No. 21-270

IN THE

Supreme Court of the United States

BNSF RAILWAY COMPANY,

Petitioner,

v.

ROBERT DANNELS,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Montana

BRIEF OF WASHINGTON LEGAL FOUNDATION AND ALLIED EDUCATIONAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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September 24, 2021

QUESTION PRESENTED

Whether the Federal Employers' Liability Act (FELA), 45 U.S.C. §§ 51-60, preempts state-law duties that require a defendant to settle and pay FELA claims even when the defendant has non-frivolous defenses to liability under FELA.

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INTERESTS OF *AMICI CURIAE*[*]

Washington Legal Foundation is a public-interest law firm and policy center with supporters nationwide, including many in Montana. WLF promotes free enterprise, individual rights, limited government, and the rule of law. It often appears as *amicus curiae* in cases arising under the Federal Employers' Liability Act (FELA), 45 U.S.C. §§ 51-60. *See, e.g.*, *BNSF Ry. Co. v. Tyrell*, 137 S. Ct. 1549 (2017); *CSX Transp., Inc. v. Hensley*, 556 U.S. 838 (2009); *Figueroa v. BNSF Ry. Co.*, 390 P.3d 1019 (Or. 2017) (en banc). And it has twice filed an *amicus* brief in this case.

Allied Educational Foundation is a nonprofit charitable and educational foundation based in Tenafly, New Jersey. Founded in 1964, AEF promotes education in diverse areas of study, including law and public policy. It has appeared as *amicus* many times in this Court.

FELA provides the sole remedy by which railway employees may recover from their employer for work-related injuries. FELA's exclusive compensation scheme differs markedly from state worker-compensation regimes, by which employees may recover for their injuries only in no-fault administrative proceedings. Recovery under FELA also tends to

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[*] No party's counsel authored any part of this brief. No person or entity, other than *amici* or their counsel, helped pay for the brief's preparation or submission. After timely notice, each party's counsel of record consented in writing to the filing of this brief.

be more generous than that available under state worker-compensation laws.

As this Court has repeatedly held, FELA occupies the entire field of railway-employer liability to employees for work-related injuries. By overlaying a separate state-law regime on top of the one Congress created, the Montana Supreme Court's decision—if allowed to stand—will unduly interfere with FELA's efficient and uniform compensation scheme.

SUMMARY OF ARGUMENT

FELA occupies the entire field of remedies for railway employees seeking compensation for their work-related injuries. Unlike worker's compensation laws, FELA requires plaintiffs to prove common-law negligence and permits recovery of tort damages. Yet the Montana courts have made a hash of this uniform federal scheme. They have rejected—repeatedly—any suggestion that Montana's state-law cause of action for bad-faith defense of a FELA claim is preempted by FELA.

Montana is the only State that allows a railway employee to sue her employer for alleged bad-faith defense of a FELA claim. As the Montana Supreme Court has conceded, Montana "use[s] the bad faith tort in a manner uniformly rejected by all other jurisdictions." *Story v. City of Bozman*, 791 P.2d 767, 773 (Mont. 1990), *overruled on other grounds by Arrowhead Sch. Dist. No. 75 v. Klyap*, 79 P.3d 250 (Mont. 2003).

What's worse, if the railway employer's FELA liability is "reasonably clear," Montana law obliges

the employer (1) to pay the claimant's lost wages and medical expenses pending resolution of the suit and (2) to enter into a "prompt, fair, and equitable settlement" with the claimant. *See* Mont. Code Ann. § 33-18-201(6); *DuBray v. Farmers Inc. Exch.*, 36 P.3d 897, 900 (Mont. 2001). The implication is clear: a railway defends a FELA suit in Montana at its own peril.

The Montana Supreme Court first rejected a FELA preemption defense in *Reidelbach v. Burlington N. & Santa Fe Ry. Co.*, 60 P.3d 418 (Mont. 2002), and has clung to that misguided view ever since. The decision below makes matters worse. Finding it "ironic" and "inconceivable" that Congress did not think to provide a remedy for bad-faith defense of a FELA claim, the Montana Supreme Court decided that Montana law may do so. (Pet. App. 14a-15a, 19a.) "[F]ill[ing] the space left by FELA," the Montana Supreme Court held that allowing a "remedy for a railroad's claims handling conduct" best serves Montana's "overriding interest" in protecting its citizens. (*Id.* 15a.)

