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 THE ASSOCIATION OF AMERICAN RAILROADS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae Association of American Railroads (AAR) is an incorporated, nonprofit trade association representing the nation's major freight railroads, many smaller freight railroads, Amtrak, and some commuter authorities. AAR's members account for the vast majority of the rail industry's line haul mileage, freight revenues, and employment. In matters of significant interest to its members, AAR frequently appears on behalf of the railroad industry before Congress, the courts and administrative agencies. AAR participates as *amicus curiae* to represent the views of its members when a case raises an issue of importance to the railroad industry as a whole. AAR filed an *amicus* brief in the previous interlocutory appeal to this Court (*BNSF Ry. Co. v. Montana Eighth Judicial Dist. Court*, No. 18-1246), and in the Montana Supreme Court.

This case is of interest to AAR's member railroads because it represents an effort by a railroad employee to seek multiple recoveries for losses arising from a single work-related injury and punishes a railroad for invoking its federal-law defenses under the Federal Employers' Liability Act (FELA), 45 U.S.C. §§ 51-60. FELA covers all railroads in the United States, and provides railroad employees with a uniform, exclusive remedy against their employing railroad for work-related injuries. Here, the Montana courts nonethe-

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[1] As required by Rule 37.2(a), counsel for AAR has timely notified the parties of AAR's intent to file this brief. Both parties have consented to AAR's filing of an *amicus* brief. Pursuant to Rule 37.6, AAR states that no person or entity other than AAR has made monetary contributions toward this brief, and no counsel for any party authored this brief in whole or in part.

less imposed a state-law duty on railroads to *drop* bona fide defenses to liability under FELA and to settle the negligence claims against them rather than to defend themselves as federal law allows. By imposing such a state-law penalty for invoking a federal defense, the Montana courts not only contravened well-established precedent of this Court holding that state law cannot be used to affect in any way the parties' rights and obligations under FELA, but also resurrected the very absence of uniformity in treatment of railroads and their workers that Congress enacted FELA to eliminate. AAR's member railroads have a strong interest in preserving the nationwide uniformity FELA provides and preventing state courts from using state law to expand the railroads' obligations to compensate their employees for workplace injuries.

SUMMARY OF THE ARGUMENT

Railroads' obligations to their employees with respect to workplace injuries flow solely and exclusively from FELA, a unique federal law which provides a tort remedy to railroad workers. Congress enacted FELA so that railroads' liability to their workers would be governed by a uniform, nationwide federal standard. FELA lawsuits often raise issues related to negligence, contributory negligence, causation, and damages, and employers are entitled to defend themselves against employee allegations of negligence, and to insist that a jury make a determination on all contested facts before they are obligated to provide compensation. Where negligence is shown, and the railroad is liable, federal law exclusively determines the nature of the remedy.

This Court has repeatedly held that states may not alter a railroad's rights and obligations under FELA. Under this longstanding and unbroken line of prece-

dent, Montana's novel state tort law is preempted because it would impose claim-handling duties (typically applied to insurance companies) on railroads that would supersede a railroad's rights under FELA to contest allegations of negligence made against it and expose railroads to additional remedies that FELA forecloses. The Montana Supreme Court's decision to allow railroad workers to pursue supplemental state-law remedies for a workplace injury upends FELA's negligence-based framework and destroys the uniformity that this Court has held is essential to FELA. This Court's intervention in needed to restore uniformity and to reaffirm that FELA is exclusive and paramount.

ARGUMENT

I. THIS COURT SHOULD REVIEW THE DECISION BELOW BECAUSE IT CONFLICTS WITH THIS COURT'S NUMEROUS PRECEDENTS PROHIBITING STATES FROM SUPPLEMENTING OR EXPANDING FELA DUTIES OR REMEDIES.

This is an extraordinary case in which a state's highest court continues to defy settled law and ignore numerous and unequivocal precedents of this Court holding that FELA provides the sole and exclusive remedy of railroad employees against their employer for workplace injuries, occupying the field and superseding all state laws covering that subject. *See, e.g., South Buffalo Ry. Co. v. Ahern*, 344 U.S. 367, 371-72 (1953); *Brady v. Southern Ry. Co.*, 320 U.S. 476, 479 (1943); *Chesapeake & Ohio Ry. Co. v. Stapleton*, 279 U.S. 587, 590 (1929); *Chicago, Milwaukee & St. Paul Ry. Co. v. Coogan*, 271 U.S. 472, 474 (1926); *New York Cent. R.R. v. Winfield*, 244 U.S. 147, 150 (1917); *New York Cent. & Hudson River R.R. v. Tonsellito*, 244

U.S. 360, 362 (1917); *Seaboard Air Line Ry. v. Horton*, 233 U.S. 492, 501 (1914).

