injuries; the alleged emotional distress damages would not have arisen but for the filing of a FELA claim in response to the on-the-job injury. Indeed, under *Reidelbach*'s later-in-time rationale, FELA would not cover continuing medical expenses for treatment of the on-the-job injury when the treatment is not received until some years after the employee's disability retirement.

Review is also warranted because this may be BNSF's only opportunity to obtain Supreme Court review of its preemption claim. The denial of its petition for a writ of supervisory control is a final judgment and thus is subject to review under 28 U.S.C. § 1257(a). That final judgment explicitly rejected BNSF's claim that the complaint should be dismissed based on federal preemption. If the Court grants review and reverses the judgment below, the litigation would come to an end.

On the other hand, if the Court denies review, BNSF will likely face a substantial default judgment in the district court. Because that judgment will be based on a refusal to produce attorney-client privilege and work-product privilege documents whose confidentiality BNSF deems critical, the subsequent appeal to the Montana Supreme Court will likely focus on the propriety of the district court's production orders. Given the unorthodox nature of those orders, there is a good chance that the Montana Supreme Court will reverse without ever reaching BNSF's federal preemption claim. This Court has deemed

certiorari petitions arising under these circumstances to be particularly fit for review. *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 482-83 (1975).

Finally, review is warranted because Montana's bad-faith cause of action—which in essence permits "double dipping" by FELA claimants—is of particular importance not only to BNSF but to the other railroads that operate in Montana. It effectively deprives them of their ability to defend against insubstantial FELA claims because they fear that an aggressive defense will be cited in subsequent litigation as evidence of bad faith. This Montana-only cause of action also undermines one of Congress's major purposes in adopting FELA: to establish uniform liability standards governing compensation claims submitted by injured railroad workers. If Dannels's state-law cause of action is not preempted, the compensation claims submitted by a railroad employee will receive significantly different treatment depending on whether his train was traveling through Montana or Idaho at the time he incurred his injury.

REASONS FOR GRANTING THE PETITION

I. REVIEW IS WARRANTED BECAUSE THE DECISION BELOW DIRECTLY CONFLICTS WITH THIS COURT'S UNDERSTANDING OF FELA'S PREEMPTIVE SCOPE

The petition raises issues of exceptional importance. Congress adopted FELA in 1908 to provide railroad employees a right to recover for work-related injuries that were the result, in whole or in part, of their railroad-employer's negligence. Congress

acted in response to concerns that adequate compensation was unavailable under state law, and that "the physical dangers of railroading ... resulted in the death or maiming of thousands of workers every year." *Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532, 542 (1994). The Court has decreed that FELA be liberally and uniformly construed to ensure that injured employees in all 50 States receive adequate compensation.

Now more than a century old, FELA has achieved its intended purposes. Indeed, Respondent Dannels benefitted greatly from the statute; he has never suggested that the $1.7 million FELA judgment awarded to him by Montana's courts did not adequately compensate him for his work-related injuries.

But while FELA includes a comprehensive compensation scheme, Congress imposed some finite limits on the extent of railroad liability. For example, the federal appeals courts have uniformly held that FELA does not authorizes punitive-damage awards, and this Court has determined that it limits awards for emotional distress damages (no matter how genuine they may be) and medical monitoring costs.

The comprehensive nature of the federal scheme demonstrates that Congress has "occupied the field" and thereby left no room for states to impose their own regulation of railroad-injury claims. Indeed, this Court has repeatedly so held. Review is warranted because the decision below, as well as a long line of Montana decisions on which the decision relies, directly conflict with this Court's FELA preemption decisions.

A. The Court Has Determined that Congress, When It Adopted FELA, Intended to Establish an Exclusive Federal Regime for Railroad Injuries

The Montana Supreme Court does not dispute that FELA preempts recovery of additional damages under state law for on-the-job injuries suffered by railroad employees. Rather, it holds that injuries (such as emotional distress) caused by a railroad's bad-faith handling of a FELA claim are not part of the field over which Congress sought to establish exclusive federal control when it adopted FELA. *Reidelbach*, 312 Mont. 506-07. That holding directly conflicts with this Court's FELA case law.

Very soon after FELA's adoption, a series of Court decisions established that FELA does, indeed, "occupy the field" and thereby preempts state-law claims based on injuries arising from a railroad's conduct. Those decisions are still good law and continue to be followed by courts across the country.