This Court should intervene. The Montana Supreme Court's outlier rule imposes new substantive duties on FELA defendants, undermining the nationwide uniformity Congress intended for FELA to provide. And the decision below sharply conflicts with FELA decisions from both this Court and other federal and state courts.

Beyond the recalcitrance of the Montana Supreme Court, the petition raises issues of exceptional importance. Montana's bad faith cause of action—which effectively permits double dipping by FELA

claimants—is of critical concern not only to BNSF but to every railroad that operates in Montana. In essence, Montana law denies them the ability to defend against even minor FELA claims for fear that an aggressive defense will cost them more in "bad faith" liability than the claim is worth. Unless this Court intervenes, FELA claims will continue to receive wildly disparate treatment depending on where the train was traveling when the claimant was injured.

The Court should grant review, vacate the decision below, and clarify that FELA preempts Montana's peculiar take on bad faith.

REASONS FOR GRANTING THE PETITION

I. REVIEW IS NEEDED BECAUSE THE DECISION BELOW FLOUTS THIS COURT'S CASELAW ON FELA PREEMPTION.

Congress adopted FELA in 1908 to give railroad employees the right to recover for work-related injuries caused, in whole or in part, by their employer's negligence. Congress was responding to growing concerns that "the physical dangers of railroading * * * resulted in the death or maiming of thousands of workers every year." *Consol. Rail Corp. v. Gottshall*, 512 U.S. 532, 542 (1994). FELA ensures that injured railway employees in all 50 States uniformly receive fair and adequate compensation for their work-related injuries.

Now more than a century old, FELA has achieved its intended purpose. Indeed, the Respondent has greatly benefitted from the statute. He has

never suggested that the $1.7 million FELA judgment the Montana courts awarded him failed to fully compensate him for his work-related injuries.

Yet even FELA's generous, comprehensive remedial scheme is not without limits. The courts of appeals have uniformly held that FELA does not permit punitive-damage awards. And this Court has held that FELA limits the availability of awards for emotional distress and medical-monitoring costs.

The comprehensiveness of FELA's remedial scheme shows that Congress has 'occupied the field,' leaving no room for States to impose their own additional remedies for railway-injury claims. This Court has said so many times. Yet the decision below, and the growing line of Montana decisions on which it relies, directly conflict with this Court's FELA caselaw. To ensure that FELA remains the exclusive remedial scheme that Congress intended, this Court's intervention is sorely needed.

A. The decision below displaces FELA as the exclusive remedy for railway employees' work-related injuries.

The Montana Supreme Court does not dispute that FELA precludes railway employees from recovering any other damages under state law for work-related injuries. Rather, it maintains that injuries (including emotional distress) caused by a railway's bad-faith defense of a FELA claim are not part of FELA's preemptive reach. That holding contradicts this Court's FELA caselaw.

Shortly after FELA's enactment, a string of this Court's decisions clarified that FELA occupies the entire field of remedies for railway workers' work-related injuries. Those decisions remain good law, and courts across the country apply them consistently.

Start with *New York Central R.R. Co. v. Winfield*, 244 U.S. 147 (1917) (*Winfield*), in which a railway worker injured his eye. He sought compensation not under FELA, but under New York workers' compensation law. The Court held that the plaintiff's state-law claims were preempted by FELA. The Court explained that Congress intended FELA "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." *Id.* at 150. Quoting the House report accompanying FELA's adoption, the Court recognized that Congress "hoped to fix a uniform rule of liability throughout the Union" and intended FELA to "supplant the numerous state statutes on the subject so far as they relate to interstate commerce." *Id.* (quoting H.R. Rep. No. 60-1386, at 3 (1908)).

In the same year, the Court held that FELA preempted compensation claims under New Jersey law. *Erie v. R.R. Co. v. Winfield*, 244 U.S. 170, 172 (1917) (*Erie*) ("Congress intended [FELA] to be as comprehensive of those instances in which it excludes liability as those in which liability is imposed."). And the Court clarified that FELA preempts state-law claims even by relatives of an injured railway worker. *N.Y. Cent. & Hudson River R.R. Co. v. Tonsellito*, 244 U.S. 360, 361 (1917)

(FELA "is comprehensive and also exclusive in respect of a railroad's liability for injuries suffered by its employees while engaging in interstate commerce").