Dannels sued his employer, BNSF, under FELA, alleging a work-related injury. After a jury trial, Dannels was awarded $1.7 million, which he has collected. That should have been the end of the case.

However, Dannels initiated a second action against BNSF, seeking additional compensation related to the very same workplace injury. This time, Dannels sued under a Montana statute and state common law which are aimed at the conduct of insurance companies. Mont. Code Ann. § 33-18-201. *See Fode v. Farmers Ins. Exch.*, 719 P.2d 414, 417 (1986) (describing Mont. Code Ann. § 33-18-201, as having been enacted "to correct abuses being practiced by insurers"). Dannels claimed he was due additional money because, by exercising its right to a jury trial rather than settling before trial, BNSF handled his FELA claim in a manner that is proscribed by Montana law, by, among other things, "neglect[ing] to attempt in good faith to effectuate prompt, fair, and equitable settlement of claims in which liability has become reasonably clear." Mont. Code Ann. § 33-18-201 (6). *See* Pet. at 10-12.

Dannels' state law claims should have been dismissed because they are preempted by FELA; state law conflicts with federal law if the state law makes it unlawful to raise a federal defense, which is exactly what Montana did here. *See Felder v. Casey*, 487 U.S. 131, 138 (1988) ("any state law, however clearly within a State's acknowledged power, which interferes with or is contrary to federal law, must yield" quoting *Free v. Bland*, 369 U.S. 663, 666 (1962)). The Montana Supreme Court attempted to avoid that obvious result by reasoning that "FELA does not occupy the entirety of the field of recovery for injured railroad employ-

ees" Pet. App. 12a, and that in handling FELA claims railroad employers must refrain from "a wide array of conduct proscribed by Montana's bad faith laws." Pet. App. 19a. In an opinion that barely mentions, let alone explains or distinguishes, this Court's multiple precedents, the Montana Supreme Court concluded that state law may supplement, or "fill the space left by" FELA, Pet. App. 15a, by imposing on railroad-defendants a host of specific claims-handling duties to employees who are injured on the job and by providing those employees with additional remedies against railroads that fail to adhere to those obligations. The Montana Supreme Court's decision is wrong and contravenes decades of this Court's FELA precedents. FELA was enacted over a hundred years ago as the exclusive remedy of railroad employees against their employer for workplace injuries. As amended by Congress, it remains the exclusive remedy today, superseding and preempting all state laws purporting to provide such a remedy.

The decision below should be reviewed by this Court because it takes away a railroad's vital federal-law defenses, fundamentally transforming FELA's liability scheme. In doing so, the Montana Supreme Court completely undermines Congress' goal that "the field of rights and duties as between an interstate commerce common carrier and its employees" be subject to "the exclusive operation of" FELA's uniform regime. *Stapleton*, 279 U.S. at 592.

A. Congress Enacted FELA to Provide a Uniform Nationwide Remedy to Injured Railroad Workers.

At the turn of the twentieth century railroads were the dominant industry in the United States outside of agriculture. The work was hazardous and the casu-

alty rate among workers was high. *See Johnson v. Southern Pac. Co.*, 196 U.S. 1, 19-20 (1904) (describing the hazards of certain aspects of railroad work).[2] Even though the railroad industry had a nationwide presence, and employees frequently crossed state lines in the course of their job, the remedies for workplace injuries were subject to differing treatment from state to state, typically in a way that was unfavorable to injured workers. *Nordgren v. Burlington N. R.R.*, 101 F.3d 1246, 1248 (8th Cir. 1996) ("Around the turn of the [twentieth] century, there was great concern that railroad employees who were injured in the course of their employment had no adequate remedy for their injuries."). For example, when the negligence of a "fellow servant"—which typically was not attributable to the employer—caused the injury, the employer was absolved of liability. *Ryan v. Cumberland Valley R.R.*, 23 Pa. 384, 386 (Pa. 1854). And when the employee "entered the employment of the defendant he assumed the usual risks and perils of the service" and "he could not call upon the defendant to make alterations to secure greater safety." *Gibson v. Erie Ry. Co.*, 63 N.Y. 449, 452 (N.Y. App. 1875); *see also Clark, Adm'x v. St. Paul & Sioux City R.R.*, 9 N.W. 581, 582 (Minn. 1881). In addition, in the majority of states, any contributory negligence by the plaintiff barred recovery even if the defendant also was at fault. *See Louisville, Nashville & Great S. R.R. v. Fleming*, 82 Tenn. 128, 135 (Tenn. 1884).