New York Central R.R. Co. v. Winfield, 244 U.S. 147 (1917) ["*Winfield*"], involved a railroad worker who sustained an eye injury while employed in interstate commerce. The employee sought compensation not under FELA, but under New York State's workers' compensation law. The Court held that the state-law claim was preempted by FELA. Citing congressional reports accompanying FELA's adoption, the Court stated:

> [T]he reports ... disclose, without any uncertainty, that FELA was intended to

> be very comprehensive, to withdraw all injuries to railroad employees in interstate commerce from the operation of varying state laws, and to apply to them a national law having a uniform operation throughout all the states. ... Thus, in the House Report it is said: "It [the bill] is intended in its scope to cover all commerce to which the regulative power of Congress extends. ... by this bill it is hoped to fix a uniform rule of liability throughout the Union with reference to the liability of common carriers to their employees. ... A Federal statute of this character will supplant the numerous state statutes on the subject so far as they relate to interstate commerce."

244 U.S. at 150 (quoting House Report No. 1386, 60th Cong., 1st Sess.).

The Court held similarly that FELA preempted a compensation claim filed under New Jersey law, explaining that "Congress intended [FELA] to be as comprehensive of those instances in which it excludes liability as those in which liability is imposed." *Erie R.R. Co. v. Winfield*, 244 U.S. 170, 172 (1917) ["*Erie*"]. The Court held in *New York Central & Hudson River R.R. Co. v. Tonsellito*, 244 U.S. 360 (1917), that FELA preempts state-law claims filed by relatives of the injured railroad worker. Holding that a father could not recover for medical expenses he incurred on behalf of his minor son and for the loss of his son's services, the Court explained that FELA "is comprehensive and also exclusive in respect of a railroad's liability for

injuries suffered by its employees while engaging in interstate commerce." 244 U.S. at 361.[4]

The Court held in *Dice v. Akron, Canton & Youngstown R.R. Co.*, 342 U.S. 359 (1952), that FELA field preemption barred States from expanding or contracting the defenses otherwise available to railroads under federal law in a FELA case. It held that States are not:

> permitted to have the final say as to what defenses could or could not be properly interposed to suits under the act. Moreover, only if federal law controls can the federal Act be given that uniform application throughout the country essential to effectuate its purposes.

Dice, 342 U.S. at 361. *Reidelbach* and the decision below cannot be squared with *Dice*. Montana's bad-faith cause of action restricts railroads' right to defend

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[4] The Court has also held that another railroad safety law, adopted contemporaneously with FELA, preempts (under a field preemption theory) state law covering the same subject matter. The Boiler Inspection Act (adopted in 1911) and its successor, the Locomotive Inspection Act (adopted in 1915), prohibit use of a locomotive unless it meets federal safety standards and has been certified as such by federal inspectors. 49 U.S.C. § 20701. In *Napier v. Atlantic Coast Line R.R. Co.*, 272 U.S. 605 (1926), the Court held that the LIA preempts the field and thus bars state governments from adopting additional locomotive safety regulations. In 2012, the Court held in *Kurns* that LIA field-preemption also preempts state-law design-defect and failure-to-warn claims against locomotive manufacturers by railroad workers. 565 U.S. at 637-38.

FELA actions vigorously (by, for example, requiring the employer in many instances to advance lost wages and medical expenses while the issue of FELA liability is still being contested). *Dice* held that such state-law rules are field preempted; *Reidelbach* held that they are not.

Reidelbach stated that field preemption is inapplicable because injuries caused by a railroad's bad-faith handling of a FELA claim are not part of any preempted field—they are distinct from the on-the-job injuries that gave rise to the initial FELA claim and often occur after the claimant's railroad employment has ceased. 312 Mont. at 506-07. But that rationale cannot be reconciled with *Winfield, Erie, Tonsellito*, and *Dice*, which held that Congress intended FELA "to be very comprehensive" and "to withdraw all injuries to railroad employees in interstate commerce from the operation of varying state laws." *Winfield*, 244 U.S. at 150. Indeed, *Reidelbach* suggests that the preempted field is very small indeed. Its logic seems to exclude, for example, *any* medical bills incurred by a former employee in the years following his disability retirement, even when the bills are for treatment of the lingering effects of his on-the-job injury.