More importantly, FELA also preempts the States from expanding or contracting the defenses available to railways under FELA. *Dice v. Akron, Canton & Youngstown R.R. Co.*, 342 U.S. 359, 361 (1952). States are not "permitted to have the final say as to what defenses could or could not be properly interposed to suits under [FELA]." *Id.* For "only if federal law controls can [FELA] be given that uniform application throughout the country essential to effectuate its purposes." *Id.*

Dice cannot be squared with the decision below (nor its predecessor, *Reidelbach*). In practice, Montana's bad-faith tort regime unduly restricts a railway's right to defend a FELA suit vigorously. If a railway chooses to mount a defense, it may be penalized by having to advance lost wages and medical expenses while the issue of FELA liability is still being contested. That is not what FELA guarantees; *Dice* held that such state-law rules are field preempted.

Building on its decision in *Reidelbach*, the Montana Supreme Court insisted that field preemption does not apply here because the Respondent's injuries arise from BNSF's bad-faith defense of his FELA claim rather than BNSF's workplace negligence. But that rationale contradicts *Winfield*, *Erie*, *Tonsellito*, and *Dice*, which clarify that Congress intended FELA "to be very comprehensive" and "to withdraw all injuries to railroad employees in inter-

state commerce from the operation of varying state laws." *Winfield*, 244 U.S. at 150.

Relying on *Winfield*, *Erie*, *Tonsellito*, and *Dice*, the Ninth Circuit and Montana federal district courts have consistently held that FELA provides the exclusive remedy for railway workers injured in interstate commerce. *See, e.g.*, *Counts v. Burlington N. R.R. Co.*, 896 F.2d 424, 425-26 (9th Cir. 1990); *Toscano v. Burlington N. R.R. Co.*, 678 F. Supp. 1477, 1479 (D. Mont. 1987). Indeed, the Ninth Circuit has held that field preemption applies even if a railway employee seeks relief under state law unavailable under FELA. *See*, *e.g.*, *Stiffarm v. Burlington N. R.R. Co.*, 81 F.3d 170 (Table), 1996 WL 146687, at *2 (9th Cir. 1996) (per curiam) (intentional infliction of emotional distress); *Wildman v. Burlington N. R.R. Co.*, 825 F.2d 1392, 1395 (9th Cir. 1987) (punitive damages).

The Montana Supreme Court's FELA jurisprudence directly conflicts with these decisions. Indeed, *Reidelbach* held that claims seeking emotional distress and punitive damages for a railway's allegedly bad-faith defense of a FELA claim are not preempted—precisely because they are not recoverable under FELA. 60 P.3d at 430 ("[G]iven the humanitarian purpose of the FELA, we find it inconceivable * * * that Congress intended the FELA to cover only certain railroad injuries while absolutely precluding any remedy for others."). Among other things, *Reidelbach*'s logic would seem to allow a former employee to sue to recoup medical bills during his disability retirement—even if they arise from the lingering effects of his FELA-compensated on-the-job injury.

In short, FELA litigants in Montana are subject to conflicting preemption rules depending on whether the case is tried in state or federal court. Neither the Supremacy Clause nor this Court's field-preemption precedents permit that result.

B. The decision below obstructs FELA's uniform, nationwide liability scheme.

The Montana Supreme Court's disruption of FELA's uniform remedial scheme is especially worthy of review. One of Congress's primary aims in adopting FELA was to create uniform liability standards for compensation claims by injured railway workers. A state law is conflict-preempted if it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Arizona v. United States*, 567 U.S. 387, 399 (2012). Montana's unique bad faith cause of action eliminates FELA's uniformity and thus stands as an obstacle to Congress's nationwide remedial scheme.

This Court has long recognized Congress's desire that FELA provide a uniform, nationwide liability scheme for injured railway workers' compensation claims. *See, e.g.*, *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."); *Erie*, 244 U.S. at 172 (FELA "establishes a rule or regulation which is intended to operate uniformly in all the states"); *Dice*, 342 U.S. at 361 ("[O]nly if federal law controls can [FELA] be given that uniform application

throughout the country essential to effectuate its purposes.").