In 1908, Congress addressed this situation by enacting FELA, intending "to cover all commerce to

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[2] In the year ending June 30, 1907, 4,534 rail workers were killed on the job and 87,644 were injured. Interstate Commerce Commission, *Statistics of Railways in the United States* 1908 41, 99 (1909).

which the regulative power of Congress extends" in order to "supplant the numerous State statutes on the subject" and "create uniformity throughout the Union." H.R. Rep. No. 1386, at 1, 3 (1908). From the standpoint of railroad employees, FELA was a significant improvement over the prevailing common law. The fellow servant and assumption of the risk doctrines were eliminated. 45 U.S.C. §§ 51, 54; *Chesapeake & Ohio Ry. Co. v. De Atley*, 241 U.S. 310, 313 (1916) ("Congress . . . abrogated the common-law rule known as the fellow-servant doctrine by placing the negligence of a coemployee upon the same basis as the negligence of the employer."); S. Rep. No. 460, at 2 (1908) (FELA set aside the "rule of law which presumes that a workman have notice [sic] of and assume the risks incident to all dangers of his employment and defects in the machinery."). FELA was an early example of a comparative fault statute, which at the time was a significant innovation in tort law. Rather than barring any recovery if the employee's negligence contributed to the injury, FELA damages are to be reduced only in proportion to the employee's negligence. 45 U.S.C. § 53. Under FELA, "a recovery [is not] barred even though the injured one contributed by his own negligence to the injury." H.R. Rep. No. 1386, at 1.[3] Thus, Congress struck a balance in FELA cases, requiring that each party bear the consequences of its own negligence. "What can be more fair

[3] Just as the burden of proof for showing employer negligence is on a FELA plaintiff, the burden of proving employee contributory negligence is on the defendant. *Cent. Vermont Ry. Co. v. White*, 238 U.S. 507, 512 (1915). The same standard of causation applies to employer negligence and employee contributory negligence. *Norfolk S. Ry. Co. v. Sorrell*, 549 U.S. 158, 171 (2007).

than that each party shall suffer the consequences of his own carelessness." *Id.* at 5.

While FELA ameliorated some of the harsher aspects of early twentieth century common law, it retained what at the time was the universal compensation model in the United States: the law of negligence. *See New Orleans & N. E. R.R. v. Harris*, 247 U.S. 367, 371 (1918) ("negligence is essential to recovery"). The rights and obligations under FELA depend upon "applicable principles of common law. . . . Negligence by the railway company is essential to a recovery." *Southern Ry. Co. v. Gray*, 241 U.S. 333, 339 (1916). *See also, Urie v. Thompson*, 337 U.S. 163, 182 (1949); *Adams v. CSX Transp., Inc*., 899 F.2d 536, 539 (6th Cir. 1990). FELA incorporates ordinary negligence as the standard of care. *CSX Transp., Inc. v. McBride*, 564 U.S. 685, 703 (2011). In order to recover damages under FELA, the plaintiff must prove all elements of a negligence case. *Fulk v. Ill. Cent. R.R.*, 22 F.3d 120, 124 (7th Cir. 1994).

B. As a Fault-Based System, FELA is Unique Among Employee Compensation Laws.

FELA differs fundamentally from the employee compensation systems that cover virtually all other American workers (and, in fact, workers throughout the world). *See generally* Transportation Research Board, *Compensating Injured Railroad Workers Under the Federal Employers' Liability Act* (1994).[4] In