Winfield, *Erie*, *Tonsellito*, and *Dice* continue to be cited on a regular basis by other courts for the proposition that FELA provides the exclusive remedy for injured railroad workers engaged in interstate commerce. Those courts include the Ninth Circuit and the U.S. District Court for the District of Montana. *See, e.g., Wildman v. Burlington Northern R.R. Co.*, 825 F.2d 1392, 1395 (9th Cir. 1987); *Stiffarm v. Burlington Northern R.R. Co.*, 81 F.3d 170, 1996 WL 146687 at *2

(9th Cir.), *cert. denied*, 519 U.S. 823 (1996); *Giard v. Burlington Northern Santa Fe Ry. Co.*, 2014 WL 37687 at *8 (D. Mont., Jan. 6, 2014). The conflicts between those decisions and *Reidelbach* mean that injured Montana railroad workers will be subject to conflicting preemption rules depending on whether their bad-faith claims are heard in federal court or state court.[5]

The Ninth Circuit has concluded that field preemption applies even if the damages sought by the railroad employee under state law are not available under FELA. *See, e.g., Wildman*, 825 F.2d at 1395 (employee's state-law claims for punitive damages are preempted even though punitive damages are unavailable in a FELA action); *Stiffarm*, 1996 WL 146687, at *2 (employee's state-law claims for intentional infliction of emotional distress are preempted even though such damages might not be available in a FELA action).[6] In direct conflict with the

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[5] For obvious reasons, plaintiffs' lawyers prefer to have their bad-faith claims heard in state court. To prevent removal of those claims to federal court under diversity jurisdiction, lawyers always include a Montana citizen as an additional defendant. A desire to prevent removal fully explains Dannels decision to name Nancy Ahern as a defendant alongside BNSF. Dannels recently told the district court that he has no interest in pursuing damages claims against Ahern.

[6] This Court has interpreted FELA as limiting railroad workers' rights to recover for emotional distress suffered on the job. An employee who has suffered emotional injuries but no physical injuries is not entitled to recover for those injuries unless they were sustained at a time when the railroad's conduct placed him in immediate risk of physical harm. *Gottshall*, 512 U.S. at 554-555. The Court explained that a rule authorizing broader recovery of emotional distress damages could "lead to

Ninth Circuit, *Reidelbach* held that claims for emotional distress caused by a railroad's bad-faith defense of a FELA proceeding (and associated claims for punitive damages) are *not* preempted, in large measure because such damages are not recoverable in a FELA lawsuit. 312 Mont. at 515 (stating that "given the humanitarian purpose of the FELA, we find it inconceivable ... that Congress intended the FELA to cover only certain railroad worker injuries while absolutely precluding any remedy for others").

B. The Decision Below Conflicts with This Court's Decisions Recognizing Congressional Intent to Create Uniform Liability Standards

The Montana Supreme Court's rejection of conflict preemption also merits review. This Court has repeatedly stated that one of Congress's major objectives in adopting FELA was to create uniform liability standards governing compensation claims submitted by injured railroad workers. Under well-accepted conflict-preemption principles, state law is preempted to the extent that it interferes with the

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unpredictable and nearly infinite liability for defendants." *Id.* at 552. The Court's limitation on recovery as a matter of federal law was "based upon the recognized possibility of *genuine* claims from the essentially infinite number of persons, in an infinite variety of situations, who might suffer real emotional harm as a result of negligent conduct." *Id.* (emphasis in original). Nor may an asymptomatic worker who has been exposed to carcinogens such as asbestos recover for his very real emotional distress damages, nor may he recover the costs of medical monitoring designed to detect cancer. *Metro-North Commuter R.R. Co. v. Buckley*, 521 U.S. 424 (1997).

maintenance of uniform liability standards. *See, e.g., Arizona v. United States*, 567 U.S. 387, 399 (2012) (conflict preemption applies whenever "the challenged state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress"). Montana's unique bad-faith cause of action eliminates that uniformity and thereby runs afoul of this Court's FELA preemption case law.

In sharp contrast with that case law, *Reidelbach* expressly *rejected* the defendant's contention that conflict-preemption principles barred recognition of Montana's cause of action against railroads alleged to have acted in bad faith in handling a FELA claim. 312 Mont. at 507-16. Review is warranted to resolve that additional conflict.