The lower federal courts agree. *See, e.g.*, *Counts*, 896 F.2d at 425 ("[U]niform application [of FELA] throughout the country is essential to effectuate its purposes."); *Toscano*, 678 F. Supp at 1479 ("The desire for uniformity which prompted Congress to enact the FELA precludes [the plaintiff] from imposing liability upon [the defendant] for actions relating to a FELA claim, when the liability is predicated upon a duty having its genesis in state law.").

Montana stands athwart the goal of uniformity. The Montana Supreme Court shows no sign of revisiting its outlier view of FELA preemption. The court decided *Reidelbach* nearly 20 years ago and has stood by that decision ever since. As a result, Montana FELA claimants now routinely file a second lawsuit accusing their employers of bad-faith defense of their FELA claims.

Montana's rule is all the more disruptive because railway workers often work in more than one State. An engineer might, for example, drive a locomotive from Minnesota to Oregon, passing through three other States (including Montana). If the engineer is injured along that route, due-process limits on personal jurisdiction would likely require any lawsuit arising out of that injury to be filed in the State where the injury occurred. *See Tyrell*, 137 S. Ct. at 1559-60.

If the Montana Supreme Court's anti-preemption holding is allowed to stand, a railway's

liability exposure will be far greater if the employee's injury occurs in Montana rather than Minnesota, North Dakota, Idaho, or Oregon. Because FELA is concerned with interstate commerce, tying a railway's potential liability on the happenstance of where a fast-moving train happens to be at the precise moment of injury makes no sense. Montana's recalcitrance stands as a major obstacle to the accomplishment of Congress's goal of a uniform, nationwide remedial scheme for compensating injured railway workers.

II. REVIEW IS NEEDED BECAUSE THE QUESTION PRESENTED IS VITALLY IMPORTANT TO THE ENTIRE RAILWAY INDUSTRY.

The disastrous impact of the decision below goes far beyond its unfairness to BNSF. Correcting Montana's bad faith exception to FELA preemption is critical to the larger railway industry—indeed, to any railway that operates in Montana. Under Montana's novel view of FELA preemption, FELA claimants suing in Montana courts have unfair leverage. They are free to "double dip" by first suing their employer for work-related injuries under FELA and then by suing again for bad faith if the employer disputes the validity of their claims.

Especially bad is Montana's added requirement that railway employers advance the claimant's wages and medical expenses during the suit, once the employer's liability becomes "reasonably clear." But that vague standard creates a trap for the wary. An employer may be convinced that FELA liability isn't "reasonably clear," but there is no guarantee that a state-court jury will agree. Montana law thus

gives the FELA claimant added hydraulic leverage to force a settlement, even in unmeritorious cases.

The result is that railway employers' ability to defend against FELA claims in Montana is significantly impaired. That is no small matter. The lack of any statutory limits on compensation under FELA, coupled with FELA's relaxed causation element, already makes railway employees' available remedy under FELA far more generous than that provided by state worker-compensation laws.

True, FELA is not a no-fault statute. It allows railways to avoid liability by showing that the employee's injury did not result from the employer's negligence. Yet railways in Montana are routinely sued for bad faith simply for arguing, when defending a FELA claim, that they did not act negligently. This not only undermines FELA's uniform and exclusive remedial scheme, but it presents employers with a very real quandary.

As the petition explains, the understandable fear of lawsuits for bad-faith defense in a FELA suit forces railways to settle even insubstantial FELA claims. And as the history of this lawsuit shows, claims that a railway defended a FELA suit in bad faith (and thus should be liable for punitive damages) often involve discovery orders that threaten to expose a vast number of confidential documents—including documents that bear no relation to the employer's Montana operations. This Court's intervention is needed to clarify whether Congress intended to allow States to seriously chill railways' ability to defend themselves under FELA.

* * *

After seven years of protracted litigation, the Respondent's bad faith suit has finally come to an end. Denying review will not allow for further percolation of the question presented. All 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 claims for bad faith are preempted under FELA. And the question is unlikely to arise elsewhere because no other State has emulated Montana's brazen disregard for federal law.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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