[4] Other than railroads, and the maritime industry, to which the substance of FELA applies by virtue of the Jones Act, 46 U.S.C. § 30104, all industries in the United States are covered by either state or federal no-fault workers' compensation systems. Price V. Fishback and Shawn Everett Kantor, *The Adoption of*

contrast to FELA, the workers' compensation laws that were enacted throughout the United States in the decades after FELA are based on a no-fault insurance model. Though they differ in detail from state to state, under workers' compensation an employee who is hurt on the job is entitled to compensation regardless of whether the employer was at fault or the employee's negligence contributed to the injury. *Id.* at 18-19, 85. Typically, benefits consist of a percentage (commonly, two-thirds) of lost wages, capped at a prescribed amount. *Id.* at 87-88. Injured workers also are entitled to medical expenses incurred as a result of the injury. *Id.* at 86. Most workers' compensation laws also include a schedule of benefits, payable for the loss, or loss of use, of certain body parts or functions. *Id.* at 92. Beyond that, however, noneconomic (pain and suffering) losses generally are not compensable. *Id.* at 3.[5] Thus, under workers' compensation, the level and scope of compensation are prescribed by statute, in exchange for the employer relinquishing the right to contest fault, and instead adopting the role of insurer with the obligation to compensate all workplace injuries. While employers covered by workers' compensation are obligated to

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Workers' Compensation in the United States, 41 J.L & Econ. 305, 319-20 (1998). No-fault workers' compensation is the prevailing model worldwide today. PETER M. LENCSIS, WORKERS' COMPENSATION: A REFERENCE AND GUIDE 14 (1998).

[5] In FELA cases, the caps and limitations on recovery that characterize workers' compensation do not apply, and injured workers may seek both economic and noneconomic damages. *Frazier v. Norfolk & W. Ry. Co.*, 996 F.2d 922, 925 (7th Cir. 1993). Juries typically are given wide discretion to make determinations of fact, including questions about the extent of damages suffered. *Schneider v. Nat'l R.R. Passenger Corp.*, 987 F.2d 132, 137 (2d. Cir 1993).

provide benefits to employees who are injured on the job, they generally are immune from negligence suits by injured employees. *Id.* at 85.

As the result of a choice made by Congress, under FELA there is no employer-provided "insurance" for workplace injuries. The railroad is not the worker's insurer, and payment to injured railroad employees is not guaranteed simply because an injury is work-related. *Consol. Rail Corp. v. Gottshall*, 512 U.S. 532, 543 (1994) ("FELA does not make the employer the insurer of the safety of his employees while they are on duty." (internal quotation marks omitted)).[6] Instead, railroads' duties to their employees flow solely and exclusively from FELA, under which a railroad is obligated to provide compensation for workplace injuries only when the worker's injury was caused by the railroad's negligence. *O'Hara v. Long Island R.R.*, 665 F.2d 8, 9 (2nd Cir. 1981) ("FELA is not an insurance program. Claimants must at least offer some evidence that would support a finding of negligence.").

C. The Parties to a FELA Case are Entitled to Have a Jury Decide Contested Issues of Fact.

Because negligence, causation, and damages must be proved as a condition of recovery FELA cases turn on their specific facts. FELA's comparative negligence scheme requiring that damages be reduced

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[6] Railroad employers may have other obligations to injured employees that arise from collective bargaining agreements negotiated between the railroads and representatives of employee unions. Disabled railroad workers may also be entitled to certain benefits under other federal statutes. *See e.g.*, 45 U.S.C. § 231a(a)(1)(iv) & (v) (providing benefits to disabled employees who meet certain age and service criteria).

in proportion to the employee's negligence also raises triable issues in many cases and can result in employees suffering similar injuries receiving widely different awards depending on whether, and the extent to which, the jury finds their negligence contributed to the injury. *E.g., Shepherd v. Metro-North Comm. R.R.*, 791 F. Supp. 1008 (S.D.N.Y. 1992) (evidence supported a jury finding that plaintiff's negligence was 90% the cause of the injury); *Plambeck v. Union Pac. R.R.*, 441 N.W.2d 614 (Neb. 1989) (same). Regardless of whether an employee's contributory negligence is at issue, damages must be proven—with the burden of proof on the plaintiff—and often are contested, with both parties typically offering expert witnesses to testify about the level of lost wages and other economic losses.

Many FELA claimants allege injuries that are the cumulative result of long-term exposures in the workplace, such as exposures to toxic or hazardous substances, or to repetitive workplace activities. (Here, for example, "Dannels alleged that throughout his employment, BNSF negligently assigned him physical work activities that caused 'cumulative trauma' to his lower back and spine." Pet. App. 3a. These claims often raise contested causation issues because the injuries alleged also can result from non-workplace exposures. For example, certain cancers may be caused by both smoking and exposure to asbestos. Loss of hearing and worn out body parts (*e.g.*, knees, back, shoulders) can be the result of aging and/or hobbies and other non-work activities, as well as workplace exposures. FELA clearly permits railroad-employers to contest liability in these types of cases when they believe the evidence warrants.