Congress's uniform-liability-standards objective has been recognized repeatedly by both this Court and other federal and state courts. *See, e.g., Erie*, 244 U.S. at 172 (FELA "establishes a rule or regulation which is intended to operate uniformly in all the states"); *Winfield*, 244 U.S. at 150 ("A federal statute of this character ... will create uniformity throughout the Union, and the legal status of such employer's liability for personal injuries, instead of being subject to numerous rules, will be fixed by one rule in all the states."); *Dice*, 342 U.S. at 361 ("[O]nly if federal law controls [defenses available to a FELA defendant] can the federal Act be given that uniform application throughout the country essential to effectuate its purposes."); *Counts v. Burlington Northern R.R. Co*, 896 F.2d 424, 425 (9th Cir. 1990) ("[U]niform application [of FELA] throughout the country [is] essential to effectuate its purposes."); *Toscano v.*

Burlington Northern R.R. Co, 678 F. Supp. 1477, 1479 (D. Mont. 1987) ("The desire for uniformity which prompted Congress to enact the FELA precludes Toscano from imposing liability upon the Burlington Northern for actions relating to an FELA claim, when the liability is predicated upon a duty having a genesis in state law.").

Such non-uniformity is particularly unwarranted when one considers that railroad employees often work in more than one State. An engineer might, for example, drive a locomotive from Minnesota to Washington State, passing through three other States in the process. If the engineer is injured during the course of his trip, due-process limitations on personal jurisdiction mean that a lawsuit seeking compensation for damages arising out of that injury will likely need to be filed in the State in which the injury occurred. *See Tyrrell*, 137 S. Ct. at 1559-60. If the Montana Supreme Court's anti-preemption holding is correct, then the engineer's compensation claims will be on far stronger footing if his injury occurs while the train is traveling through Montana than when the train later reaches Idaho. Basing liability standards on the happenstance of where a fast-moving train happens to be located at the precise moment of injury (even assuming that a "precise moment" can be determined) stands as a significant obstacle to accomplishment of Congress's goal of creating a uniform liability standard throughout the Nation governing FELA compensation claims.

II. UNLESS REVIEW IS GRANTED NOW, PETITIONERS MAY BE DEPRIVED OF ANY OPPORTUNITY TO RAISE THEIR PREEMPTION CLAIM

The Montana Supreme Court's denial of the December 2018 petition for a writ of supervisory control is a final judgment and thus subject to review by this Court under 28 U.S.C. § 1257(a). *Bandini Petroleum Co. v. Superior Court*, 284 U.S. 8, 14 (1931). The issue pressed here—Petitioners' contention that federal preemption principles require dismissal of Respondent Dannels's state-law bad-faith claim—was squarely rejected by the Montana Supreme Court. And while it is theoretically possible that Petitioners could again bring the issue before this Court following post-trial appeals even if the Petition is denied, all relevant considerations support granting review now.

Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 477 (1975), outlined four scenarios under which the Court deems it appropriate to grant certiorari petitions in cases "in which the highest court of a State has finally determined the federal issue present in a particular case, but in which there are further proceedings in the lower state courts to come." *Cox* explained that in "most, if not all, of the cases in these [four] categories ... immediate rather than delayed review would be the best way to avoid 'the mischief of economic waste and of delayed justice.'" *Id.* at 477-78 (quoting *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 124 (1945)).

Most pertinent here is the fourth of the four scenarios described by *Cox*:

> [T]here are those situations where the federal issue has been finally decided in the state courts with further proceedings pending in which the party seeking review here 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, or determining the admissibility of evidence in, the state proceedings still to come. In these circumstances, if a refusal immediately to review the state court decision might seriously erode federal policy, the Court has entertained and decided the federal issue, which itself has been finally determined by the state courts for purposes of the state litigation.

Cox, 420 U.S. at 482-83.

The fourth *Cox* scenario fits this case precisely. First, reversal of the Montana Supreme Court on the federal preemption issue will be "preclusive of any further litigation" on Dannels's state-law bad-faith claim. Petitioners assert that the cause of action is entirely preempted.

Moreover, if review is denied, Petitioners face serious obstacles to bringing the federal issue back to this Court after completion of post-trial appeals. The

district court has already entered a default judgment against BNSF on the issues of liability and causation, and the threat of a default judgment on compensatory and punitive damages looms unless BNSF accedes to the trial judge's demands that it produce documents that, BNSF asserts, contain highly confidential attorney-client privilege and work-product privilege information. Thus, any post-judgment appeal to the Montana Supreme Court is likely to focus primarily on the propriety (under state law) of the trial court's sanctions orders. And in light of the highly unorthodox nature of those orders—among other things, the trial judge ordered production of documents that Dannels never demanded and did so without providing BNSF an opportunity to argue why production was inappropriate—there is a significant possibility that the Montana Supreme Court could overturn a pro-plaintiff judgment without ever addressing the federal preemption issue.[7]

An even more serious obstacle facing BNSF, its General Counsel, and its outside attorneys is the threat of huge contempt-of-court-sanctions. Dannels filed a motion asking that BNSF be fined $25,000 per day until it produces all contested documents, and on March 30 the district granted granted Dannels's request for a hearing and issued an order to BNSF's outside counsel and its General Counsel to show cause why they should not be held in contempt of court for

[7] There is also a very significant possibility that BNSF would prevail at any trial on liability and damages issues. Indeed, it is not immediately apparent how Dannels was injured by BSNF's response to his FELA claim, given that BNSF fully satisfied his $1.7 million FELA judgment.

failing to produce those documents. If this Court denies the Petition, BNSF may conclude that the prospect of ever-mounting contempt fines, possibly exceeding $10 million, makes settlement of this litigation its only realistic alternative. A settlement would, of course, prevent the federal preemption issue from returning to the Court.

For all the reasons outlined above, failure to review the issue now "might seriously erode public policy." *Cox*, 420 U.S. at 469. Congress enacted FELA in large measure to ensure adoption of a railroad-injury liability standard that applies uniformly throughout the Nation. The Montana courts are undercutting that congressional policy by limiting the defenses available to railroads when contesting FELA claims filed by their employees.

The theoretical possibility that the Montana Supreme Court might decide on its own to overrule its *Reidelbach* decision is not grounds to deny BNSF's petition. The Montana Supreme Court decided *Reidelbach* nearly 20 years ago and has stood by the decision ever since. As a result, Montana FELA claimants routinely file a second lawsuit accusing their employers of bad faith in handling their FELA claims. In connection with this lawsuit, BNSF has twice asked the Montana Supreme Court to overrule *Reidelbach* and has been rebuffed on both occasions. There is no reason to think that the third time will be the charm. If the Montana Supreme Court were seriously thinking about overruling its longstanding precedent (and it has given no indication that it is), it has had more than sufficient opportunity to do so before now.

Finally, granting the Petition will "avoid the mischief of economic waste and of delayed justice." *Cox*, 420 U.S. at 478. Dannels's bad-faith lawsuit has been pending in Montana's courts for five years; it has proven to be extremely expensive and time-consuming for all concerned. Delaying review will not allow for further "percolation" of the issue; all of the relevant courts (the Montana Supreme Court, the Ninth Circuit, and the U.S. District Court for the District of Montana) have already weighed in on whether state-law bad-faith claims are preempted by federal law. The preemption issue is unlikely to arise elsewhere because no other State has emulated Montana law. Granting the Petition will resolve a long-standing conflict and may well bring this lawsuit to an end.

III. THE QUESTION PRESENTED IS VERY IMPORTANT TO THE ENTIRE RAILROAD INDUSTRY

Review is also warranted because Montana's bad-faith cause of action is of particular importance not only to BNSF but to the entire railroad industry—particularly to railroads that operate in Montana.[8] Montana's cause of action in essence permits "double dipping" by FELA claimants. They can sue their employers for work-related injuries and then sue again alleging bad faith if the employers do not concede the validity of their claims.

Particularly problematic is Montana's

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[8] Among the other large railroads that operate in Montana is Union Pacific Corp.

requirement that FELA employers advance the plaintiff's wages and medical expenses during the pendency of suit once the employer's FELA liability becomes "reasonably clear." That vague standard can and does create havoc for employers. An employer may think that liability is not "reasonably clear," but it can have no assurance that a state-court jury will agree.

The result is that employers' ability to defend against FELA claims in Montana is significantly impaired. The absence of statutory limits on compensation and FELA's extremely relaxed causation standard mean that, in general, the compensation available to railroad employees under FELA is more generous than the compensation available to employees whose claims are governed by state worker-compensation statutes. But FELA is not a no-fault statute; it authorizes railroads to avoid liability by demonstrating that the employee's injury was not a result of its negligence. Yet railroads in Montana are routinely sued for bad-faith conduct when they argue, when defending a FELA claim, that they did not act negligently.

As the Petition explains (at 29-31), the understandable fear of bad-faith lawsuits forces railroads to settle even insubstantial FELA claims. And as this lawsuit demonstrates, claims that a railroad repeatedly handles FELA lawsuits in bad faith (and thus should be liable for punitive damages) can results in discovery orders that threaten to expose vast quantities of confidential documents—including documents that bear no relation to operations in Montana. Review is warranted to determine whether Congress has authorized state-law litigation practices

that so seriously undermine employers' statutorily authorized FELA defenses.

CONCLUSION

The Court should grant the Petition.

Respectfully submitted,

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