Quite simply, FELA employers are entitled to defend themselves against employee allegations of negligence, and to insist that a jury make that factual determination before they are obligated to provide compensation. Hundreds of FELA lawsuits are filed by railroad employees each year. In some cases, settling quickly makes sense; in fact, most claims result in settlement before trial. In others, the outcome is far from certain, as the facts may call into question whether the employer was negligent and/or the degree to which the employee's negligence caused the injury. In such cases, if a compromise cannot be reached each party maintains the right to have a jury decide disputed issues of fact, regardless of whether the plaintiff asserts, and a state court jury finds retrospectively in follow-on litigation, that "liability ha[d] become reasonably clear" per Mont. Code Ann. § 33-18-201 (6). Indeed, Congress intended that the parties have the opportunity to have a jury determine contested issues of fact. *Bailey v. Cent. Vermont Ry.*, 319 U.S. 350, 354 (1943) ("The right to trial by jury is . . . fundamental" and "part and parcel of the [FELA] remedy." (internal quotation marks and citation omitted)); *see also Dice v. Akron, Canton & Youngstown R.R.*, 342 U.S. 359, 363 (1952); *Wilkerson v. McCarthy*, 336 U.S. 53, 58 (1949); *Tennant v. Peoria & Pekin Union Ry. Co.*, 321 U.S. 29, 35 (1944). Nonetheless, Montana has imposed a state-law duty on railroads to drop good faith defenses and pay a settlement or face the prospect of follow-on litigation for "pain and suffering" and punitive damages for exercising their right to go to a jury.

D. The Rights and Obligations of Parties to a FELA Case Must Be Applied Uniformly and May Not Be Altered or Supplemented by State Law.

Montana's imposition of "good faith" claims-handling obligations on railroads in FELA cases, thereby transforming railroads into their workers' insurers, is an assault on FELA and this Court's precedents. FELA is the exclusive remedy of railroad employees against their employer for workplace injuries which must be applied uniformly nationwide. *Winfield*, 244 U.S. at 150 (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."); *Ahern*, 344 U.S. at 371-72; *Brady*, 320 U.S. at 479; *Horton*, 233 U.S. at 501. This Court has made it abundantly clear that states may not superimpose new or different duties on railroads with respect to their obligations to compensate employees who are hurt on the job.

The uniformity demanded in FELA cases means that the substantive rights and remedies of FELA plaintiffs and defendants must be the same regardless of where a lawsuit is adjudicated.[7] This includes not just the standard of liability (negligence) and the requirement that damage awards be reduced in proportion to the employee's contributory negligence, but also the nature and scope of the compensation

[7] FELA suits may be brought in either state or federal court. 45 U.S.C. § 56. State courts hearing FELA cases may apply state procedural rules but must apply federal substantive law. *St. L. SW Ry. Co. v. Dickerson*, 470 U.S. 409, 411 (1985).

available. *E.g., Gottshall*, 512 U.S. at 555 (damages for negligent infliction of emotional distress are available under FELA, but only to plaintiffs who were in the "zone of danger" of the defendant's negligent conduct); *Monessen SW Ry. Co. v. Morgan*, 486 U.S. 330, 337-339 (1988) (prejudgment interest is not available under FELA); *Anderson v. Burlington N., Inc.*, 469 F.2d 288 (10th Cir. 1972) (loss of consortium damages not available under FELA); *Wildman v. Burlington N. R.R.*, 825 F.2d 1392, 1394 (9th Cir. 1987) (punitive damages not available under FELA); *Kozar v. Chesapeake & Ohio Ry. Co.*, 449 F.2d 1238, 1243 (6th Cir. 1971) (same).

FELA also exclusively regulates employer conduct in the handling of claims by prohibiting contracts or devices that limit an employer's liability, 45 U.S.C. § 55, or that prevent an employee from voluntarily providing information about a workplace injury. 45 U.S.C. § 60. Congress remains free to amend FELA to impose additional duties on FELA defendants. But that is Congress' exclusive province, and in the absence of Congress doing so states may not alter or add to the rights and duties of railroad employers under FELA. *Winfield*, 244 U.S. at 150; *Tonsellito*, 244 U.S. at 362; *Cf. Bailey*, 319 U.S. at 358 (Roberts, J.) (admonishing that the Court should not write policies into FELA "when Congress has not chosen that policy.")

Montana's novel state tort law is preempted because it imposes claim-handling duties on railroads that would take away their right under federal law to defend themselves by contesting allegations of negligence in FELA cases. FELA governs the "rights and obligations" of railroad employers and employees who are parties to a FELA suit, and this Court has consistently struck down efforts by individual states to

apply state law to "the field of rights and duties as between" railroads and their employees. *Stapleton*, 279 U.S. at 592. *See* Pet. at 17-19. When Congress enacted FELA, it "took possession of the field of employers' liability to employees in interstate transportation by rail; and all state laws upon that subject were superseded. The rights and obligations of the [railroad] depend upon that Act and applicable principles of common law as interpreted by the federal courts." *Stapleton*, 279 U.S. at 590 (citations omitted)); *Coogan*, 271 U.S. at 474 (same). *Tonsellito*, 244 U.S. at 362 ("liability can [not] be extended . . . by common or statutory laws of the state"). As this Court explained, "it can not be that state legislatures have a right to interfere . . . by way of complement to the legislation of Congress, to prescribe additional regulations, and what they may deem auxiliary provisions for the same purpose." *Stapleton*, 279 U.S. at 592.

BNSF declined to settle Dannels' FELA claim, but instead opted to go to trial. FELA required Dannels to prove BNSF's negligence before a jury and gave BNSF the right to insist on that proof and refuse to compensate Dannels in the absence of such proof. Montana may not alter that requirement.

E. This Court Should Grant Certiorari to Restore Uniformity in the Application of FELA.

As Petitioner explains, allowing the decision below to stand will deepen a conflict between state and federal courts in Montana, whereby the rights and obligations in FELA cases heard in Montana courts differ from those in federal courts as well as in other states. *See* Pet. at 3-4. FELA plaintiffs in Montana state courts will remain free to supplement their FELA awards by bringing "bad faith" claim-handling

actions under Montana statutory and common law. Other states may follow Montana. But even if they do not, the lack of uniformity engendered by the decision below will have a negative and untenable impact on FELA litigation.

Constitutional limitations on a court's general jurisdiction apply in FELA cases, limiting a court's ability to assert personal jurisdiction to where the defendant-railroad is "at home" (generally the state of incorporation or principal place of business). *BNSF Ry. Co. v. Tyrrell*, 137 S. Ct. 1549 (2017). However, because many railroad employees work in multiple states, under specific, or case-linked, jurisdiction (not at issue in *Tyrrell*) FELA plaintiffs may retain some degree of flexibility in selecting the jurisdiction in which to litigate their FELA case. Where a railroad does sufficient business in a state it may be subject to "specific personal jurisdiction in that State on claims related to the business it does" in that state. *Id*. at 1559. For example, a railroad worker who was injured in Texas was permitted to bring a FELA suit in Kansas due to various employment contacts in Kansas. *Overfelt v. BNSF Ry. Co.*, 2016 Dist. LEXIS 33432 (D. Kan. 2016). Similarly, in *Hill v. Union Pac. R.R.*, 362 F.Supp.3d 890 (D. Ida. 2019), two railroad employees, injured respectively in Kansas and Wyoming, were permitted to bring FELA suits in Idaho.

The significant number of FELA cases alleging cumulative exposure or trauma further underscores both the need for national uniformity in FELA cases and the magnitude of the impact of the Montana Supreme Court's decision. Many railroad employees who worked in multiple states over the course of their careers allege that exposure to a harmful substance or activity occurred, and caused injury, in all of those

states. Arguably, this could support specific personal jurisdiction in several states under the theory that the cause of action arose in a number of locations. Unless this Court intervenes, the availability of additional remedies, including punitive damages, to FELA plaintiffs litigating in Montana courts will create an incentive to funnel additional cases to the state, an outcome the principle of uniformity is meant to avoid. *See* Pet. at 4 (FELA permits plaintiffs to bring and maintain suits in state court if they choose).

* * *

If a railroad employee is dissatisfied with the pace or seriousness of settlement negotiations over a workplace injury, he or she may file, and vigorously pursue, a FELA lawsuit. Congress has not adopted a no-fault insurance-based system, nor imposed settlement-inducing obligations on employers when they handle FELA claims. Instead, Congress has maintained the tort-based FELA system, with its reliance on jury trials, as the exclusive remedy of railroad workers. As a result, states are not free, through the guise of insurance regulation or otherwise, to alter or add to the rights and remedies available to railroad employees under FELA.

CONCLUSION

For the foregoing reasons, the petition should be granted.

Respectfully submitted,

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